

**NEW AUTOMOBILE FRANCHISE ACT
AMENDMENTS**

2002 GENERAL SESSION

STATE OF UTAH

Sponsor: Dan R. Eastman

This act amends the New Automobile Franchise Act. The act adds and amends definitions. The act expands the list of prohibited acts by a franchisor or an affiliate of the franchisor. The act clarifies the compensation structure for advisory board members. This act makes technical changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

13-14-102, as last amended by Chapter 86, Laws of Utah 2000

13-14-103, as last amended by Chapter 158, Laws of Utah 2001

13-14-201, as last amended by Chapter 330, Laws of Utah 2000

13-14-203, as enacted by Chapter 277, Laws of Utah 1996

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-14-102** is amended to read:

13-14-102. Definitions.

As used in this chapter:

(1) "Affiliate" has the meaning set forth in Section 16-10a-102.

~~[(1)]~~ (2) "Board" means the Utah Motor Vehicle Franchise Advisory Board created in Section 13-14-103.

~~[(2)]~~ (3) "Dealership" means a site or location in this state:

- (a) at which a franchisee conducts the business of a new motor vehicle dealer; and
- (b) that is identified as a new motor vehicle dealer's principal place of business for

licensing purposes under Section 41-3-204.

~~[(3)]~~ (4) "Department" means the Department of Commerce.

~~[(4)]~~ (5) "Executive director" means the executive director of the Department of Commerce.

~~[(5)]~~ (6) "Franchise" or "franchise agreement" means a written agreement, for a definite or indefinite period, in which:

(a) a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic; and

(b) a community of interest exists in the marketing of new motor vehicles, new motor vehicle parts, and services related to the sale or lease of new motor vehicles at wholesale or retail.

~~[(6)]~~ (7) "Franchisee" means a person with whom a franchisor has agreed or permitted, in writing or in practice, to purchase, sell, or offer for sale new motor vehicles manufactured, produced, represented, or distributed by the franchisor.

~~[(7)]~~ (8) "Franchisor" means a person who has, in writing or in practice, agreed with or permits a franchisee to purchase, sell, or offer for sale new motor vehicles manufactured, produced, represented, or distributed by the franchisor, and includes:

(a) the manufacturer or distributor of the new motor vehicles;

(b) an intermediate distributor; and

(c) an agent, officer, or field or area representative of the franchisor.

(9) "Lead" means the referral by a franchisor to a franchisee of a potential customer whose contact information was obtained from a franchisor's program, process, or system designed to generate referrals for the purchase or lease of a new motor vehicle, or for service work related to the franchisor's vehicles.

~~[(8)]~~ (10) "Line-make" means the motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor, or manufacturer of the motor vehicle.

(11) "Mile" means 5,280 feet.

~~[(9)]~~ (12) "Motor home" means a self-propelled vehicle, primarily designed as a temporary dwelling for travel, recreational, or vacation use.

~~[(10)]~~ (13) "Motor vehicle" means:

(a) a travel trailer;

(b) a motor vehicle as defined in Section 41-3-102;

- (c) a semitrailer as defined in Section 41-1a-102;
- (d) a trailer as defined in Section 41-1a-102; and
- (e) a recreational vehicle.

~~[(11)]~~ (14) "New motor vehicle" has the same meaning as defined in Section 41-3-102.

~~[(12)]~~ (15) "New motor vehicle dealer" is a person who is licensed under Subsection 41-3-202(1)(a).

~~[(13)]~~ (16) "Notice" or "notify" includes both traditional written communications and all reliable forms of electronic communication unless expressly prohibited by statute or rule.

~~[(14)]~~ (17) "Recreational vehicle" means a vehicular unit other than a mobile home, primarily designed as a temporary dwelling for travel, recreational, or vacation use, which is either self-propelled or pulled by another vehicle. "Recreational vehicle" includes a travel trailer, a camping trailer, a motor home, a fifth wheel trailer, and a van.

