

POWERSPORT VEHICLE FRANCHISE ACT

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: Dan R. Eastman

LONG TITLE

General Description:

This bill modifies the Powersport Vehicle Franchise Act.

Highlighted Provisions:

This bill:

- ▶ amends provisions relating to the Powersport Vehicle Franchise Advisory Board, including:
 - membership of the board;
 - requirements for the transaction of business by the board; and
 - powers and duties of the board;
- ▶ clarifies the powers and duties of the executive director of the Department of Commerce and the advisory board;
- ▶ shifts numerous duties from the board to the executive director including:
 - allowing the executive director to issue certain decisions after a recommendation is received from the board; and
 - allowing the executive director to make administrative rules in consultation with the board;
- ▶ adds provisions regarding administrative hearings to Section 13-35-106;
- ▶ shifts the responsibility for notifying a franchisor of a protest to the establishment or relocation of a franchise from the board to the department;
- ▶ clarifies that the executive director is to comply with procedures for the issuance of formal orders mandated by Section 63-46b-10 in both formal and informal



- 28 adjudicative proceedings;
- 29 ▶ clarifies acceptable methods of communicating certain required notices; and
- 30 ▶ makes technical changes.

31 **Monies Appropriated in this Bill:**

32 None

33 **Other Special Clauses:**

34 None

35 **Utah Code Sections Affected:**

36 AMENDS:

- 37 **13-35-102**, as last amended by Chapter 123, Laws of Utah 2004
- 38 **13-35-103**, as last amended by Chapter 123, Laws of Utah 2004
- 39 **13-35-104**, as enacted by Chapter 234, Laws of Utah 2002
- 40 **13-35-105**, as enacted by Chapter 234, Laws of Utah 2002
- 41 **13-35-106**, as enacted by Chapter 234, Laws of Utah 2002
- 42 **13-35-107**, as enacted by Chapter 234, Laws of Utah 2002
- 43 **13-35-201**, as enacted by Chapter 234, Laws of Utah 2002
- 44 **13-35-202**, as last amended by Chapter 131, Laws of Utah 2003
- 45 **13-35-203**, as last amended by Chapter 131, Laws of Utah 2003
- 46 **13-35-301**, as enacted by Chapter 234, Laws of Utah 2002
- 47 **13-35-302**, as last amended by Chapter 123, Laws of Utah 2004
- 48 **13-35-303**, as enacted by Chapter 234, Laws of Utah 2002
- 49 **13-35-304**, as enacted by Chapter 234, Laws of Utah 2002
- 50 **13-35-305**, as enacted by Chapter 234, Laws of Utah 2002
- 51 **13-35-306**, as enacted by Chapter 234, Laws of Utah 2002



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

54 Section 1. Section **13-35-102** is amended to read:

55 **13-35-102. Definitions.**

56 As used in this chapter:

- 57 (1) [~~"Board"~~] "Advisory board" or "board" means the Utah Powersport Vehicle
- 58 Franchise Advisory Board created in Section 13-35-103.

- 59 (2) "Dealership" means a site or location in this state:
60 (a) at which a franchisee conducts the business of a new powersport vehicle dealer; and
61 (b) that is identified as a new powersport vehicle dealer's principal place of business
62 for registration purposes under Section 13-35-105.
- 63 (3) "Department" means the Department of Commerce.
- 64 (4) "Executive director" means the executive director of the Department of Commerce.
- 65 (5) "Franchise" or "franchise agreement" means a written agreement, for a definite or
66 indefinite period, in which:
67 (a) a person grants to another person a license to use a trade name, trademark, service
68 mark, or related characteristic; and
69 (b) a community of interest exists in the marketing of new powersport vehicles, new
70 powersport vehicle parts, and services related to the sale or lease of new powersport vehicles at
71 wholesale or retail.
- 72 (6) "Franchisee" means a person with whom a franchisor has agreed or permitted, in
73 writing or in practice, to purchase, sell, or offer for sale new powersport vehicles manufactured,
74 produced, represented, or distributed by the franchisor.
- 75 (7) (a) "Franchisor" means a person who has, in writing or in practice, agreed with or
76 permits a franchisee to purchase, sell, or offer for sale new powersport vehicles manufactured,
77 produced, represented, or distributed by the franchisor, and includes:
78 (i) the manufacturer or distributor of the new powersport vehicles;
79 (ii) an intermediate distributor;
80 (iii) an agent, officer, or field or area representative of the franchisor; and
81 (iv) a person who is affiliated with a manufacturer or a representative or who directly
82 or indirectly through an intermediary is controlled by, or is under common control with the
83 manufacturer.
- 84 (b) For purposes of Subsection (7)(a)(iv), a person is controlled by a manufacturer if
85 the manufacturer has the authority directly or indirectly by law or by an agreement of the
86 parties, to direct or influence the management and policies of the person.
- 87 (8) "Lead" means the referral by a franchisor to a franchisee of an actual or potential
88 customer for the purchase or lease of a new powersport vehicle, or for service work related to
89 the franchisor's vehicles.

