

FRANCHISE LAW AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Dan R. Eastman

House Sponsor: _____

LONG TITLE

General Description:

This bill makes changes to Title 13, Chapter 14, New Automobile Franchise Act.

Highlighted Provisions:

This bill:

- ▶ addresses the definition of a franchise agreement;
- ▶ adds a member to the Utah Motor Vehicle Franchise Advisory Board;
- ▶ makes the executive director's decision in an adjudication under the chapter publicly available;
- ▶ addresses a franchisor's control over a franchisee's place of business;
- ▶ prohibits discrimination by a franchisor against a franchisee under certain circumstances;
- ▶ prohibits a franchisor from recovering the cost of a warranty repair through a fee or other charge to the franchisee;
- ▶ requires compensation from a franchisor to a franchisee if a franchisor renders itself incapable of performing a franchise agreement by selling or transferring assets essential to the manufacture or distribution of a line-make;
- ▶ requires a franchisor to meet a higher burden of proof to terminate or relocate a franchise or to establish an additional franchise;
- ▶ requires the advisory board to consider any negative economic effect on an existing franchisee when evaluating a new or relocated franchise;



- 28 ▶ addresses a franchisor's obligations when a franchise is terminated or not continued;
- 29 ▶ allows a private right of action for a violation of the chapter; 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 **13-14-102**, as last amended by Laws of Utah 2005, Chapters 167 and 249

38 **13-14-103**, as last amended by Laws of Utah 2005, Chapter 249

39 **13-14-104**, as last amended by Laws of Utah 2005, Chapter 249

40 **13-14-201**, as last amended by Laws of Utah 2005, Chapters 167 and 249

41 **13-14-301**, as last amended by Laws of Utah 2005, Chapter 249

42 **13-14-304**, as last amended by Laws of Utah 2005, Chapter 249

43 **13-14-306**, as last amended by Laws of Utah 2005, Chapter 249

44 **13-14-307**, as last amended by Laws of Utah 1997, Chapter 162

45 **ENACTS:**

46 **13-14-308**, Utah Code Annotated 1953



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

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

50 **13-14-102. Definitions.**

51 As used in this chapter:

52 (1) "Advisory board" or "board" means the Utah Motor Vehicle Franchise Advisory
53 Board created in Section 13-14-103.

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

55 (3) "Aftermarket product" means any product or service not included in the
56 manufacturer's suggested retail price of the new motor vehicle, as that price appears on the
57 label required by 15 U.S.C. Sec. 1232(f).

58 (4) "Dealership" means a site or location in this state:

59 (a) at which a franchisee conducts the business of a new motor vehicle dealer; and
60 (b) that is identified as a new motor vehicle dealer's principal place of business for
61 licensing purposes under Section 41-3-204.

62 (5) "Department" means the Department of Commerce.

63 (6) "Executive director" means the executive director of the Department of Commerce.

64 (7) "Franchise" or "franchise agreement" means a written agreement, a course of
65 dealing, or a practice for a definite or indefinite period, in which:

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

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

71 (8) "Franchisee" means a person with whom a franchisor has agreed or permitted, in
72 writing or in practice, to purchase, sell, or offer for sale new motor vehicles manufactured,
73 produced, represented, or distributed by the franchisor.

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

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

78 (b) an intermediate distributor; and

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

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

84 (11) "Line-make" means the motor vehicles that are offered for sale, lease, or
85 distribution;

86 (a) under a common name, trademark, service mark, or brand name of the franchisor,
87 or manufacturer of the motor vehicle[-]; or

88 (b) that are substantially similar in design, specifications, or are manufactured in a
89 facility owned or controlled by the franchisor or manufacturer.

90 (12) "Mile" means 5,280 feet.

91 (13) "Motor home" means a self-propelled vehicle, primarily designed as a temporary
92 dwelling for travel, recreational, or vacation use.

93 (14) (a) "Motor vehicle" means:

94 (i) a travel trailer;

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

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

97 (iv) a trailer as defined in Section 41-1a-102; and

98 (v) a recreational vehicle.

99 (b) "Motor vehicle" does not include a motorcycle as defined in Section 41-1a-102.