~~[(15)]~~ (18) (a) "Relevant market area," except with respect to recreational vehicles, means:

- (i) the county in which a dealership is to be established or relocated; and
- (ii) the area within a ~~[ten aeronautical miles]~~ ten-mile radius from the site of the new or relocated dealership.

(b) "Relevant market area," with respect to recreational vehicles, means:

- (i) the county in which the dealership is to be established or relocated; and
- (ii) the area within a ~~[35 aeronautical miles]~~ 35-mile radius from the site of the new or relocated dealership.

~~[(16)]~~ (19) "Sale, transfer, or assignment" means any disposition of a franchise or an interest in a franchise, with or without consideration, including a bequest, inheritance, gift, exchange, lease, or license.

~~[(17)]~~ (20) "Serve" or "served," unless expressly indicated otherwise by statute or rule, includes any reliable form of communication.

~~[(18)]~~ (21) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehicle without motive power, designed as a temporary dwelling for travel, recreational, or vacation use that does not require a special highway movement permit when drawn by a self-propelled motor

vehicle.

~~[(19)]~~ (22) "Written," "write," "in writing," or other variations of those terms shall include all reliable forms of electronic communication.

Section 2. Section **13-14-103** is amended to read:

13-14-103. Utah Motor Vehicle Franchise Advisory Board -- Creation -- Appointment of members -- Alternate members -- Chair -- Quorum -- Conflict of interest.

(1) There is created within the department the Utah Motor Vehicle Franchise Advisory Board that consists of:

(a) the executive director or the executive director's designee;

(b) six members appointed by the executive director, with the concurrence of the governor as follows:

(i) one motorcycle or recreational motor vehicle franchisee;

(ii) two new motor vehicle franchisees from among the three congressional districts of the state as the districts were constituted on January 1, 1996, no more than one of which shall be located in the same congressional district;

(iii) three members representing motor vehicle franchisors registered by the department pursuant to Section 13-14-105, or three members of the general public, none of whom shall be related to any franchisee, or any combination of these representatives under this Subsection (1)(b)(iii); and

(iv) three alternate members, with one alternate from each of the designations set forth in Subsections (1)(b)(i), (1)(b)(ii), and (1)(b)(iii), who shall take the place of a regular advisory board member from the same designation at a meeting of the advisory board where that regular advisory board member is absent or otherwise disqualified from participating in the advisory board meeting.

(2) (a) Members of the advisory board shall be appointed for a term of four years.

(b) The executive director may adjust the term of members who were appointed to the advisory board prior to July 1, 2001, by extending the unexpired term of a member for up to two additional years in order to insure that approximately half of the members are appointed every two years.

(c) In the event of a vacancy on the advisory board, the executive director with the concurrence of the governor, shall appoint an individual to complete the unexpired term of the member whose office is vacant.

(d) A member may not be appointed to more than two consecutive terms.

(3) (a) The executive director or the executive director's designee shall be the chair of the advisory board.

(b) The department shall keep a record of all hearings, proceedings, transactions, communications, and recommendations of the advisory board.

(4) Four or more members of the advisory board constitute a quorum for the transaction of business. The action of a majority of the members of the advisory board is considered the action of the advisory board.

(5) (a) A member of the advisory board may not participate as a board member in a proceeding or hearing:

(i) involving the member's licensed business or employer; or

(ii) when a member, a member's business or family, or employer has a pecuniary interest in the outcome or other conflict of interest concerning an issue before the advisory board.

(b) If a member of the advisory board is disqualified under Subsection (5)(a), the executive director shall select the appropriate alternate member to act on the issue before the advisory board as provided in Subsection (1)(b)(iv).

(6) Except for the executive director or the executive director's designee, an individual may not be appointed or serve on the advisory board while holding any other elective or appointive state or federal office.

