

FIRST REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 70

90TH GENERAL ASSEMBLY

Reported from the Committee on Judiciary, February 25, 1999, with recommendation that the Senate Committee Substitute do pass.

S0574.03C

TERRY L. SPIELER, Secretary.

AN ACT

To repeal sections 407.815, 407.816, 407.820, 407.822 and 407.825, RSMo Supp. 1998, relating to motor vehicle franchise practices, and to enact in lieu thereof four new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 407.815, 407.816, 407.820, 407.822 and 407.825, RSMo Supp. 1998, are repealed and four new sections enacted in lieu thereof, to be known as sections 407.815, 407.820, 407.822 and 407.825, to read as follows:

407.815. As used in sections 407.810 to 407.835, unless the context otherwise requires, the following terms mean:

(1) "Administrative hearing commission", the body established in chapter 621, RSMo, to conduct administrative hearings;

(2) "All-terrain vehicle", any motorized vehicle manufactured and used exclusively for off-highway use which is fifty inches or less in width, with an unladen dry weight of six hundred pounds or less, traveling on three, four or more low pressure tires, with a seat designed to be straddled by the operator, and handlebars for steering control;

(3) "Coerce", to force a person to act in a given manner or to compel by pressure or threat but shall not be construed to include the following:

(a) Good faith recommendations, exposition, argument, persuasion or attempts at persuasion;

(b) Notice given in good faith to any franchisee of such franchisee's violation of terms or provisions of such franchise or contractual agreement;

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

(c) Any other conduct set forth in section 407.830 as a defense to an action brought pursuant to sections 407.810 to 407.835; or

(d) Any other conduct set forth in sections 407.810 to 407.835 that is permitted of the franchisor or is expressly excluded from coercion or a violation of sections 407.810 to 407.835;

(4) "Franchise", a written arrangement or contract for a definite or indefinite period, in which a person grants to another person a license to use, or the right to grant to others a license to use, a trade name, trademark, service mark, or related characteristics, in which there is a community of interest in the marketing of goods or services, or both, at wholesale or retail, by agreement, lease or otherwise, and in which the operation of the franchisee's business with respect to such franchise is substantially reliant on the franchisor for the continued supply of franchised new motor vehicles, and accessories for sale at wholesale or retail;

(5) "Franchisee", a person to whom a franchise is granted;

(6) "Franchisor", a person, **company, corporation or other business entity** who grants a franchise to another person, **including any distributor, subsidiary, affiliate, agent, captive organization or other person, company, organization, corporation or entity associated in any way with such franchisor**;

(7) "Motor vehicle", any motor-driven vehicle required to be registered pursuant to the provisions of chapter 301, RSMo, except that, **trailers**, motorcycles and all-terrain vehicles as defined in section 301.010, RSMo, shall not be included;

(8) "New", when referring to motor vehicles or parts, means those motor vehicles or parts which have not been held except as inventory, as that term is defined in subdivision (4) of section 400.9-109, RSMo;

(9) "Person", a sole proprietor, partnership, corporation, or any other form of business organization.

[407.816. As used in subdivision (5) of section 407.815, the term "motor driven vehicle" shall not include "trailer" as such term is defined in subdivision (56) of section 301.010, RSMo.]

407.820. Any person who is engaged or engages directly or indirectly in purposeful contacts within the state of Missouri, **including contact using the Internet**, in connection with the offering, advertising, purchasing, selling, or contracting to purchase or to sell new motor vehicles, or who, being a motor vehicle franchisor, is transacting or transacts any business with a motor vehicle franchisee who maintains a place of business within the state and with whom he has a franchise, shall be subject to the jurisdiction of the courts of the state of Missouri, upon service of process in accordance with the provisions of section 506.510, RSMo, irrespective of whether such person is a manufacturer, importer, distributor or dealer in new motor vehicles.