90 (9) "Line-make" means the powersport vehicles that are offered for sale, lease, or
91 distribution under a common name, trademark, service mark, or brand name of the franchisor,
92 or manufacturer of the powersport vehicle.

93 (10) (a) "Powersport vehicle" means:

94 (i) an all-terrain type I or type II vehicle "ATV" defined in Section 41-22-2;

95 (ii) a snowmobile as defined in Section 41-22-2;

96 (iii) a motorcycle as defined in Section 41-1a-102;

97 (iv) a personal watercraft as defined in Section 73-18-2;

98 (v) except as provided in Subsection (10)(b), a motor-driven cycle as defined in
99 Section 41-6-1; or

100 (vi) a moped as defined in Section 41-6-1.

101 (b) "Powersport vehicle" does not include:

102 (i) an electric assisted bicycle defined in Section 41-6-1;

103 (ii) a motor assisted scooter as defined in Section 41-6-1; or

104 (iii) a personal motorized mobility device as defined in Section 41-6-1.

105 (11) "New powersport vehicle dealer" means a person who is engaged in the business
106 of buying, selling, offering for sale, or exchanging new powersport vehicles either outright or
107 on conditional sale, bailment, lease, chattel mortgage, or otherwise who has established a place
108 of business for the sale, lease, trade, or display of powersport vehicles.

109 (12) "Notice" or "notify" includes both traditional written communications and all
110 reliable forms of electronic communication unless expressly prohibited by statute or rule.

111 (13) "Relevant market area" means:

112 (a) the county in which a powersport dealership is to be established or relocated; and

113 (b) the area within a 15-mile radius from the site of the new or relocated dealership.

114 (14) "Sale, transfer, or assignment" means any disposition of a franchise or an interest
115 in a franchise, with or without consideration, including a bequest, inheritance, gift, exchange,
116 lease, or license.

117 (15) "Serve" or "served," unless expressly indicated otherwise by statute or rule,
118 includes any reliable form of communication.

119 (16) "Written," "write," "in writing," or other variations of those terms shall include all
120 reliable forms of electronic communication.

121 Section 2. Section **13-35-103** is amended to read:

122 **13-35-103. Utah Powersport Vehicle Franchise Advisory Board -- Creation --**
123 **Appointment of members -- Alternate members -- Chair -- Quorum -- Conflict of interest.**

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

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

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

129 (i) three new powersport vehicle franchisees, one from each of the three congressional
130 districts in the state; and

131 (ii) (A) three members representing powersport vehicle franchisors registered by the
132 department pursuant to Section 13-35-105~~[, or]~~;

133 (B) three members of the general public, none of whom shall be related to any
134 franchisee~~[,]~~; or

135 (C) three members consisting of any combination of these representatives under this
136 Subsection (1)(b)(ii).

137 (2) (a) The executive director shall also appoint, with the concurrence of the governor,
138 three alternate members, with at least one alternate from each of the designations set forth in
139 Subsections (1)(b)(i) and (1)(b)(ii), except that the new powersport vehicle franchisee alternate
140 or alternates for the designation under Subsection (1)(b)(i) may be from any congressional
141 district.

142 (b) An alternate shall take the place of a regular advisory board member from the same
143 designation at a meeting of the advisory board where that regular advisory board member is
144 absent or otherwise disqualified from participating in the advisory board meeting.

145 (3) (a) (i) Members of the advisory board appointed under Subsections (1)(b) and (2)
146 shall be appointed for a term of four years.

147 (ii) No specific term shall apply to the executive director or the executive director's
148 designee.

149 (b) The executive director may adjust the term of members who were appointed to the
150 advisory board prior to July 1, 2002, by extending the unexpired term of a member for up to
151 two additional years in order to insure that approximately half of the members are appointed

152 every two years.

153 (c) In the event of a vacancy on the advisory board of a member appointed under
154 Subsection (1)(b) or (2), the executive director with the concurrence of the governor, shall
155 appoint an individual to complete the unexpired term of the member whose office is vacant.

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

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

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

161 (5) (a) Four or more members of the advisory board constitute a quorum for the
162 transaction of business.

163 (b) The action of a majority of [~~the members of the advisory board~~] a quorum present
164 is considered the action of the advisory board.

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

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

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

170 (b) If a member of the advisory board is disqualified under Subsection (6)(a), the
171 executive director shall select the appropriate alternate member to act on the issue before the
172 advisory board as provided in Subsection (2).

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

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

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

181 (b) (i) A state government officer or employee member who does not receive salary,
182 per diem, or expenses from the member's agency for the member's service may receive per

183 diem and expenses incurred in the performance of the member's official duties at the rates
184 established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

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

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

188 Section 3. Section **13-35-104** is amended to read:

189 **13-35-104. Powers and duties of the advisory board and the executive director.**

190 ~~[The]~~ (1) (a) Except as provided in Subsection 13-35-106(3), the advisory board shall
191 make recommendations to the executive director on the administration and enforcement of this
192 chapter ~~and shall~~, including adjudicative and rulemaking proceedings.