~~[(7) The members of the advisory board shall serve without compensation.]~~

(7) (a) (i) A member of the advisory board who is not a government employee shall receive no compensation or benefits for the member's services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) A member may decline to receive per diem and expenses for the member's services.

(b) (i) A state government officer and employee member who does not receive salary, per diem, or expenses from the member's agency for the member's service may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) A state government officer and employee member may decline to receive per diem and expenses for the member's service.

(8) The department shall provide necessary staff support to the advisory board.

Section 3. Section **13-14-201** is amended to read:

13-14-201. Prohibited acts by franchisors -- Affiliates -- Disclosures.

(1) A franchisor may not in this state:

(a) except as provided in Subsection (3), require a franchisee to order or accept delivery of any new motor vehicle, part, accessory, equipment, or other item not otherwise required by law that is not voluntarily ordered by the franchisee;

(b) require a franchisee to participate monetarily in any advertising campaign or contest, or purchase any promotional materials, display devices, or display decorations or materials;

(c) require a franchisee to change the capital structure of the franchisee's dealership or the means by or through which the franchisee finances the operation of the franchisee's dealership, if the dealership at all times meets reasonable capital standards determined by and applied in a nondiscriminatory manner by the franchisor;

(d) require a franchisee to refrain from participating in the management of, investment in, or acquisition of any other line of new motor vehicles or related products, if:

(i) the franchisee maintains a reasonable line of credit for each make or line of vehicles; and

(ii) complies with reasonable capital and facilities requirements of the franchisor;

(e) require a franchisee to prospectively agree to a release, assignment, novation, waiver, or estoppel that would:

(i) relieve a franchisor from any liability imposed by this chapter; or

(ii) require any controversy between the franchisee and a franchisor to be referred to a third party if the decision by the third party would be binding;

(f) require a franchisee to change the location of the principal place of business of the franchisee's dealership or make any substantial alterations to the dealership premises, if the change or alterations would be unreasonable;

(g) coerce or attempt to coerce a franchisee to join, contribute to, or affiliate with an advertising association;

(h) require, coerce, or attempt to coerce a franchisee to enter into an agreement with the franchisor or do any other act that is unfair or prejudicial to the franchisee, by threatening to cancel a franchise agreement or other contractual agreement or understanding existing between the franchisor and franchisee;

(i) adopt, change, establish, modify, or implement a plan or system for the allocation, scheduling, or delivery of new motor vehicles, parts, or accessories to its franchisees so that the plan or system is not fair, reasonable, and equitable;

(j) increase the price of any new motor vehicle that the franchisee has ordered from the franchisor and for which there exists at the time of the order a bona fide sale to a retail purchaser if the order was made prior to the franchisee's receipt of an official written price increase notification;

(k) fail to indemnify and hold harmless its franchisee against any judgment for damages or settlement approved in writing by the franchisor:

(i) including court costs and attorneys' fees arising out of actions, claims, or proceedings including those based on:

(A) strict liability;

(B) negligence;

(C) misrepresentation;

(D) express or implied warranty;

(E) revocation as described in Section 70A-2-608; or

(F) rejection as described in Section 70A-2-602; and

(ii) to the extent the judgment or settlement relates to alleged defective or negligent actions by the franchisor;

(l) threaten or coerce a franchisee to waive or forbear its right to protest the establishment

or relocation of a same line-make franchisee in the relevant market area of the affected franchisee;

(m) fail to ship monthly to a franchisee, if ordered by the franchisee, the number of new motor vehicles of each make, series, and model needed by the franchisee to achieve a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation being achieved nationally at the time of the order by each make, series, and model covered under the franchise agreement;

(n) require or otherwise coerce a franchisee to under-utilize the franchisee's existing facilities;

(o) fail to include in any franchise agreement the following language or language to the effect that: "If any provision in this agreement contravenes the laws or regulations of any state or other jurisdiction where this agreement is to be performed, or provided for by such laws or regulations, the provision is considered to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force.";