100 (15) "New motor vehicle" means a motor vehicle as defined in Subsection (14) that has
101 never been titled or registered and has been driven less than 7,500 miles, unless the motor
102 vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does not apply.

103 (16) "New motor vehicle dealer" is a person who is licensed under Subsection
104 41-3-202(1)(a) to sell new motor vehicles.

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

107 (18) (a) "Recreational vehicle" means a vehicular unit other than a mobile home,
108 primarily designed as a temporary dwelling for travel, recreational, or vacation use, that is
109 either self-propelled or pulled by another vehicle.

110 (b) "Recreational vehicle" includes:

111 (i) a travel trailer;

112 (ii) a camping trailer;

113 (iii) a motor home;

114 (iv) a fifth wheel trailer; and

115 (v) a van.

116 (19) (a) "Relevant market area," except with respect to recreational vehicles, means:

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

118 (ii) the area within a ten-mile radius from the site of the new or relocated dealership.

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

120 (i) the county in which the dealership is to be established or relocated; and

121 (ii) the area within a 35-mile radius from the site of the new or relocated dealership.

122 (20) "Sale, transfer, or assignment" means any disposition of a franchise or an interest
123 in a franchise, with or without consideration, including a bequest, inheritance, gift, exchange,
124 lease, or license.

125 (21) "Serve" or "served," unless expressly indicated otherwise by statute or rule,
126 includes any reliable form of communication.

127 (22) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable vehicle
128 without motive power, designed as a temporary dwelling for travel, recreational, or vacation
129 use that does not require a special highway movement permit when drawn by a self-propelled
130 motor vehicle.

131 (23) "Written," "write," "in writing," or other variations of those terms shall include all
132 reliable forms of electronic communication.

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

134 **13-14-103. Utah Motor Vehicle Franchise Advisory Board -- Creation --**
135 **Appointment of members -- Alternate members -- Chair -- Quorum -- Conflict of interest.**

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

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

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

141 (i) one recreational motor vehicle franchisee;

142 (ii) [~~two~~] three new motor vehicle franchisees from different congressional districts in
143 the state; and

144 (iii) (A) three members representing motor vehicle franchisors registered by the
145 department pursuant to Section 13-14-105;

146 (B) three members of the general public, none of whom shall be related to any
147 franchisee; or

148 (C) three members consisting of any combination of these representatives under this
149 Subsection (1)(b)(iii).

150 (2) (a) The executive director shall appoint, with the concurrence of the governor, three
151 alternate members, with one alternate from each of the designations set forth in Subsections

152 (1)(b)(i), (1)(b)(ii), and (1)(b)(iii), except that the new motor vehicle franchisee alternate or
153 alternates for the designation under Subsection (1)(b)(ii) may be from any congressional
154 district.

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

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

160 (ii) No specific term ~~shall apply~~ applies to the executive director or the executive
161 director's designee.

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

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

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

170 (4) (a) The executive director or the executive director's designee ~~shall be~~ is the chair
171 of the advisory board.

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

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

176 (b) The action of a majority of a quorum present is considered the action of the
177 advisory board.

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

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

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

183 board.

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

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

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

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

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

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

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

202 Section 3. Section **13-14-104** is amended to read:

203 **13-14-104. Powers and duties of the advisory board and the executive director.**

204 (1) (a) Except as provided in Subsection 13-14-106(3), the advisory board shall make
205 recommendations to the executive director on the administration and enforcement of this
206 chapter, including adjudicative and rulemaking proceedings.

207 (b) The executive director shall:

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

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

210 (2) The executive director, in consultation with the advisory board, shall make rules for
211 the administration of this chapter in accordance with Title 63, Chapter 46a, Utah
212 Administrative Rulemaking Act.

213 (3) (a) An adjudicative proceeding under this chapter shall be conducted in accordance

214 with Title 63, Chapter 46b, Administrative Procedures Act.

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

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

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

222 (A) personal attendance at the hearing; or

223 (B) review of the record developed at the hearing.

224 (4) The executive director's decision under this section shall be made available to the
225 public.

