AN ACT

ENTITLED, An Act to revise certain provisions regarding the rights of certain new vehicle dealers and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 32-6B-1 be amended to read as follows:

32-6B-1. Terms as used in this chapter mean:

(1) "Administrator," the administrator of the dealer licensing and inspection program of the Department of Revenue and Regulation;

(2) "Auctioneer," a person who presides over a public auction where following an initial starting price, bids are taken from two or more people until a final bid or price is established for a motor vehicle;

(2A) "Authorized emergency vehicle," any vehicle of a fire department and any ambulance and emergency vehicle of a municipal department or public service corporation that are designated or authorized by the Department of Public Safety;

(3) "Broker," a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale or exchange of vehicles, and who is not:

(a) A dealer or a bona fide agent or employee of a dealer;

(b) A representative or a bona fide agent or employee of a manufacturer; or

(c) At any point in the transaction the bona fide owner of the vehicle involved in the transactions;

(4) "Community," the franchisee's area of responsibility as stipulated in the franchise. A community has a minimum radius of ten miles around an existing dealership;

(5) "Converter," a person who modifies or installs on previously assembled chassis special

bodies or equipment which, when completed, form an integral part of the vehicle and which constitutes a major manufacturing alteration and who may issue a supplemental or secondary statement of origin;

(6) "Demonstration," the noncommercial use of a dealer owned vehicle by any employee of the dealership for any purpose in the ordinary course of business relating to the sale of the vehicle within the trade or market area of the dealership or demonstration by any prospective buyer for a period of three days. The term includes vehicles donated by a dealership to a community or organization and used for a one-day parade or event;

(6A) "Department," the Department of Revenue and Regulation;

(6B) "Emergency vehicle dealer," any person who converts or manufacturers authorized emergency vehicles and who, for commission or with intent to make a profit or gain, sells, exchanges, rents with option to purchase, offers, or attempts to negotiate a sale or exchange of new, or new and used authorized emergency vehicles, or who is engaged wholly or in part in the business of selling new, or new and used authorized emergency vehicles;

(7) "Franchise," a written or oral agreement or contract between a franchisor and franchisee which fixes the legal rights and liabilities of the parties to such agreement or contract;

(8) "Franchisee," person who receives vehicles from a franchisor under a franchise and who offers and sells the vehicles to the general public;

(9) "Franchisor," any person engaged in the manufacturing or distribution of vehicles including any person who acts for the franchisor;

(9A) "Good faith," honesty in fact and the observance of reasonable, nondiscriminatory commercial standards of fair dealing in the trade, as defined and interpreted in the Uniform Commercial Code as amended to January 1, 2010;

(10) "In-transit," the noncommercial use of a dealer owned vehicle by any employee of the dealership for travel to and from any service facility, detail shop, repair shop, gas station, car wash, dealer auction, another lot owned by the dealer, a supplemental lot, temporary special events lot, temporary supplemental lot, or any other location to facilitate a dealer trade;

(10A) "Manufacturer," a person who manufactures or assembles vehicles, including motor homes, and who issues the original or first manufacturer's statement of origin. The term, manufacturer, includes a central or principal sales corporation through which it distributes its products to franchised dealers;

(11) "Motor home," a motor vehicle designed as an integral unit to be used as a conveyance upon the public highways and for use as a temporary or recreational dwelling and having at least four of the following permanently installed systems:

(a) Cooking facilities;

(b) Ice box or mechanical refrigerator;

(c) Potable water supply including plumbing and a sink with faucet either self-contained or with connections for an external source, or both;

(d) Self-contained toilet connected to a plumbing system with connection for external water disposal;

(e) Heating or air conditioning system, or both, separate from the vehicle engine or the vehicle electrical system;

(f) A one hundred ten--one hundred fifteen volt alternating current electrical system separate from the vehicle engine electrical system either with its own power supply or with a connection for an external source, or both, or a liquified petroleum system and supply;

(12) "Public auction," a business that is open to the public where South Dakota titled motor vehicles are consigned, displayed, and auctioned to the highest bidder by an auctioneer;

(12A) "Recreational park trailer," a vehicle that is primarily designed to provide temporary living quarters for recreational, camping, or seasonal use and which:

(a) Is built on a single chassis mounted on wheels;

(b) Has a gross trailer area not exceeding four hundred square feet in the setup mode;

(c) Is certified by the manufacturer as complying with American National Standards Institute Standard No. A119.5 in effect on January 1, 2008; and

(d) Has at least a seventeen digit identification number and the manufacturer has designated the vehicle as a recreational park model on the manufacturer statement of origin;

(13) "Sell-it-yourself lot," any space provided to a person for a fee to display that person's boat or vehicle for sale;