(p) engage in the distribution, sale, offer for sale, or lease of a new motor vehicle to purchasers who acquire the vehicle in this state except through a franchisee with whom the franchisor has established a written franchise agreement, if the franchisor's trade name, trademark, service mark, or related characteristic is an integral element in the distribution, sale, offer for sale, or lease;

(q) engage in the distribution or sale of a recreational vehicle which is manufactured, rented, sold, or offered for sale in this state without being constructed in accordance with the standards set by the American National Standards Institute for recreational vehicles and evidenced by a seal or plate attached to the vehicle;

(r) except as provided in Subsection (2), authorize or permit a person to perform warranty service repairs on motor vehicles, except warranty service repairs:

(i) by a franchisee with whom the franchisor has entered into a franchise agreement for the sale and service of the franchisor's motor vehicles; or

(ii) on owned motor vehicles by a person or government entity who has purchased new motor vehicles pursuant to a franchisor's or manufacturer's fleet discount program;

- (s) fail to provide a franchisee with a written franchise agreement;
- (t) notwithstanding any other provisions of this chapter, unreasonably fail or refuse to offer to its same line-make franchised dealers all models manufactured for that line-make, or unreasonably require a dealer to pay any extra fee, remodel, renovate, recondition the dealer's existing facilities, or purchase unreasonable advertising displays or other materials as a prerequisite to receiving a model or series of vehicles, except that a recreational vehicle manufacturer may split a line-make between motor home and travel trailer products;
 - (u) except as provided in Subsection (6), directly or indirectly:
 - (i) own an interest in a new motor vehicle dealer or dealership;
 - (ii) operate or control a new motor vehicle dealer or dealership;
 - (iii) act in the capacity of a new motor vehicle dealer, as defined in Section 13-14-102; or
 - (iv) operate a motor vehicle service facility;
 - (v) fail to timely pay for all reimbursements to a franchisee for incentives and other payments made by the franchisor;
 - (w) directly or indirectly influence or direct potential customers to franchisees in an inequitable manner, including:
 - (i) charging a franchisee a fee for a referral regarding a potential sale or lease of any of the franchisee's products or services in an amount exceeding the actual cost of the referral;
 - (ii) giving a customer referral to a franchisee on the condition that the franchisee agree to sell the vehicle at a price fixed by the franchisor; or
 - (iii) advising a potential customer as to the amount that the potential customer should pay for a particular product;
 - (x) fail to provide comparable delivery terms to each franchisee for a product of the franchisor, including the time of delivery after the placement of an order by the franchisee;
 - (y) if personnel training is provided by the franchisor to its franchisees, unreasonably fail to make that training available to each franchisee on proportionally equal terms;
 - (z) condition a franchisee's eligibility to participate in a sales incentive program on the requirement that a franchisee use the financing services of the franchisor or a subsidiary or affiliate

of the franchisor for inventory financing;

(aa) make available for public disclosure, except with the franchisee's permission or under subpoena or in any administrative or judicial proceeding in which the franchisee or the franchisor is a party, any confidential financial information regarding a franchisee, including:

- (i) monthly financial statements provided by the franchisee;
- (ii) the profitability of a franchisee; or
- (iii) the status of a franchisee's inventory of products;

(bb) use any performance standard, incentive program, or similar method to measure the performance of franchisees unless the standard or program:

- (i) is designed and administered in a fair, reasonable, and equitable manner;
- (ii) if based upon a survey, utilizes an actuarially generally acceptable, valid sample; and
- (iii) is, upon request by a franchisee, disclosed and explained in writing to the franchisee, including how the standard or program is designed, how it will be administered, and the types of data that will be collected and used in its application;

(cc) other than sales to the federal government, directly or indirectly, sell, lease, offer to sell, or offer to lease, a new motor vehicle or any motor vehicle owned by the franchisor, except through a franchised new motor vehicle dealer;