226 Section 4. Section **13-14-201** is amended to read:

227 **13-14-201. Prohibited acts by franchisors -- Affiliates -- Disclosures.**

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

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

232 (b) require a franchisee to:

233 (i) participate monetarily in any advertising campaign; or

234 (ii) contest, or purchase any promotional materials, display devices, or display
235 decorations or materials;

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

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

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

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

244 (e) require a franchisee to prospectively agree to a release, assignment, novation,

245 waiver, or estoppel that would:

246 (i) relieve a franchisor from any liability, including notice and hearing rights imposed
247 on the franchisor by this chapter; or

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

250 (f) require a franchisee to change the location of the principal place of business of the
251 franchisee's dealership or make any substantial alterations to the dealership premises, if the
252 change or alterations would be unreasonable or cause the franchisee to lose control or
253 discretion of the premises;

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

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

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

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

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

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

271 (A) strict liability;

272 (B) negligence;

273 (C) misrepresentation;

274 (D) express or implied warranty;

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

- 276 (F) rejection as described in Section 70A-2-602; and
- 277 (ii) to the extent the judgment or settlement relates to alleged defective or negligent
- 278 actions by the franchisor;
- 279 (l) threaten or coerce a franchisee to waive or forbear its right to protest the
- 280 establishment or relocation of a same line-make franchisee in the relevant market area of the
- 281 affected franchisee;
- 282 (m) fail to ship monthly to a franchisee, if ordered by the franchisee, the number of
- 283 new motor vehicles of each make, series, and model needed by the franchisee to achieve a
- 284 percentage of total new vehicle sales of each make, series, and model equitably related to the
- 285 total new vehicle production or importation being achieved nationally at the time of the order
- 286 by each make, series, and model covered under the franchise agreement;
- 287 (n) require or otherwise coerce a franchisee to under-utilize the franchisee's existing
- 288 facilities;
- 289 (o) fail to include in any franchise agreement the following language or language to the
- 290 effect that: "If any provision in this agreement contravenes the laws or regulations of any state
- 291 or other jurisdiction where this agreement is to be performed, or provided for by such laws or
- 292 regulations, the provision is considered to be modified to conform to such laws or regulations,
- 293 and all other terms and provisions shall remain in full force.";
- 294 (p) engage in the distribution, sale, offer for sale, or lease of a new motor vehicle to
- 295 purchasers who acquire the vehicle in this state except through a franchisee with whom the
- 296 franchisor has established a written franchise agreement, if the franchisor's trade name,
- 297 trademark, service mark, or related characteristic is an integral element in the distribution, sale,
- 298 offer for sale, or lease;
- 299 (q) engage in the distribution or sale of a recreational vehicle that is manufactured,
- 300 rented, sold, or offered for sale in this state without being constructed in accordance with the
- 301 standards set by the American National Standards Institute for recreational vehicles and
- 302 evidenced by a seal or plate attached to the vehicle;
- 303 (r) except as provided in Subsection (2), authorize or permit a person to perform
- 304 warranty service repairs on motor vehicles, except warranty service repairs:
- 305 (i) by a franchisee with whom the franchisor has entered into a franchise agreement for
- 306 the sale and service of the franchisor's motor vehicles; or

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

309 (s) fail to provide a franchisee with a written franchise agreement;

310 (t) (i) except as provided in Subsection (1)(t)(ii) and notwithstanding any other
311 provisions of this chapter:

312 (A) unreasonably fail or refuse to offer to its same line-make franchised dealers all
313 models manufactured for that line-make;

314 (B) unreasonably require a dealer to:

315 (I) pay any extra fee, remodel, renovate, recondition the dealer's existing facilities; or

316 (II) purchase unreasonable advertising displays or other materials as a prerequisite to
317 receiving a model or series of vehicles;

318 (ii) notwithstanding Subsection (1)(t)(i), a recreational vehicle manufacturer may split
319 a line-make between motor home and travel trailer products;

320 (u) except as provided in Subsection (6), directly or indirectly:

321 (i) own an interest in a new motor vehicle dealer or dealership;

322 (ii) operate or control a new motor vehicle dealer or dealership;

323 (iii) act in the capacity of a new motor vehicle dealer, as defined in Section 13-14-102;

324 or

325 (iv) operate a motor vehicle service facility;