(14) "Semitrailer," any vehicle of the trailer type, equipped with a kingpin assembly, designed and used in conjunction with a fifth wheel connecting device on a motor vehicle and constructed so that some part of its weight and that of its load rests upon or is carried by another vehicle;

(15) "Supplemental lot," a physically separate location owned and maintained by a licensed dealer within the same county as the principal place of business;

(16) "Temporary special events lot," a location other than the principal place of business, supplemental lot, or temporary supplemental lot where a licensed trailer dealer, a licensed used car dealer selling only truck tractors, travel trailers, or motor homes, or any combination thereof, or a licensed vehicle dealer selling only truck tractors, travel trailers, or motor homes, or any combination thereof, may conduct business for a period of time

not to exceed ten consecutive days for a specific purpose such as fairs, auctions, shopping center sales, or tent sales. A temporary special events lot shall meet all local zoning and building codes for the type of business being conducted;

(17) "Temporary supplemental lot," a location other than the principal place of business or supplemental lot but within the same county as the principal place of business, or within the corporate limits of a municipality which overlaps boundaries of a county, or in an adjoining county, if the adjoining county has no licensed vehicle dealer selling automobiles, pick-ups, or passenger vans and the temporary supplemental lot is no more than ten miles from the principal place of business, where a licensed vehicle dealer or a licensed used vehicle dealer may conduct business for a period of time not to exceed ten consecutive days for a specific purpose such as fairs, auto shows, auctions, shopping center promotions, or tent sales. A temporary supplemental lot shall meet all local zoning and building codes for the type of business being conducted. If a licensed vehicle dealer establishes a temporary supplemental lot in a county with a licensed used vehicle dealer, a licensed used vehicle dealer may establish a temporary supplemental lot in a county with a licensed vehicle dealer. A licensed vehicle dealer may establish, for manufacturer sponsored events, a temporary supplemental lot in an adjoining county that has no like franchised licensed dealer;

(18) "Trailer," any vehicle without motive power designed to be coupled to or drawn by a motor vehicle and constructed so that no part of its weight or that of its load rests upon the towing vehicle;

(19) "Trailer dealer," any person who, for commission or with intent to make a profit or gain, sells, exchanges, rents with option to purchase, offers or attempts to negotiate a sale or exchange of new or used trailers, semitrailers or travel trailers or who is engaged in the

business of selling new or used trailers, semitrailers or travel trailers whether or not such vehicles are owned by such person;

(20) "Travel trailer," any trailer or semitrailer which provides as its primary purpose adequate, comfortable, temporary living quarters while on pleasure excursions or while touring for business, professional, educational or recreational purposes;

(21) "Used vehicle dealer," any person who, for commission or with intent to make a profit or gain sells, exchanges, rents with option to purchase, offers or attempts to negotiate a sale or exchange of used vehicles or who is engaged in the business of selling used vehicles; or any person who sells five or more used vehicles or offers for sale five or more used vehicles at the same address or telephone number in any one calendar year;

(22) "Vehicle," any new or used automobile, truck, truck tractor, motorcycle, motor home, trailer, semitrailer or travel trailer of the type and kind required to be titled and registered under chapters 32-3 and 32-5, except manufactured homes, mobile homes, mopeds or snowmobiles;

(23) "Vehicle dealer," any person who, for commission or with intent to make a profit or gain, sells, exchanges, rents with option to purchase, offers or attempts to negotiate a sale or exchange of new, or new and used vehicles, or who is engaged wholly or in part in the business of selling new, or new and used vehicles.

Section 2. That § 32-6B-7 be amended to read as follows:

32-6B-7. Before any license is issued, the applicant shall deliver to the department a good and sufficient surety bond, executed by the applicant as principal and by a surety company qualified to do business in the state as surety. The bond shall be for an amount based upon the type of license applied for, as follows:

(1) Vehicle dealer's license --$25,000;

(2) Used vehicle dealer's license --$25,000;

(3) Motorcycle dealer's license --$5,000;

(4) Trailer dealer's license --$10,000 for trailers weighing more than 3,000 pounds; or

(5) Emergency vehicle dealer's license --$10,000.

The bond shall be to the department and in favor of any customer who suffers any loss that may be occasioned by reason of the failure of title or by reason of any fraudulent misrepresentation or breaches of warranty as to freedom from liens. The bond shall be for the license period. A new bond or a proper continuation certificate shall be delivered to the department at the beginning of each license period. Any surety company that pays a claim against the bond of a licensee shall notify the department, in writing, that it has paid such a claim. Any surety company that cancels the bond of a licensee shall notify the department, in writing, of the cancellation, giving the reason for that cancellation. If a claim is made to the department against the bond, which claim is based upon a final judgment of a court of record of this state, the dealer shall execute an additional bond for the amount necessary to maintain the security at the original level.