(dd) compel a franchisee, through a finance subsidiary, to agree to unreasonable operating requirements, except that this Subsection (1)(dd) shall not be construed to limit the right of a financing subsidiary to engage in business practices in accordance with the usage of trade in retail and wholesale motor vehicle financing; ~~or~~

(ee) condition the franchisor's participation in co-op advertising for a product category on the franchisee's participation in any program related to another product category or on the franchisee's achievement of any level of sales in a product category other than that which is the subject of the co-op advertising~~[-];~~

(ff) discriminate against a franchisee in the state in favor of another franchisee of the same line-make in the state by:

- (i) selling or offering to sell a new motor vehicle to one franchisee at a higher actual price,

including the price for vehicle transportation, than the actual price at which the same model similarly equipped is offered to or is made available by the franchisor to another franchisee in the state during a similar time period;

(ii) except as provided in Subsection (8), using a promotional program or device or an incentive, payment, or other benefit, whether paid at the time of the sale of the new motor vehicle to the franchisee or later, that results in the sale of or offer to sell a new motor vehicle to one franchisee in the state at a higher price, including the price for vehicle transportation, than the price at which the same model similarly equipped is offered or is made available by the franchisor to another franchisee in the state during a similar time period; or

(iii) except as provided in Subsection (9), failing to provide or direct a lead in a fair, equitable, and timely manner; or

(gg) through an affiliate, take any action that would otherwise be prohibited under this chapter.

(2) Notwithstanding Subsection (1)(r), a franchisor may authorize or permit a person to perform warranty service repairs on motor vehicles if the warranty services is for a franchisor of recreational vehicles.

(3) Subsection (1)(a) does not prevent the franchisor from requiring that a franchisee carry a reasonable inventory of:

- (a) new motor vehicle models offered for sale by the franchisor; and
- (b) parts to service the repair of the new motor vehicles.

(4) Subsection (1)(d) does not prevent a franchisor from:

- (a) requiring that a franchisee maintain separate sales personnel or display space; or
- (b) refusing to permit a combination of new motor vehicle lines, if justified by reasonable business considerations.

(5) Upon the written request of any franchisee, a franchisor shall disclose in writing to the franchisee the basis on which new motor vehicles, parts, and accessories are allocated, scheduled, and delivered among the franchisor's dealers of the same line-make.

(6) (a) A franchisor may engage in any of the activities listed in Subsection (1)(u), for a

period not to exceed 12 months if:

(i) (A) the person from whom the franchisor acquired the interest in or control of the new motor vehicle dealership was a franchised new motor vehicle dealer; and

(B) the franchisor's interest in the new motor vehicle dealership is for sale at a reasonable price and on reasonable terms and conditions; or

(ii) the franchisor is engaging in the activity listed in Subsection (1)(u) for the purpose of broadening the diversity of its dealer body and facilitating the ownership of a new motor vehicle dealership by a person who:

(A) is part of a group that has been historically underrepresented in the franchisor's dealer body;

(B) would not otherwise be able to purchase a new motor vehicle dealership;

(C) has made a significant investment in the new motor vehicle dealership which is subject to loss;

(D) has an ownership interest in the new motor vehicle dealership; and

(E) operates the new motor vehicle dealership under a plan to acquire full ownership of the dealership within a reasonable period of time and under reasonable terms and conditions.

(b) The board may, for good cause shown, extend the time limit set forth in Subsection (6)(a) for an additional period not to exceed 12 months.

(c) A franchisor who was engaged in any of the activities listed in Subsection (1)(u) in this state prior to May 1, 2000, may continue to engage in that activity, but shall not expand that activity to acquire an interest in any other new motor vehicle dealerships or motor vehicle service facilities after May 1, 2000.