326 (v) fail to timely pay for all reimbursements to a franchisee for incentives and other
327 payments made by the franchisor;

328 (w) directly or indirectly influence or direct potential customers to franchisees in an
329 inequitable manner, including:

330 (i) charging a franchisee a fee for a referral regarding a potential sale or lease of any of
331 the franchisee's products or services in an amount exceeding the actual cost of the referral;

332 (ii) giving a customer referral to a franchisee on the condition that the franchisee agree
333 to sell the vehicle at a price fixed by the franchisor; or

334 (iii) advising a potential customer as to the amount that the potential customer should
335 pay for a particular product;

336 (x) fail to provide comparable delivery terms to each franchisee for a product of the
337 franchisor, including the time of delivery after the placement of an order by the franchisee;

338 (y) if personnel training is provided by the franchisor to its franchisees, unreasonably
339 fail to make that training available to each franchisee on proportionally equal terms;

340 (z) condition a franchisee's eligibility to participate in a sales incentive program on the
341 requirement that a franchisee use the financing services of the franchisor or a subsidiary or
342 affiliate of the franchisor for inventory financing;

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

346 (i) monthly financial statements provided by the franchisee;

347 (ii) the profitability of a franchisee; or

348 (iii) the status of a franchisee's inventory of products;

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

351 (i) is designed and administered in a fair, reasonable, and equitable manner;

352 (ii) if based upon a survey, utilizes an actuarially generally acceptable, valid sample;

353 and

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

356 (A) how the standard or program is designed;

357 (B) how the standard or program will be administered; and

358 (C) the types of data that will be collected and used in the application of the standard or
359 program;

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

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

367 (ee) condition the franchisor's participation in co-op advertising for a product category
368 on the franchisee's participation in any program related to another product category or on the

369 franchisee's achievement of any level of sales in a product category other than that which is the
370 subject of the co-op advertising;

371 (ff) except as provided in Subsections (7) through (9), discriminate against a franchisee
372 in the state in favor of another franchisee of the same line-make in the state [~~by~~]:

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

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

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

385 (iv) using a formula, computation, or process intended to gauge the franchisee's
386 performance; or

387 (v) in the sale of a motor vehicle owned by the franchisor;

388 (gg) (i) take control over funds owned or under the control of a franchisee based on the
389 findings of a warranty audit or sales incentive audit unless the following conditions are
390 satisfied:

391 (A) the franchisor fully identifies in writing the basis for the franchisor's claim or
392 charge back arising from the audit, including notifying the franchisee that the franchisee has 20
393 days from the day on which the franchisee receives the franchisor's claim or charge back to
394 assert a protest in writing to the franchisor identifying the basis for the protest;

395 (B) the franchisee's protest shall inform the franchisor that the protest shall be
396 submitted to a mediator in the state who is identified by name and address in the franchisee's
397 notice to the franchisor;

398 (C) if mediation is requested under Subsection (1)(gg)(i)(B), mediation shall occur no
399 later than 30 days after the day on which the franchisor receives the franchisee's protest of a

400 claim or charge back;

401 (D) if mediation does not lead to a resolution of the protest, the protest shall be set for
402 binding arbitration in the same venue in which the mediation occurred;

403 (E) binding arbitration under Subsection (1)(gg)(i)(D) shall be conducted:

404 (I) by an arbitrator mutually agreed upon by the franchisor and the franchisee; and

405 (II) on a date mutually agreed upon by the franchisor and the franchisee, but shall be
406 held no later than 90 days after the franchisor's receipt of the franchisee's notice of protest;

407 (F) this Subsection (1)(gg)(i) applies exclusively to warranty audits and sales incentive
408 audits;

409 (G) Subsections (1)(gg)(i)(A) through (E) do not apply if the franchisor reasonably
410 believes that the amount of the claim or charge back is related to a fraudulent act by the
411 franchisee; and

412 (H) The costs of the mediator or arbitrator instituted under this Subsection (1)(gg) shall
413 be shared equally by the franchisor and the franchisee.