193 (b) The executive director shall:

194 (i) consider the advisory board's recommendations; and

195 (ii) issue any final decision by the department.

196 ~~[(1)]~~ (2) ~~[conduct rulemaking proceedings]~~ The executive director, in consultation with
197 the advisory board, shall make rules for the administration of this chapter in accordance with
198 Title 63, Chapter 46a, Utah Administrative Rulemaking Act[, concerning administrative
199 proceedings before the advisory board; and].

200 ~~[(2)]~~ (3) (a) ~~[conduct adjudicative proceedings required by]~~ An adjudicative proceeding
201 under this chapter shall be conducted in accordance with Title 63, Chapter 46b, Administrative
202 Procedures Act[, for the purpose of making recommendations to the executive director].

203 (b) In an adjudicative proceeding under this chapter, any order issued by the executive
204 director:

205 (i) shall comply with Section 63-46b-10, whether the proceeding is a formal or an
206 informal adjudicative proceeding under Title 63, Chapter 46b, Administrative Procedures Act;
207 and

208 (ii) if the order modifies or rejects a finding of fact in a recommendation from the
209 advisory board, shall be made on the basis of information learned from the executive director's:

210 (A) personal attendance at the hearing; ~~§~~→ or ←~~§~~

211 (B) review of the record developed at the hearing ~~§~~→ [; or

212 ~~— (C) consultation with the executive director's designee under Subsection~~
213 ~~13-14-103(1)(a), who attended the adjudicative proceeding]~~ ←~~§~~ .

214 Section 4. Section **13-35-105** is amended to read:

215 **13-35-105. Registration -- Fees.**

216 (1) A franchisee or franchisor doing business in this state shall:

217 (a) annually register or renew its registration with the department in a manner
218 established by the department [~~in collaboration with the advisory board~~]; and

219 (b) pay an annual registration fee in an amount determined by the department in
220 accordance with Sections 13-1-2 and 63-38-3.2.

221 (2) The department[~~, in collaboration with the advisory board,~~] shall register or renew
222 the registration of a franchisee or franchisor if the franchisee or franchisor complies with this
223 chapter and rules made by the department under this chapter.

224 (3) A franchisee or franchisor registered under this section shall comply with this
225 chapter and any rules made by the department under this chapter including any amendments to
226 this chapter or the rules made after a franchisee or franchisor enter into a franchise agreement.

227 (4) The fee imposed under Subsection (1)(b) shall be collected by the department and
228 deposited into the Commerce Service Fund.

229 (5) Notwithstanding Subsection (1), an agent, officer, or field or area representative of
230 a franchisor does not need to be registered under this section if the franchisor is registered
231 under this section.

232 Section 5. Section **13-35-106** is amended to read:

233 **13-35-106. Administrative proceedings commenced by the agency.**

234 (1) Except as provided in Subsection [~~(5)~~] (3), after a hearing and after receipt of the
235 advisory board's recommendation, if the executive director finds that a person has violated this
236 chapter or any rule made under this chapter, the executive director may:

237 (a) issue a cease and desist order; and

238 (b) assess an administrative fine.

239 [~~(2) Except as provided in Subsection (5), the executive director shall comply with~~
240 ~~Title 63, Chapter 46b, Administrative Procedures Act, and shall consult with the advisory~~
241 ~~board prior to any order or assessment of fine.~~]

242 [~~(3)~~] (2) (a) In determining the amount and appropriateness of an administrative fine
243 under Subsection (1), the executive director shall consider:

244 (i) the gravity of the violation;

245 (ii) any history of previous violations; and
 246 (iii) any attempt made by the person to retaliate against another person for seeking
 247 relief under this chapter or other federal or state law relating to the motor vehicle industry.

248 (b) In addition to any other action permitted under Subsection (1), the department may
 249 file an action with a court seeking to enforce the executive director's order and pursue the
 250 executive director's assessment of a fine in an amount not to exceed \$5,000 for each day a
 251 person violates an order of the executive director.

252 ~~[(4) Any person aggrieved by an adverse determination by the executive director may~~
 253 ~~either seek reconsideration of the order pursuant to Section 63-46b-13 of the Administrative~~
 254 ~~Procedures Act or seek judicial review of the order.]~~

255 ~~[(5)]~~ (3) (a) In addition to the grounds for issuing an order on an emergency basis listed
 256 in Subsection 63-46b-20(1), the executive director may issue an order on an emergency basis if
 257 the executive director determines that irreparable damage is likely to occur if immediate action
 258 is not taken.

259 (b) In issuing an emergency order under Subsection ~~[(5)]~~ (3)(a), the executive director
 260 shall comply with the requirements of Subsections 63-46b-20(2) and (3).