407.822. 1. Any party seeking relief pursuant to the provisions of sections 407.810 to 407.835 may file an application for a hearing with the administrative hearing commission within

the time periods specified in this section. The application for a hearing shall comply with the requirements for a request for agency action set forth in chapter 536, RSMo. Simultaneously, with the filing of the application for a hearing with the administrative hearing commission, the applicant shall send by certified mail, return receipt requested, a copy of the application to the party or parties against whom relief is sought. Within ten days of receiving a timely application for a hearing, the administrative hearing commission shall enter an order fixing a date, time and place for a hearing on the record. Such hearing shall be within forty-five days of the date of the order but the administrative hearing commission may continue the hearing date up to forty-five additional days by agreement of the parties or upon a finding of good cause. The administrative hearing commission shall send by certified mail, return receipt requested, a copy of the order to the party seeking relief and to the party or parties against whom relief is sought. The order shall also state that the party against whom relief is sought shall not proceed with the initiation of its activity or activities until the administrative hearing commission issues its final decision or order.

2. Unless otherwise expressly provided in sections 407.810 to 407.835, the provisions of chapter 536, RSMo, shall govern hearings and prehearing procedures conducted pursuant to the authority of this section. The administrative hearing commission shall issue a final decision or order, in proceedings arising pursuant to the provisions of sections 407.810 to 407.835, within sixty days from the conclusion of the hearing. **In any proceeding initiated pursuant to sections 407.810 to 407.835 involving a matter requiring a franchisor to show good cause for any intended action being protested by a franchisee, the franchisor shall refrain from taking the protested action if, after hearing on the matter before the administrative hearing commission, the administrative hearing commission determines that good cause does not exist for the franchisor to take such action. The franchisee may, if necessary, seek enforcement of the decision of the administrative hearing commission pursuant to the provisions of section 407.835. Venue for such proceedings shall be in the circuit court of Cole County, Missouri. In determining any relief necessary for enforcement of the decision of the administrative hearing commission, the court shall defer to the commission's factual findings, and review shall be limited to a determination of whether the commission's decisions was authorized by law and whether the commission abused its discretion.** Any final decisions of the administrative hearing commission shall be subject to review pursuant to a petition for review to be filed in the court of appeals in the district in which the hearing, or any part of the hearing, is held and by delivery of copies of the petition to each party of record, within thirty days after the mailing or delivery of the final decision and notice of the final decision in such a case. **Appeal of the administrative hearing commission's decision pursuant to this section shall not preclude any action authorized by section 407.835, brought in a court of competent jurisdiction, requesting an award of legal or equitable relief, provided that if such an**

action is brought solely for the purpose of enforcing a decision so the administrative hearing commission which is on appeal pursuant to this section, the court in which such action is pending shall hold in abeyance its judgment pending issuance of a decision by the court of appeals. Review pursuant to this section shall be exclusive and decisions of the administrative hearing commission reviewable pursuant to this section shall not be reviewable in any other proceeding, and no other official or court shall have power to review any such decision by an action in the nature of mandamus or otherwise, except pursuant to the provisions of this section. The party seeking review shall be responsible for the filing of the transcript and record of all proceedings before the administrative hearing commission with the appropriate court of appeals.

3. Any franchisee receiving a notice from a franchisor pursuant to the provisions of sections 407.810 to 407.835, or any franchisee adversely affected by a franchisor's acts or proposed acts described in the provisions of sections 407.810 to 407.835, shall be entitled to file an application for a hearing before the administrative hearing commission for a determination as to whether the franchisor has good cause for its acts or proposed acts.

4. Not less than sixty days before the effective date of the initiation of any enumerated act pursuant to subdivisions (5), (6), (7) and (14) of subsection 1 of section 407.825, a franchisor shall give written notice to the affected franchisee or franchisees, by certified mail, return receipt requested, except as follows:

(1) Upon the initiation of an act pursuant to subdivision (5) of subsection 1 of section 407.825, such notice shall be given not less than fifteen days before the effective date of such act only if the grounds for the notice include the following:

(a) Transfer of any ownership or interest in the franchised dealership without the consent of the motor vehicle franchisor;

(b) Material misrepresentation by the motor vehicle franchisee in applying for the franchise;

(c) Insolvency of the motor vehicle franchisee or the filing of any petition by or against the motor vehicle franchisee under any bankruptcy or receivership law;