414 (ii) A franchisor may not require a franchisee to execute a written waiver of the
415 requirements of Subsection (1)(gg)(i);

416 (hh) coerce, or attempt to coerce a franchisee to purchase or sell an aftermarket product
417 manufactured by the franchisor, or obtained by the franchisor for resale from a third-party
418 supplier and the franchisor or its affiliate derives a financial benefit from the franchisee's sale
419 or purchase of the aftermarket product as a condition to obtaining preferential status from the
420 franchisor; ~~or~~

421 (ii) through an affiliate, take any action that would otherwise be prohibited under this
422 chapter[-]; or

423 (jj) impose any fee, surcharge, or other charge on a franchisee designed to recover the
424 cost of a warranty repair for which the franchisee is paid by the franchisor.

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

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

430 (a) new motor vehicle models offered for sale by the franchisor; and

431 (b) parts to service the repair of the new motor vehicles.

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

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

434 (b) refusing to permit a combination of new motor vehicle lines, if justified by

435 reasonable business considerations.

436 (5) Upon the written request of any franchisee, a franchisor shall disclose in writing to

437 the franchisee the basis on which new motor vehicles, parts, and accessories are allocated,

438 scheduled, and delivered among the franchisor's dealers of the same line-make.

439 (6) (a) A franchisor may engage in any of the activities listed in Subsection (1)(u), for a
440 period not to exceed 12 months if:

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

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

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

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

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

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

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

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

456 (b) After receipt of the advisory board's recommendation, the executive director may,
457 for good cause shown, extend the time limit set forth in Subsection (6)(a) for an additional
458 period not to exceed 12 months.

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

462 service facilities after May 1, 2000.

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

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

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

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

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

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

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

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

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

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

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

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

490 Section 5. Section **13-14-301** is amended to read:

491 **13-14-301. Termination or noncontinuance of franchise -- Compensation for**
492 **franchisor rendering itself incapable of performance.**

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

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

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

500 (c) the franchisor is willing and able to comply with Section 13-14-307.

501 (2) A franchisor may terminate a franchise, without complying with Subsection (1):

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

504 (b) if the franchisee's license as a new motor vehicle dealer is revoked under Title 41,
505 Chapter 3, Motor Vehicle Business Regulation Act; or

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

507 (3) (a) At any time before the effective date of termination or noncontinuance of the
508 franchise, the franchisee may apply to the advisory board for a hearing on the merits, and
509 following notice to all parties concerned, the hearing shall be promptly held as provided in
510 Section 13-14-304.

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

513 (i) final determination of the issue by the executive director; and

514 (ii) the applicable appeal period has lapsed.

515 (4) (a) A franchisor shall compensate a franchisee in accordance with Subsection (5) if
516 the franchisor renders itself incapable of performing under a franchise agreement by selling or
517 otherwise transferring assets essential to the manufacture or distribution of a line-make covered
518 by a franchise agreement.

519 (b) If a person other than the franchisor manufactures or distributes a line-make after
520 the franchisor of the line-make renders itself incapable of performance under Subsection (4)(a),
521 that person shall offer to enter into a franchise agreement with the franchisee substantially
522 similar to the franchise agreement between the franchisor and the franchisee.

523 (5) A franchisor shall compensate a franchisee under Subsection (4)(a) by paying the

524 franchisee the greater of:

525 (a) the franchisee's actual pecuniary loss resulting from the franchisor's incapacity to
526 perform; or

527 (b) the highest of the franchise's fair market value at one of the following dates:

528 (i) the day on which the franchisor renders itself incapable of performance of the
529 franchise agreement;

530 (ii) the day exactly one year before the day on which the franchisor renders itself
531 incapable of performance of the franchise agreement; or

532 (iii) the day immediately preceding the day on which the franchisor announces the
533 action that renders the franchisor incapable of performance.

534 (6) (a) The amount required to be paid to a franchisee under Subsection (5) shall be
535 paid to the franchisee within 30 days after the day on which the franchisor and the franchisee
536 agree on the amount of payment required.

537 (b) If no agreement concerning the amount of payment required under Subsection (5) is
538 reached within 90 days after the day on which the franchisor rendered itself incapable of
539 performance, the franchisee may sue to recover the amount required to be paid under
540 Subsection (5) and the franchisee's costs and fees for the suit.