261 Section 6. Section **13-35-107** is amended to read:

262 **13-35-107. Administrative proceedings -- Request for agency action.**

263 (1) (a) A person may commence an adjudicative proceeding in accordance with this
 264 chapter and with Title 63, Chapter 46b, Administrative Procedures Act, to:

265 (i) remedy a violation of this chapter; ~~[or]~~

266 (ii) obtain approval of an act regulated by this chapter~~[-]; or~~

267 (iii) obtain any determination ~~Œ→ that ←Œ~~ this chapter specifically authorizes that person
 267a to request.

268 (b) A person shall commence an adjudicative proceeding by filing a request for agency
 269 action in accordance with Section 63-46b-3.

270 ~~[(2) (a) The advisory board shall conduct all adjudicative proceedings in accordance~~
 271 ~~with Title 63, Chapter 46b, Administrative Procedures Act, with a quorum of the advisory~~
 272 ~~board members in attendance.]~~

273 ~~[(b) An order or decision issued by the executive director shall comply with Section~~
 274 ~~63-46b-10.]~~

275 ~~[(c) Any hearing under this chapter shall be conducted as an informal proceeding~~

276 ~~unless otherwise designated as a formal proceeding pursuant to the provisions of Title 63,~~
 277 ~~Chapter 46b, Administrative Procedures Act.]~~

278 ~~[(3)] (2) [The advisory board] After receipt of the advisory board's recommendation,~~
 279 ~~the executive director shall apportion in a fair and equitable manner between the parties any~~
 280 ~~costs of the adjudicative proceeding, including reasonable attorney's fees [subject to final~~
 281 ~~approval by a court].~~

282 Section 7. Section **13-35-201** is amended to read:

283 **13-35-201. Prohibited acts by franchisors -- Disclosures.**

284 (1) A franchisor in this state may not:

285 (a) except as provided in Subsection (2), require a franchisee to order or accept
 286 delivery of any new powersport vehicle, part, accessory, equipment, or other item not otherwise
 287 required by law that is not voluntarily ordered by the franchisee;

288 (b) require a franchisee to:

289 (i) participate monetarily in any advertising campaign or contest[;]; or

290 (ii) purchase any promotional materials, display devices, or display decorations or
 291 materials;

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

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

299 (i) ~~[the franchisee]~~ maintains a reasonable line of credit for each make or line of
 300 powersport vehicles; and

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

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

304 (i) relieve a franchisor from any liability **Ŝ→**, **including notice and hearing rights** **←Ŝ**
 304a **imposed Ŝ→ on the franchisor ←Ŝ** by this chapter; or

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

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

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

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

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

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

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

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

327 (A) strict liability;

328 (B) negligence;

329 (C) misrepresentation;

330 (D) express or implied warranty;

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

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

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

335 (l) threaten or coerce a franchisee to waive or forbear its right to protest the
336 establishment or relocation of a same line-make franchisee in the relevant market area of the
337 affected franchisee;

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

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

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

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

355 (q) except as provided in Subsection (2), authorize or permit a person to perform
356 warranty service repairs on powersport vehicles, except warranty service repairs:

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

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

361 (r) fail to provide a franchisee with a written franchise agreement;

362 (s) notwithstanding any other provisions of this chapter, unreasonably fail or refuse to
363 offer to its same line-make franchised dealers all models manufactured for that line-make, or
364 unreasonably require a dealer to pay any extra fee, remodel, renovate, recondition the dealer's
365 existing facilities, or purchase unreasonable advertising displays or other materials as a
366 prerequisite to receiving a model or series of vehicles;

367 (t) except as provided in Subsection (5), directly or indirectly:

368 (i) own an interest in a new powersport vehicle dealer or dealership;

- 369 (ii) operate or control a new powersport vehicle dealer or dealership;
- 370 (iii) act in the capacity of a new powersport vehicle dealer, as defined in Section
371 13-35-102; or
- 372 (iv) operate a powersport vehicle service facility;
- 373 (u) fail to timely pay for all reimbursements to a franchisee for incentives and other
374 payments made by the franchisor;
- 375 (v) directly or indirectly influence or direct potential customers to franchisees in an
376 inequitable manner, including:
- 377 (i) charging a franchisee a fee for a referral regarding a potential sale or lease of any of
378 the franchisee's products or services in an amount exceeding the actual cost of the referral;
- 379 (ii) giving a customer referral to a franchisee on the condition that the franchisee agree
380 to sell the vehicle at a price fixed by the franchisor; or
- 381 (iii) advising a potential customer as to the amount that the potential customer should
382 pay for a particular product;
- 383 (w) fail to provide comparable delivery terms to each franchisee for a product of the
384 franchisor, including the time of delivery after the placement of an order by the franchisee;
- 385 (x) if personnel training is provided by the franchisor to its franchisees, unreasonably
386 fail to make that training available to each franchisee on proportionally equal terms;
- 387 (y) condition a franchisee's eligibility to participate in a sales incentive program on the
388 requirement that a franchisee use the financing services of the franchisor or a subsidiary or
389 affiliate of the franchisor for inventory financing;
- 390 (z) make available for public disclosure, except with the franchisee's permission or
391 under subpoena or in any administrative or judicial proceeding in which the franchisee or the
392 franchisor is a party, any confidential financial information regarding a franchisee, including:
- 393 (i) monthly financial statements provided by the franchisee;
- 394 (ii) the profitability of a franchisee; or
- 395 (iii) the status of a franchisee's inventory of products;
- 396 (aa) use any performance standard, incentive program, or similar method to measure
397 the performance of franchisees unless the standard or program:
- 398 (i) is designed and administered in a fair, reasonable, and equitable manner;
- 399 (ii) if based upon a survey, utilizes an actuarially generally acceptable, valid sample;