(d) Any unfair business practice by the motor vehicle franchisee after the motor vehicle franchisor has issued a written warning to the motor vehicle franchisee to desist from such practice;

(e) Conviction of the motor vehicle franchisee of a crime which is a felony;

(f) Failure of the motor vehicle franchisee to conduct customary sales and service operations during customary business hours for at least seven consecutive business days unless such closing is due to an act of God, strike or labor difficulty or other cause over which the motor vehicle franchisee has no control; or

(g) Revocation of the motor vehicle franchisee's license;

(2) Upon initiation of an act pursuant to subdivision (7) of subsection 1 of section 407.825, such notice shall be given within sixty days of the franchisor's receipt of a written proposal to consummate such sale or transfer and the receipt of all necessary information and documents generally used by the franchisor to conduct its review. The franchisor's notice of disapproval shall also specify the reasonable standard which the franchisor contends is not satisfied and the reason the franchisor contends such standard is not satisfied. Failure on the part of the franchisor to provide such notice shall be conclusively deemed an approval by the franchisor of the proposed sale or transfer to the proposed transferee. A franchisee's application for a hearing shall be filed with the administrative hearing commission within twenty days from receipt of such franchisor's notice;

(3) Pursuant to paragraphs (a) and (b) of subdivision (14) of subsection 1 of section 407.825, such notice shall be given within sixty days of the franchisor's receipt of a deceased or incapacitated franchisee's designated family member's intention to succeed to the franchise or franchises or of the franchisor's receipt of the personal and financial data of the designated family member, whichever is later.

5. A franchisor's notice to a franchisee or franchisees pursuant to subdivisions (5), (6), (7) and (14) of subsection 1 of section 407.825 shall contain a statement of the particular grounds supporting the intended action or activity which shall include any reasonable standards which were not satisfied. The notice shall also contain at a minimum, on the first page thereof, a conspicuous statement which reads as follows: "NOTICE TO FRANCHISEE: YOU MAY BE ENTITLED TO FILE A PROTEST WITH THE MISSOURI ADMINISTRATIVE HEARING COMMISSION IN JEFFERSON CITY, MISSOURI, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE CONTENTS OF THIS NOTICE. ANY ACTION MUST BE FILED WITHIN TWENTY DAYS FROM RECEIPT OF THIS NOTICE."

6. When more than one application for a hearing is filed with the administrative hearing commission, the administrative hearing commission may consolidate the applications into one proceeding to expedite the disposition of all relevant issues.

7. In all proceedings before the administrative hearing commission pursuant to this section, section 407.825 and section 621.053, RSMo, where the franchisor is required to give notice pursuant to subsection 4 of this section, the franchisor shall have the burden of proving by a preponderance of the evidence that good cause exists for its actions. In all other actions, the franchisee shall have the burden of proof.

407.825. 1. Notwithstanding the terms of any franchise agreement, the performance, whether by act or omission, by a motor vehicle franchisor of any or all of the following acts enumerated in this subsection are hereby defined as unlawful practices, the remedies for which are set forth in [section] **sections 407.822 and 407.835**:

(1) To engage in any conduct which is capricious, in bad 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, RSMo, uniform commercial code, shall not constitute unfair practices pursuant to sections 407.810 to 407.835;

(2) To coerce any motor vehicle franchisee to accept delivery of any new motor vehicle or vehicles, equipment, 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. 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 unreasonably 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 cause of which such motor vehicle franchisor shall have no control;

(4) To coerce any motor vehicle franchisee to enter into any agreement with such motor vehicle franchisor or to do any other act prejudicial to such motor vehicle franchisee, by threatening to cancel any franchise or any contractual agreement existing between such motor vehicle franchisor and motor vehicle franchisee; provided, however, that notice in good faith to any motor vehicle franchisee of such motor vehicle franchisee's violation of any provisions of such franchise or contractual agreement shall not constitute a violation of sections 407.810 to 407.835;