Section 3. That § 32-6B-10 be amended to read as follows:

32-6B-10. No dealer's license may be issued to a person who desires to sell or offer for sale new vehicles until the applicant furnishes written proof, satisfactory to the department, that the person has a bona fide contract or franchise in effect in this state with the manufacturer of the vehicle the person proposes to deal in. For the purposes of this section, written proof which does not adequately capture the intent of both the applicant and the manufacturer to be bound by the subject franchise or bona fide contract may be deemed insufficient by the department.

Section 4. That chapter 32-6B be amended by adding thereto a NEW SECTION to read as follows:

The provisions of §§ 32-6B-45 to 32-6B-56, inclusive, do not apply to any trailer franchisee

dealing in trailers with a weight of three thousand pounds or less. This section may not be construed to exclude such a franchisee from the licensing and other requirements contained in this chapter.

Section 5. That § 32-6B-45 be amended to read as follows:

32-6B-45. No franchisor may, directly or through an officer, agent, or employee, terminate, cancel, fail to renew, or substantially change the competitive circumstances of a vehicle dealership agreement without good cause. For the purposes of this section, good cause means failure by a vehicle dealer to substantially comply with essential and reasonable requirements imposed upon the vehicle dealer by the vehicle dealership agreement, if the requirements are not different from those requirements imposed on other similarly situated vehicle dealers by their terms. In addition, good cause exists if:

(1) Without the consent of the vehicle manufacturer, the vehicle dealer has transferred an interest in the vehicle dealership, there has been a withdrawal from the dealership of an individual proprietor, partner, major shareholder, or the manager of the dealership, or there has been a substantial reduction in interest of a partner or major stockholder;

(2) The vehicle dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within thirty days after the filing, there has been a closeout or sale of a substantial part of the dealer's assets related to the vehicle business, or there has been a commencement of dissolution or liquidation of the dealer;

(3) There has been a change, without the prior written approval of the manufacturer, in the location of the dealer's principal place of business under the dealership agreement;

(4) The vehicle dealer has defaulted under a security agreement between the dealer and the vehicle manufacturer or there has been a revocation or discontinuance of a guarantee of the dealer's present or future obligations to the vehicle manufacturer;

(5) The vehicle dealer has failed to operate in the normal course of business for seven consecutive days or has otherwise abandoned the business;

(6) The vehicle dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the manufacturer;

(7) The dealer has engaged in conduct which is injurious or detrimental to the dealer's customers or to the public welfare; or

(8) The vehicle dealer, after receiving notice from the manufacturer of its requirements for reasonable market penetration based on the manufacturer's experience in other comparable marketing areas, consistently fails to meet the manufacturer's market penetration requirements.

A vehicle manufacturer shall provide a vehicle dealer at least ninety days prior written notice of termination, cancellation, or nonrenewal of the dealership agreement. The notice shall state all reasons constituting good cause for the action and shall provide that the dealer has sixty days in which to cure any claimed deficiency. If the deficiency is rectified within sixty days, the notice is void. The notice and right to cure provisions under this section do not apply if the reason for termination, cancellation, or nonrenewal is for any reason set forth in subdivisions (1) to (7), inclusive.

Section 6. That § 32-6B-46 be repealed.

Section 7. That § 32-6B-49.1 be amended to read as follows:

32-6B-49.1. No franchise agreement may include any term or condition in a franchise that:

(1) Requires the franchisee to waive trial by jury involving the franchisor;

(2) Specifies the jurisdictions, venues or tribunals in which disputes arising with respect to the franchise, lease or agreement shall or may not be submitted for resolution or otherwise prevents a franchisee from bringing an action in a particular forum otherwise available

under the law;

(3) Requires that disputes between the franchisor and franchisee be submitted to arbitration or to any other binding alternate dispute resolution procedure. However, any franchise, lease or agreement may authorize the submission of a dispute to arbitration or to binding alternate dispute resolution if the franchisor and franchisee voluntarily agree to submit the dispute to arbitration or binding alternate dispute resolution at the time the dispute arises;

(4) Requires a franchisee to pay the attorney fees of a franchisor;

(5) Prohibits the holder of an existing franchise from being dualed with another franchisor's line that does not substantially affect the current franchisor or community;

(6) Prohibits the holder of an existing franchise from moving to another facility within the franchisee's community that is equal to or superior to the franchisee's former facility;

(7) Prohibits the holder of an existing franchise from making improvements to the franchisee's current facility within the franchisee's community; or

(8) Permits a franchisor or the franchisor's assignee to exercise a right of first refusal to acquire a franchisee's franchise or a franchisee's assets in connection with the sale by a franchisee of that franchisee's franchise or assets.