400 and

401 (iii) is, upon request by a franchisee, disclosed and explained in writing to the
402 franchisee, including:

403 (A) how the standard or program is designed[;];

404 (B) how [it] the standard or program will be administered[;]; and

405 (C) the types of data that will be collected and used in [its] the application of the
406 standard or program;

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

410 (cc) compel a franchisee, through a finance subsidiary, to agree to unreasonable
411 operating requirements, except that this Subsection (1)(cc) [~~shall~~] may not be construed to limit
412 the right of a financing subsidiary to engage in business practices in accordance with the usage
413 of trade in retail and wholesale powersport vehicle financing;

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

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

420 (i) selling or offering to sell a new powersport vehicle to one franchisee at a higher
421 actual price, including the price for vehicle transportation, than the actual price at which the
422 same model similarly equipped is offered to or is made available by the franchisor to another
423 franchisee in the state during a similar time period;

424 (ii) except as provided in Subsection (6), using a promotional program or device or an
425 incentive, payment, or other benefit, whether paid at the time of the sale of the new powersport
426 vehicle to the franchisee or later, that results in the sale of or offer to sell a new powersport
427 vehicle to one franchisee in the state at a higher price, including the price for vehicle
428 transportation, than the price at which the same model similarly equipped is offered or is made
429 available by the franchisor to another franchisee in the state during a similar time period; or

430 (iii) except as provided in Subsection (7), failing to provide or direct a lead in a fair,

431 equitable, and timely manner; or

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

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

436 (a) new powersport vehicle models offered for sale by the franchisor; and

437 (b) parts to service the repair of the new powersport vehicles.

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

439 (a) requiring that a franchisee maintain separate sales personnel or display space; or

440 (b) refusing to permit a combination of new powersport vehicle lines, if justified by
441 reasonable business considerations.

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

445 (5) (a) A franchisor may engage in any of the activities listed in Subsection (1)(t), for a
446 period not to exceed 12 months if:

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

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

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

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

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

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

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

460 (E) operates the new powersport vehicle dealership under a plan to acquire full

461 ownership of the dealership within a reasonable period of time and under reasonable terms and

462 conditions.

463 (b) ~~[The board]~~ After receipt of the advisory board's recommendation, the executive
464 director may, for good cause shown, extend the time limit set forth in Subsection (5)(a) for an
465 additional period not to exceed 12 months.

466 (c) Notwithstanding ~~[the provisions of]~~ Subsection (1)(t), a franchisor may own,
467 operate, or control a new powersport vehicle dealership trading in a line-make of powersport
468 vehicle if:

469 (i) as to that line-make of powersport vehicle, there are no more than four franchised
470 new powersport vehicle dealerships licensed and in operation within the state as of January 1,
471 2002;

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

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

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

481 (v) as of January 1, 2002, no fewer than half of the franchisees of the line-make within
482 the state own and operate two or more dealership facilities in the geographic area covered by
483 the franchise agreement.

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

487 (7) Subsection (1)(ee)(iii) may not be construed to:

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

490 (b) require a franchisor to disregard the preference of a potential customer in providing
491 or directing a lead, provided that the franchisor does not direct the customer to such a
492 preference.

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

495 Section 8. Section **13-35-202** is amended to read:

496 **13-35-202. Sale or transfer of ownership.**

497 (1) (a) The franchisor shall give effect to the change in a franchise agreement as a
498 result of an event listed in Subsection (1)(b):

499 (i) subject to Subsection 13-35-305(2)(b); and

500 (ii) unless exempted under Subsection (2).

501 (b) The franchisor shall give effect to the change in a franchise agreement pursuant to
502 Subsection (1)(a) for the:

503 (i) sale of a dealership;

504 (ii) contract for sale of a dealership;

505 (iii) transfer of ownership of a franchisee's dealership by sale, transfer of the business,
506 or by stock transfer; or

507 (iv) change in the executive management of the franchisee's dealership.

508 (2) A franchisor is exempted from the requirements of Subsection (1) if:

509 (a) the transferee is denied, or would be denied, a new powersport vehicle franchisee's
510 registration pursuant to Section 13-35-105; or

511 (b) the proposed sale or transfer of the business or change of executive management
512 will be substantially detrimental to the distribution of the franchisor's new powersport vehicles
513 or to competition in the relevant market area, provided that the franchisor has given written
514 notice to the franchisee within 60 days following receipt by the franchisor of the following:

515 (i) a copy of the proposed contract of sale or transfer executed by the franchisee and the
516 proposed transferee;

517 (ii) a completed copy of the franchisor's written application for approval of the change
518 in ownership or executive management, if any, including the information customarily required
519 by the franchisor; and

520 (iii) (A) a written description of the business experience of the executive management
521 of the transferee in the case of a proposed sale or transfer of the franchisee's business; or

522 (B) a written description of the business experience of the person involved in the
523 proposed change of the franchisee's executive management in the case of a proposed change of

524 executive management.