(5) To terminate, cancel or refuse to continue any franchise, directly or indirectly through the actions of the franchisor, unless such new motor vehicle franchisee substantially defaults in the performance of such franchisee's reasonable and lawful obligations under such franchisee's franchise, or such new motor vehicle franchisor discontinues the sale in the state of Missouri of such franchisor's products which are the subject of the franchise:

(a) Notwithstanding the terms of any franchise agreement to the contrary, good cause to terminate, cancel or refuse to continue any franchise agreement shall not be established based upon the fact that the motor vehicle franchisee owns, has an investment in, participates in the management of or holds a franchise agreement for the sale or service of another make or line of new motor vehicles or the motor vehicle dealer has established another make or line of new motor

vehicles or service in the same dealership facilities as those of the motor vehicle franchisor prior to February 1, 1997, or such establishment is approved in writing by the franchisee and the franchisor. If the franchise agreement requires the approval of the franchisor, such approval shall be requested in writing by the franchisee and the franchisor shall approve or disapprove such a request in writing within sixty days of receipt of such request. A request from a franchisee shall be deemed to have been approved if the franchisor fails to notify the franchisee, in writing, of its disapproval within sixty days after its receipt of the written request;

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

- a. The franchisee's sales in relation to sales in the market;
- b. The franchisee's investment and obligations;
- c. Injury to the public welfare;
- d. The adequacy of the franchisee's service facilities, equipment, parts and personnel in relation to those of other franchisees of the same line-make;
- e. Whether warranties are being honored by the franchisee;
- f. The parties' compliance with their franchise agreement;
- g. The desire of a franchisor for market penetration or a market study, if any, prepared by the franchisor or franchisee are two factors which may be considered;
- h. 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 of such motor vehicle franchisee 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) Prevent, by contract or otherwise, any sale or transfer of a franchisee's franchise or franchises 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 proposed management or ownership of the franchise operations or to the qualification, capitalization, integrity or character of the proposed transferee and which are reasonable. A 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 fully 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 the existing 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 any 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 proposed management or ownership of the franchise operations or to the qualification, capitalization, integrity or character of the proposed transferee which are reasonable;

d. Injury to the public welfare;

e. The harm to the franchisor;

(e) Upon a finding by the administrative hearing commission or any court of competent jurisdiction, pursuant to the provisions of sections 407.810 to 407.835, that a franchisor has failed to demonstrate good cause for its failure or refusal to approve of a proposed transfer of a franchise to a proposed transferee, such proposed transferee shall be entitled to such 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 in asserting its rights hereunder;

(f) It shall be unreasonable for a franchisor to disapprove the sale or transfer of a franchise to a proposed transferee if such transfer would not exceed the franchisor's written, reasonable and uniformly applied restrictions, if any, relating to multiple ownership or control of franchises of the same line-make by a franchisee or franchisees, provided such restrictions are specified in the franchise agreement;

(8) To prevent by contract or otherwise any motor vehicle franchisee from changing the executive management of **the** motor vehicle franchisee's business, except that any attempt by a motor vehicle franchisor to demonstrate by giving reasons that such change in executive management will be detrimental to the distribution of the motor vehicle franchisor's motor vehicles shall not constitute a violation of this subdivision;

(9) To impose unreasonable standards of performance upon a motor vehicle franchisee;

(10) To require a motor vehicle franchisee at the time of entering into a franchise 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, **or, except for recreational motor vehicle franchisees and franchisors, to require any controversy between a motor vehicle franchisee and a franchisor to be referred to any person other than the duly constituted courts of this state or the United States or the administrative hearing commission, if such referral would be mandatory or binding on the motor vehicle franchisee;**

(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, which term or condition directly or indirectly violates the provisions of

sections 407.810 to 407.835, **or as a provision of any franchise to require a motor vehicle franchisee to release, convey or otherwise provide customer information, including but not limited to, information containing the name, address, income, credit history, employment, age, sex, race and sales transaction information of a franchisee's customers, to any third party if to do so would be unlawful, or if the customer objects in writing to the release of such information, unless the release of such information is required by subpoena or otherwise compelled by law, or unless the information is necessary for the franchisor to meet its obligations to consumers or to the motor vehicle franchisee, including vehicle recalls or other requirements imposed by state or federal law;**