(d) Notwithstanding the provisions of Subsection (1)(u), a franchisor may own, operate, or control a new motor vehicle dealership trading in a line-make of motor vehicle if:

(i) as to that line-make of motor vehicle, there are no more than four franchised new motor vehicle dealerships licensed and in operation within the state as of January 1, 2000;

(ii) the franchisor does not own directly or indirectly, more than a 45% interest in the dealership;

(iii) at the time the franchisor first acquires ownership or assumes operation or control of the dealership, the distance between the dealership thus owned, operated, or controlled and the nearest unaffiliated new motor vehicle dealership trading in the same line-make is not less than 150 miles;

(iv) all the franchisor's franchise agreements confer rights on the franchisee to develop and operate as many dealership facilities as the franchisee and franchisor shall agree are appropriate within a defined geographic territory or area; and

(v) as of January 1, 2000, no fewer than half of the franchisees of the line-make within the state own and operate two or more dealership facilities in the geographic area covered by the franchise agreement.

(7) Subsection (1)(ff) does not apply to recreational vehicles.

(8) Subsection (1)(ff)(ii) does not prohibit a promotional or incentive program that is functionally available to all competing franchisees of the same line-make in the state on substantially comparable terms.

(9) Subsection (1)(ff)(iii) may not be construed to:

(a) permit provision of or access to customer information that is otherwise protected from disclosure by law or by contract between a franchisor and a franchisee; or

(b) require a franchisor to disregard the preference volunteered by a potential customer in providing or directing a lead.

(10) Subsection (1)(gg) does not limit the right of an affiliate to engage in business practices in accordance with the usage of trade in which the affiliate is engaged.

Section 4. Section **13-14-203** is amended to read:

13-14-203. Succession to franchise.

(1) (a) A successor, including a family member of a deceased or incapacitated franchisee, who is designated by the franchisee may succeed the franchisee in the ownership and operation of the dealership under the existing franchise agreement if:

(i) the designated successor gives the franchisor written notice of an intent to succeed to the rights of the deceased or incapacitated franchisee in the franchise agreement within 180 days after the franchisee's death or incapacity;

(ii) the designated successor agrees to be bound by all of the terms and conditions of the franchise agreement; and

(iii) the designated successor meets the criteria generally applied by the franchisor in qualifying franchisees.

(b) A franchisor may refuse to honor the existing franchise agreement with the designated successor only for good cause.

(2) The franchisor may request in writing from a designated successor the personal and financial data that is reasonably necessary to determine whether the existing franchise agreement should be honored. The designated successor shall supply the personal and financial data promptly upon the request.

(3) (a) If a franchisor believes that good cause exists for refusing to honor the requested succession, the franchisor shall serve upon the designated successor notice of its refusal to approve the succession, within 60 days after the later of:

(i) receipt of the notice of the designated successor's intent to succeed the franchisee in the ownership and operation of the dealership; or

(ii) the receipt of the requested personal and financial data.

(b) Failure to serve the notice pursuant to Subsection (3)(a) is considered approval of the designated successor and the franchise agreement is considered amended to reflect the approval of the succession the day following the last day the franchisor can serve notice under Subsection (3)(a).

(4) The notice of the franchisor provided in Subsection (3) shall state the specific grounds for the refusal to approve the succession and that discontinuance of the franchise agreement shall take effect not less than 180 days after the date the notice of refusal is served unless the proposed successor files an application for hearing under Subsection (6).

(5) (a) This section does not prevent a franchisee from designating a person as the successor by written instrument filed with the franchisor.

(b) If a franchisee files an instrument under Subsection (5)~~(b)~~(a), the instrument governs the succession rights to the management and operation of the dealership subject to the designated successor satisfying the franchisor's qualification requirements as described in this section.

(6) (a) If a franchisor serves a notice of refusal to a designated successor pursuant to Subsection (3), the designated successor may, within the 180-day period provided in Subsection (4), file with the board an application for a hearing to determine whether or not good cause exists for the refusal.

(b) If application for a hearing is timely filed, the franchisor shall continue to honor the franchise agreement until after:

- (i) the requested hearing has been concluded;
- (ii) a decision is rendered by the board; and
- (iii) the applicable appeal period has expired following a decision by the board.