525 (3) For purposes of this section, the refusal by the franchisor to accept a proposed
526 transferee ~~[who] is presumed to be unreasonable and undertaken without good cause if the~~
527 proposed franchisee:

528 (a) is of good moral character; and ~~[who]~~

529 (b) otherwise meets the written, reasonable, and uniformly applied standards or
530 qualifications, if any, of the franchisor relating to the business experience of executive
531 management and financial capacity to operate and maintain the dealership required by the
532 franchisor of its franchisees ~~[is presumed to be unreasonable and undertaken without good~~
533 ~~cause].~~

534 (4) (a) If after receipt of the written notice from the franchisor described in Subsection
535 (1) the franchisee objects to the franchisor's refusal to accept the proposed sale or transfer of
536 the business or change of executive management, the franchisee may file an application for a
537 hearing before the board up to 60 days from the date of receipt of the notice.

538 (b) After a hearing, and the executive director's receipt of the advisory board's
539 recommendation, the ~~[board]~~ executive director shall determine, and enter an order providing
540 that:

541 (i) the proposed transferee or change in executive management;

542 (A) shall be approved; or

543 (B) may not be approved for specified reasons; or

544 (ii) a proposed transferee or change in executive management is approved if specific
545 conditions are timely satisfied.

546 (c) (i) The franchisee shall have the burden of proof with respect to all issues raised by
547 the franchisee's application for a hearing as provided in this section.

548 (ii) During the pendency of the hearing, the franchise agreement shall continue in effect
549 in accordance with its terms.

550 (d) The advisory board and the executive director shall expedite, upon written request,
551 any determination sought under this section.

552 Section 9. Section **13-35-203** is amended to read:

553 **13-35-203. Succession to franchise.**

554 (1) (a) A successor, including a family member of a deceased or incapacitated

555 franchisee, who is designated by the franchisee may succeed the franchisee in the ownership
556 and operation of the dealership under the existing franchise agreement if:

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

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

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

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

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

569 (b) The designated successor shall supply the personal and financial data promptly
570 upon the request.

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

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

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

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

581 (4) The notice of the franchisor provided in Subsection (3) shall state:

582 (a) the specific grounds for the refusal to approve the succession; and

583 (b) that discontinuance of the franchise agreement shall take effect not less than 180
584 days after the date the notice of refusal is served unless the proposed successor files an
585 application for hearing under Subsection (6).

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

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

592 (6) (a) If a franchisor serves a notice of refusal to a designated successor pursuant to
593 Subsection (3), the designated successor may, within the 180-day period provided in
594 Subsection (4), file with the advisory board an application for a hearing [~~to determine~~] and a
595 determination by the executive director regarding whether [~~or not~~] good cause exists for the
596 refusal.

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

599 (i) the requested hearing has been concluded;

600 (ii) a decision is rendered by the [~~board~~] executive director; and

601 (iii) the applicable appeal period has expired following a decision by the [~~board~~]
602 executive director.

603 Section 10. Section **13-35-301** is amended to read:

604 **13-35-301. Termination or noncontinuance of franchise.**

605 (1) Except as provided in Subsection (2), a franchisor may not terminate or refuse to
606 continue a franchise agreement unless:

607 (a) the franchisee has received written notice from the franchisor 60 days before the
608 effective date of termination or noncontinuance setting forth the specific grounds for
609 termination or noncontinuance that are relied on by the franchisor as establishing good cause
610 for the termination or noncontinuance;

611 (b) the franchisor has good cause for termination or noncontinuance; and

612 (c) the franchisor is willing and able to comply with Section 13-35-105.

613 (2) A franchisor may terminate a franchise, without complying with Subsection (1) [~~if~~]:

614 (a) if for a particular line-make the franchisor or manufacturer discontinues that
615 line-make;

616 (b) if the franchisee's registration as a new powersport vehicle dealer is revoked under

617 Section 13-35-105; or

618 (c) upon a mutual written agreement of the franchisor and franchisee.

619 (3) (a) At any time before the effective date of termination or noncontinuance of the
620 franchise, the franchisee may apply to the advisory board for a hearing on the merits, and
621 following notice to all parties concerned, the hearing shall be promptly held as provided in
622 Section 13-35-304.

623 (b) A termination or noncontinuance subject to a hearing under Subsection (3)(a) may
624 not become effective until:

625 (i) final determination of the issue by the [~~board~~] executive director; and

626 (ii) the applicable appeal period has lapsed.