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

(a) Any new, undamaged and unsold vehicle in the franchisee's inventory of either the current model year or purchased from the franchisor within one hundred twenty days prior to receipt of a notice of termination or nonrenewal, provided the vehicle has less than five hundred miles registered on the odometer, including mileage incurred in delivery from the franchisor or in transporting the vehicle between dealers for sale, at the dealer's net acquisition cost, plus any cost to the dealer for returning the vehicle inventory to the franchisor;

(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, plus five percent of the catalog price of the part for the cost of packing and returning the part to the franchisor. 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 for either the price in the current parts catalog or the franchisee's actual purchase price of the part, whichever is less. In the case of parts which no longer appear in the current parts catalog, the franchisor may purchase the part for either the price in the last version of the parts catalog in which the part appeared or the franchisee's actual purchase price of the part, whichever is less. The franchisee shall maintain accurate records regarding the actual purchase price of parts bought from an outgoing authorized franchisee. In the absence of such records, the franchisor is not required to purchase parts which are not in the current parts catalog;

(c) The depreciated value determined pursuant to generally accepted accounting principles 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;

(d) The fair market value of all special tools, data processing equipment and automotive service equipment owned by the franchisee which were recommended in writing and designated as special tools and equipment and purchased from, or purchased at the request of, the franchisor within three years of the termination of the franchise, if the tools and equipment are in usable and good condition, except for reasonable wear and tear;

(e) Except as provided in paragraph (a) of this subdivision, the cost of transporting, handling, packing, storing and loading of any property subject to repurchase pursuant to this section shall not exceed reasonable and customary charges; and

(f) The franchisor shall pay the franchisee the amounts specified in this subdivision within ninety 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 one hundred eighty 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 one hundred eighty days;

(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 terms and conditions of the current franchise agreement, and the designated family member meets the current reasonable criteria generally applied by the franchisor in qualifying franchisees. 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 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 the existing 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 fails to satisfy any 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 reasonable;

c. Injury to the public welfare;

d. The harm to the franchisor;

(f) Upon a finding by the administrative hearing commission or any court of competent jurisdiction, pursuant to the provisions of sections 407.810 to 407.835, that a franchisor has failed to demonstrate good cause for its refusal to honor the succession of a franchise to any qualified legal heir or devisee, or designated successor, of the franchisee, such putative heir, devisee or designated successor shall be entitled to such 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 putative heir, devisee or successor in asserting their rights to succeed the franchisee. In addition to the above-described expenses, upon a showing that the franchisor has refused to honor the succession of a franchise with the intention of harming the putative heir, devisee or successor, or has otherwise acted in bad faith in preventing succession of the franchise, such putative heir, devisee or successor shall also be entitled to an award of exemplary damages in an amount deemed appropriate by the court but not to exceed three times actual damages;

(15) To coerce, threaten, intimidate or require a franchisee under any condition affecting or related to a franchise agreement, or 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;

(16) To initiate any act enumerated in this subsection 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 subsection. Such condition shall not be construed to nullify an existing site control agreement for a franchisee's property;

(17) To fail to disclose in writing to a franchisee, at the time of delivery of a new motor vehicle, the nature and extent of any and all damage and post-manufacturing repairs made to such motor vehicle while in the possession or under the control of the manufacturer, subject to the following conditions:

(a) Notwithstanding the terms of any franchise, the franchisor is liable for any and all damage to any new motor vehicle occurring prior to delivery of such vehicle to a carrier or transporter for shipment to a franchisee, unless the franchisee determines the mode of transportation for such new motor vehicle. Except when the franchisee determines the mode of transportation, the franchisor shall remain liable for any and all damage occurring to new motor vehicles until such time as the franchisee accepts delivery of the vehicle from the carrier or transporter;