541 (7) Notwithstanding the announcement of an action that will render a franchisor
542 incapable of performing a franchise agreement, the franchisor's incapacity to perform does not
543 occur until performance ceases.

544 Section 6. Section **13-14-304** is amended to read:

545 **13-14-304. Hearing regarding termination, relocation, or establishment of**
546 **franchises.**

547 (1) (a) Within ten days of receiving an application from a franchisee under Subsection
548 13-14-301(3) challenging its franchisor's right to terminate or not continue a franchise, or an
549 application under Section 13-14-302 challenging the establishment or relocation of a franchise,
550 the executive director shall:

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

552 (ii) send a copy of the order by certified or registered mail, with return receipt
553 requested, or by any form of reliable delivery through which receipt is verifiable to:

554 (A) the applicant;

555 (B) the franchisor; and

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

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

561 (2) Any person who can establish an interest in the application may intervene as a party
562 to the hearing, whether or not that person receives notice.

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

565 (4) (a) (i) Any hearing ordered under Subsection (1) shall be conducted no later than
566 120 days after the application for hearing is filed.

567 (ii) A final decision on the challenge shall be made by the executive director no later
568 than 30 days after the hearing.

569 (b) Failure to comply with the time requirements of Subsection (4)(a) is considered a
570 determination that the franchisor acted with good cause or, in the case of a protest of a
571 proposed establishment or relocation of a dealer, that good cause exists for permitting the
572 proposed additional or relocated new motor vehicle dealer, unless:

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

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

576 (5) The franchisor has the burden of proof to establish by clear and convincing
577 evidence that under the provisions of this chapter it should be granted permission to:

578 (a) terminate or not continue the franchise;

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

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

581 Section 7. Section **13-14-306** is amended to read:

582 **13-14-306. Evidence to be considered in determining cause to relocate or**
583 **establish a new franchised dealership.**

584 In determining whether a franchisor has established good cause for relocating an
585 existing franchisee or establishing a new franchised dealership for the same line-make in a

586 given relevant market area, the advisory board and the executive director shall consider:

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

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

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

593 (4) whether it is injurious or beneficial to the public welfare or public interest for an
594 additional franchise to be established; [~~and~~]

595 (5) whether the franchisees of the same line-make in that relevant market area are
596 providing adequate service to consumers for the motor vehicles of the line-make, which shall
597 include the adequacy of:

598 (a) the motor vehicle sale and service facilities;

599 (b) equipment;

600 (c) supply of vehicle parts; and

601 (d) qualified service personnel[-]; and

602 (6) whether the relocation or establishment would cause any material negative
603 economic effect on a dealer of the same line-make in the relevant market area.

604 Section 8. Section **13-14-307** is amended to read:

605 **13-14-307. Franchisors' obligations upon termination or noncontinuation of**
606 **franchise.**

607 (1) Upon the termination or noncontinuation of a franchise by the franchisor, the
608 franchisor shall pay the franchisee:

609 (a) the franchisee's cost of new, undamaged, and unsold motor vehicles in the
610 franchisee's inventory acquired from the franchisor or another franchisee of the same line-make
611 representing both the current model year at the time of termination or noncontinuation and the
612 immediately prior model year vehicles, except only those recreational vehicles purchased
613 within the 12 months immediately preceding the date of termination or noncontinuation shall
614 be repurchased:

615 (i) plus any charges made by the franchisor, for distribution, delivery, or taxes;

616 (ii) plus the franchisee's cost of any accessories added on the vehicle, except only those

617 recreational vehicle accessories that are listed in the franchisor's wholesale product literature as
618 options for that vehicle shall be repurchased; and

619 (iii) less all allowances paid or credited to the franchisee by the franchisor;

620 (b) the franchisee's cost of new and undamaged motor vehicles in the franchisee's
621 inventory of demonstrator vehicles, reduced by 1% for each 1000 miles registered on the
622 demonstrator vehicle's odometer, except recreational vehicles whose cost shall be reduced by
623 2% for each 1,000 miles registered on the odometer of demonstrator self-propelled recreational
624 vehicles, exclusive of miles incurred in delivery of the vehicle, and the cost of demonstrator
625 nonself-propelled recreational vehicles shall be reduced by 10% of the franchisee's vehicle
626 cost:

627 (i) plus any charges made by the franchisor for distribution, delivery, or taxes;

628 (ii) plus the franchisee's cost of any accessories added on the vehicles, except only
629 those recreational vehicle accessories that are listed in the franchisor's wholesale product
630 literature as options for that vehicle shall be repurchased; and

631 (iii) less all allowances paid or credited to the franchisee by the franchisor;

632 (c) the cost of all new, undamaged, and unsold supplies, parts, and accessories as set
633 forth in the franchisor's catalog at the time of termination or noncontinuation for the supplies,
634 parts, and accessories, less all allowances paid or credited to the franchisee by the franchisor;

635 (d) the fair market value, but not less than the franchisee's depreciated acquisition cost
636 of each undamaged sign owned by the franchisee that bears a common name, trade name, or
637 trademark of the franchisor if acquisition of the sign was recommended or required by the
638 franchisor. If a recreational vehicle franchisee has a sign with multiple manufacturers listed,
639 the franchisor is only responsible for its pro rata portion of the sign;

640 (e) the fair market value, but not less than the franchisee's depreciated acquisition cost
641 of all special tools, equipment, and furnishings acquired from the franchisor or sources
642 approved by the franchisor that were recommended or required by the franchisor and are in
643 good and usable condition; ~~and~~

644 (f) the cost of transporting, handling, packing, and loading motor vehicles, supplies,
645 parts, accessories, signs, special tools, equipment, and furnishings[-];

646 (g) (i) an amount equal to the franchisee's average adjusted net profit for the highest
647 three years of the past ten year time period that is consistent with industry buy-sell standards; or

648 (ii) if the franchisee has not operated under the franchise agreement for at least three
649 years, an amount equal to the reasonably anticipated net profit over a hypothetical three year
650 period of operation ending on the date of termination;

651 (h) for a franchisee who does not own the franchisee's place of business, an amount
652 equal to the current fair rental value of the franchisee's existing place of business for the
653 remaining lease term immediately following the franchise's termination or noncontinuation or
654 until the franchisee's lease expires, whichever comes first; and

655 (i) for a franchisee who owns the franchisee's place of business, an amount equal to the
656 current fair rental value of the franchisee's existing place of business for the three year period
657 immediately following the franchise's termination or noncontinuation, or, at the franchisee's
658 option, pay the fair market value of the franchisee's place of business.

659 (2) The franchisor shall pay the franchisee the amounts specified in Subsection (1)
660 within 90 days after the tender of the property to the franchisor if the franchisee:

661 (a) has clear title to the property; and

662 (b) is in a position to convey title to the franchisor.

663 (3) If repurchased inventory, equipment, or demonstrator vehicles are subject to a
664 security interest, the franchisor may make payment jointly to the franchisee and to the holder of
665 the security interest.

666 (4) (a) A franchisee who owns the franchisee's place of business shall mitigate the
667 franchisee's damages for which compensation is paid under Subsection (1)(i).

668 (b) A franchisor who pays damages under Subsection (1)(i) may occupy the
669 franchisee's property during the period for which damages under Subsection (1)(i) are paid.

670 (5) If a franchisee remains in business after termination or noncontinuation of a
671 franchise and the franchisee retains trained personnel and appropriate equipment, the franchisor
672 shall fulfill its warranty obligations by:

673 (a) making parts available to the franchisee for a period of five years after the day on
674 which the franchise is terminated or not continued; and

675 (b) compensating the franchisee for parts and labor on a vehicle under warranty for a
676 period of five years after the day on which the franchise is terminated or not continued.

677 Section 9. Section **13-14-308** is enacted to read:

678 **13-14-308. Private right of action.**

679 A franchisee has a private right of action for actual damages against a franchisor for a
680 violation of this chapter that results in damage to the franchisee.

Legislative Review Note
as of 1-3-08 2:29 PM

Office of Legislative Research and General Counsel

S.B. 57 - Franchise Law Amendments

Fiscal Note

2008 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals or local governments. Some businesses may benefit from this change in statute.

1/17/2008, 9:55:30 AM, Lead Analyst: Schoenfeld, J.D.

Office of the Legislative Fiscal Analyst