627 Section 11. Section **13-35-302** is amended to read:

628 **13-35-302. Issuance of additional franchises -- Relocation of existing franchisees.**

629 (1) (a) Except as provided in Subsection (2), a franchisor shall comply with Subsection
630 (1)(b) if the franchisor seeks to:

631 (i) enter into a franchise establishing a powersport vehicle dealership within a relevant
632 market area where the same line-make is represented by another franchisee; or

633 (ii) relocate an existing powersport vehicle dealership.

634 (b) (i) If a franchisor seeks to take an action listed in Subsection (1)(a), prior to taking
635 the action, the franchisor shall in writing notify the advisory board and each franchisee in that
636 line-make in the relevant market area that the franchisor intends to take an action described in
637 Subsection (1)(a).

638 (ii) The notice required by Subsection (1)(b)(i) shall:

639 (A) specify the good cause on which it intends to rely for the action; and

640 (B) be delivered by registered or certified mail or by any form of reliable [~~electronic~~
641 ~~communication~~] delivery through which receipt is verifiable.

642 (c) Within 45 days of receiving notice required by Subsection (1)(b), any franchisee
643 that is required to receive notice under Subsection (1)(b) may protest to the advisory board the
644 establishing or relocating of the dealership. When a protest is filed, the [~~board~~] department
645 shall inform the franchisor that:

646 (i) a timely protest has been filed;

647 (ii) a hearing is required;

648 (iii) the franchisor may not establish or relocate the proposed dealership until the
649 advisory board has held a hearing; and

650 (iv) the franchisor may not establish or relocate a proposed dealership if the [~~board~~]
651 executive director determines that there is not good cause for permitting the establishment or
652 relocation of the dealership.

653 (d) If multiple protests are filed under Subsection (1)(c), hearings may be consolidated
654 to expedite the disposition of the issue.

655 (2) Subsection (1) does not apply to a relocation that is:

656 (a) less than one mile from the existing location of the franchisee's dealership; and
657 (b) within the same county.

658 (3) For purposes of this section:

659 (a) relocation of an existing franchisee's dealership in excess of one mile from its
660 existing location is considered the establishment of an additional franchise in the line-make of
661 the relocating franchise;

662 (b) the reopening in a relevant market area of a dealership that has not been in
663 operation for one year or more is considered the establishment of an additional powersport
664 vehicle dealership; and

665 (c) (i) except as provided in Subsection (3)(c)(ii), the establishment of a temporary
666 additional place of business by a powersport vehicle franchisee is considered the establishment
667 of an additional powersport vehicle dealership; and

668 (ii) the establishment of a temporary additional place of business by a powersport
669 vehicle franchisee is not considered the establishment of an additional powersport vehicle
670 dealership if the powersport vehicle franchisee is participating in a trade show where three or
671 more powersport vehicle dealers are participating.

672 Section 12. Section **13-35-303** is amended to read:

673 **13-35-303. Effect of terminating a franchise.**

674 If under Section 13-35-301 the [~~board~~] executive director permits a franchisor to
675 terminate or not continue a franchise and prohibits the franchisor from entering into a franchise
676 for the sale of new powersport vehicles of a line-make in a relevant market area, the franchisor
677 may not enter into a franchise for the sale of new powersport vehicles of that line-make in the
678 specified relevant market area unless the [~~franchisor first establishes in a hearing before the~~

679 ~~board]~~ executive director determines, after a recommendation by the advisory board, that there
680 has been a change of circumstances so that the relevant market area at the time of the
681 establishment of the new franchise agreement can reasonably be expected to support the new
682 franchisee.

683 Section 13. Section **13-35-304** is amended to read:

684 **13-35-304. Hearing regarding termination, relocation, or establishment of**
685 **franchises.**

686 (1) (a) Within ten days of receiving an application from a franchisee under Subsection
687 13-35-301(3) challenging its franchisor's right to terminate or not continue a franchise, or an
688 application under Subsection 13-35-302(1) challenging the establishment or relocation of a
689 franchise, the ~~[board]~~ executive director shall:

690 (i) enter an order designating the time and place for the hearing; and

691 (ii) send a copy of the order by certified or registered mail, with return receipt
692 requested, or by any form of reliable ~~[electronic communication]~~ delivery through which
693 receipt is verifiable to:

694 (A) the applicant;

695 (B) the franchisor; and

696 (C) if the application involves the establishment of a new franchise or the relocation of
697 an existing dealership, to all franchisees in the relevant market area engaged in the business of
698 offering to sell or lease the same line-make.

699 (b) A copy of an order mailed under Subsection (1)(a) shall be addressed to the
700 franchisee at the place where the franchisee's business is conducted.

701 (2) Any person who can establish ~~[to the board]~~ an interest in the application may
702 intervene as a party to the hearing, whether or not that person receives notice.

703 (3) Any person may appear and testify on the question of the public interest in the
704 termination or noncontinuation of a franchise or in the establishment of an additional franchise.

705 (4) (a) (i) Any hearing ordered under Subsection (1) shall be conducted no later than
706 120 days after the application for hearing is filed.

707 (ii) A final decision on the challenge shall be made by the ~~[board]~~ executive director no
708 later than 30 days after the hearing.