(b) Whenever a new motor vehicle is damaged in transit, when the carrier or means of transportation is determined by the franchisor, or whenever a motor vehicle is otherwise damaged prior to delivery to the franchisee, the franchisee shall:

a. Notify the franchisor of such damage within three business days from the date of delivery of such new motor vehicle to the franchisee or within such additional time as specified in the franchise agreement; and

b. Request from the franchisor authorization to repair or replace, at franchisor's cost, the components, parts and accessories damaged or to otherwise repair the damage at franchisor's cost;

(c) If the franchisor refuses or fails to authorize repair at its cost of such damage within ten days after receipt of notification pursuant to subparagraph b of paragraph (b) of this subdivision, the franchisee shall have no obligation, financial or otherwise, with respect to such motor vehicle, in which event franchisor shall repurchase such motor vehicle from franchisee;

(d) Notwithstanding any of the other provisions contained within this subdivision, no franchisor shall have any obligation to discover, disclose to a franchisee or cover the costs of repair incurred by a franchisee with respect to damage for which actual costs of repair do not exceed three percent of the manufacturer's suggested retail price for the vehicle as defined in 15 U.S.C. 1231-1233, measured by retail repair costs, except a recreational vehicle franchisor shall disclose to a recreational vehicle franchisee any repair made to the vehicle prior to delivery only if the cost of the repair exceeds six percent of the manufacturer's wholesale price, as measured by retail repair costs, and the replacement of a recreational vehicle's glass, tires, wheels, in-dash audio equipment or components, and any appliances, furniture or fixtures contained in the vehicle's living quarters is not considered a repair under this subdivision if the item

replaced has been replaced by identical manufacturer's original equipment, parts or materials;

(e) Franchisor shall be liable to franchisee for the actual amount of any judgment, damages or other loss sustained by franchisee due to franchisor's failure to provide any disclosure required by this subdivision;

(18) To directly or indirectly discriminate against a franchisee or otherwise treat franchise motor vehicle dealers differently, in any way, as a result of a formula or other calculation or process intended to gauge the performance of a dealership; to directly or indirectly discriminate between or among franchisees relating to any aspect of, but not limited to: product allocation, warranties, floor plan financing, incentive, real estate or property mortgage financing, the sale of a motor vehicle or series of motor vehicles owned by the franchisor; or, to fail or refuse to offer its same line-make franchise motor vehicle dealer all models manufactured for that line-make, or require a dealer to pay an extra fee, purchase unreasonable advertising displays or other material, or remodel, renovate or recondition the dealer's existing facilities as a prerequisite to receiving a model or series of vehicles.

2. The provisions of subdivision (13), paragraphs (a) to (f) of this section shall not apply to recreational motor vehicles, as defined in subdivision (44) of section 301.010, RSMo, or recreational motor vehicle franchisors or franchisees.

3. Notwithstanding the terms of any franchise agreement, it shall be unlawful for any new motor vehicle manufacturer, except for a recreational motor vehicle manufacturer, which is a franchisor, or any of its agents which are not franchise motor vehicle dealers, to own, operate or control a new or used motor vehicle dealership within the state of Missouri, except on a temporary basis for a period not to exceed eighteen months and only if the motor vehicle dealership was previously owned by a franchise motor vehicle dealer and is currently for sale at a commercially reasonable price to operate as another franchise; or

(1) A franchisor may operate a dealership in a bona fide relationship with a franchise motor vehicle dealer who is required to make a significant investment in the dealership, subject to loss, and who reasonably expects to acquire full ownership of the dealership under reasonable terms and conditions and within a reasonable time, not to exceed four years from the effective date on which such relationship was initially established by contract or otherwise;

(2) A franchisor may terminate such operational relationship before the expiration of four years only for such grounds, if any, as are specified in writing within the agreement establishing such relationship, or within any other addendum, standard, guideline, policy or procedure regarding such relationship. If financial performance of such dealership is provided in writing as a factor to be considered prior to

termination of such relationship, financial performance shall be determined by using generally accepted accounting principles, comparing the net profits of one or more similarly-situated dealerships used for comparison. A similarly-situated dealership shall be considered as one franchised to sell, warrant and service motor vehicles of the same line-make, and which exists within and serves a similar demographic and market area.

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