709 (b) Failure to comply with the time requirements of Subsection (4)(a) is considered a

710 determination that the franchisor acted with good cause or, in the case of a protest of a
711 proposed establishment or relocation of a dealer, that good cause exists for permitting the
712 proposed additional or relocated new motor vehicle dealer, unless:

713 (i) the delay is caused by acts of the franchisor or the additional or relocating
714 franchisee; or

715 (ii) the delay is waived by the parties.

716 (5) The franchisor has the burden of proof to establish that under [~~the provisions of~~]
717 this chapter it should be granted permission to:

718 (a) terminate or not continue the franchise;

719 (b) enter into a franchise agreement establishing an additional franchise; or

720 (c) relocate the dealership of an existing franchisee.

721 Section 14. Section **13-35-305** is amended to read:

722 **13-35-305. Evidence to be considered in determining cause to terminate or**
723 **discontinue.**

724 (1) In determining whether a franchisor has established good cause for terminating or
725 not continuing a franchise agreement, the advisory board and the executive director shall
726 consider:

727 (a) the amount of business transacted by the franchisee, as compared to business
728 available to the franchisee;

729 (b) the investment necessarily made and obligations incurred by the franchisee in the
730 performance of the franchisee's part of the franchise agreement;

731 (c) the permanency of the investment;

732 (d) whether it is injurious or beneficial to the public welfare or public interest for the
733 business of the franchisee to be disrupted;

734 (e) whether the franchisee has adequate powersport vehicle sales and service facilities,
735 equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of
736 the consumer for the new powersport vehicles handled by the franchisee and has been and is
737 rendering adequate services to the public;

738 (f) whether the franchisee refuses to honor warranties of the franchisor under which the
739 warranty service work is to be performed pursuant to the franchise agreement, if the franchisor
740 reimburses the franchisee for the warranty service work;

741 (g) failure by the franchisee to substantially comply with those requirements of the
742 franchise agreement that are determined by the advisory board or the executive director to be:

743 (i) reasonable [~~and~~];

744 (ii) material; and

745 (iii) not in violation of this chapter;

746 (h) evidence of bad faith by the franchisee in complying with those terms of the
747 franchise agreement that are determined by the advisory board or the executive director to be:

748 (i) reasonable [~~and~~];

749 (ii) material; and

750 (iii) not in violation of this chapter;

751 (i) prior misrepresentation by the franchisee in applying for the franchise;

752 (j) transfer of any ownership or interest in the franchise without first obtaining
753 approval from the franchisor or the [~~board~~] executive director after receipt of the advisory
754 board's recommendation; and

755 (k) any other factor the advisory board [~~considers~~] or the executive director consider
756 relevant.

757 (2) Notwithstanding any franchise agreement, the following do not constitute good
758 cause, as used in this chapter for the termination or noncontinuation of a franchise:

759 (a) the sole fact that the franchisor desires;

760 (i) greater market penetration; or

761 (ii) more sales or leases of new powersport vehicles;

762 (b) the change of ownership of the franchisee's dealership or the change of executive
763 management of the franchisee's dealership unless the franchisor proves that the change of
764 ownership or executive management will be substantially detrimental to the distribution of the
765 franchisor's powersport vehicles; or

766 (c) the fact that the franchisee has justifiably refused or declined to participate in any
767 conduct covered by Section 13-35-201.

768 (3) For purposes of Subsection (2), "substantially detrimental" includes the failure of
769 any proposed transferee to meet the objective criteria applied by the franchisor in qualifying
770 franchisees at the time of application.

771 Section 15. Section **13-35-306** is amended to read:

772 **13-35-306. Evidence to be considered in determining cause to relocate existing**
773 **franchisee or establish a new franchised dealership.**

774 In determining whether a franchisor has established good cause for relocating an
775 existing franchisee or establishing a new franchised dealership for the same line-make in a
776 given relevant market area, the advisory board and the executive director shall consider:

777 (1) the amount of business transacted by other franchisees of the same line-make in
778 that relevant market area, as compared to business available to the franchisees;

779 (2) the investment necessarily made and obligations incurred by other franchisees of
780 the same line-make in that relevant market area in the performance of their part of their
781 franchisee agreements;

782 (3) the permanency of the existing and proposed investment;

783 (4) whether it is injurious or beneficial to the public welfare or public interest for an
784 additional franchise to be established; and

785 (5) whether the franchisees of the same line-make in that relevant market area are
786 providing adequate service to consumers for the powersport vehicles of the line-make, which
787 shall include the adequacy of:

788 (a) the powersport vehicle sale and service facilities[;];

789 (b) equipment[;];

790 (c) supply of vehicle parts[;]; and

791 (d) qualified service personnel.

Legislative Review Note

as of 1-20-05 4:48 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number SB0134

Powersport Vehicle Franchise Act

28-Jan-05

3:48 PM

State Impact

No fiscal impact.

Individual and Business Impact

No fiscal impact.

Office of the Legislative Fiscal Analyst