An existing franchisee shall give the franchisor prior written notice of the proposed dual arrangement, relocation, or improvement described in subdivisions (5), (6), and (7). The notice shall contain sufficient information for the franchisor to evaluate the proposal. Within sixty days of receiving said notice, the franchisor shall send a letter to the franchisee either approving or disapproving the proposal. If the franchisor does not notify the franchisee of its approval or denial of the dual arrangement, relocation, or improvement within the sixty-day period, the franchisee's proposal shall be deemed to have been approved. No franchisor may unreasonably withhold its approval. Denial of a proposed dual arrangement or facility improvement shall be supported by

credible evidence that it will substantially affect in an adverse way the current franchisor or community. Denial of a proposed relocation shall be supported by credible evidence that the new location is not at least equal to the franchisee's former facility.

This section does not apply to agreements pertaining to the lease or sale of real property.

Section 8. That § 32-6B-50 be amended to read as follows:

32-6B-50. If a franchisor seeks to enter into an additional franchise of the same line-make, the franchisor shall file a notice with the department of the franchisor's intention to enter into a franchise for additional representation of the same line-make.

Section 9. That § 32-6B-51 be amended to read as follows:

32-6B-51. Upon receiving a notice of intention seeking to establish an additional franchise of the same line-make in a particular community, a copy of the notice shall be sent within five days of receipt to all franchisees in the community who are engaged in the business of offering to sell or selling the same line-make. The department may also give a copy of the franchisor's notice to any other party which it considers interested persons.

Section 10. That § 32-6B-54 be amended to read as follows:

32-6B-54. Upon a hearing conducted under the provisions of chapter 1-26, the franchisor has the burden of proof to establish that cause exists to enter into a franchise establishing an additional dealership.

Section 11. That § 32-6B-55 be amended to read as follows:

32-6B-55. If a franchisor is not permitted to enter into a franchise for the line-make in the community, no such franchise may thereafter be entered into for the sale of such vehicles in the community unless the franchisor thereafter establishes, in a subsequent hearing held under the provisions of chapter 1-26, that there has been a change of circumstances so that the community at that time can be reasonably expected to support such a dealership.

Section 12. That § 32-6B-56 be amended to read as follows:

32-6B-56. If a franchisor enters into or attempts to enter into a franchise for an additional new vehicle dealership in a community where the same line-make is already represented, without first complying with the provisions of this chapter, no dealer's license may be issued to that franchisee or proposed franchisee to engage in the business of selling new vehicles, manufactured or distributed by that franchisor.

Section 13. That § 32-6B-58 be amended to read as follows:

32-6B-58. Every franchisor or manufacturer shall properly fulfill any warranty agreement and compensate, as set forth in § 32-6B-61, each of its vehicle dealers for labor and parts. The franchisor or manufacturer shall pay all claims made by a vehicle dealer for the labor and parts within thirty days following their approval. The franchisor or manufacturer shall either approve or disapprove the claim within thirty days after its receipt. If a claim is disapproved, the vehicle dealer who submitted the claim shall be notified in writing of the claim's disapproval within the thirty-day period. Any claim rejected for technical reasons may be put into proper form by the vehicle dealer. Any claim resubmitted by the vehicle dealer within thirty days after the receipt of the claim shall be considered to be approved and payment shall be made within thirty days. The franchisor or manufacturer has the right to audit any vehicle dealer claim for a period of one year after the claim is paid to the dealer and to charge back to the new vehicle dealer the amount of any unsubstantiated claim. If there is evidence of fraud by the vehicle dealer, the audit period is two years from the actual or constructive notice of facts constituting the alleged fraud.

Section 14. That § 32-6B-61 be amended to read as follows:

32-6B-61. The schedule of compensation for warranty work shall include reasonable compensation for diagnostic work, as well as repair service, parts, and labor. Time allowances for diagnosis and performance of warranty work and service shall be adequate for the work to be

performed. The hourly labor rate paid to the dealer for warranty services may not be less than the rate charged by the dealer for like service to nonwarranty customers for nonwarranty service. Reimbursement for parts used in the performance of warranty repair may not be less than the current retail rate customarily charged by the vehicle dealer for such parts. Each manufacturer, in establishing a schedule of compensation for warranty work, shall rely on the vehicle dealer's written schedule of hourly labor rates and parts and may not obligate any vehicle dealer to engage in unduly burdensome documentation thereof, including, without limitation, obligating vehicle dealers to engage in transaction by transaction calculations.

Section 15. That § 32-6B-69.1 be amended to read as follows:

32-6B-69.1. A franchisor may reasonably and periodically audit a franchisee to determine the validity of paid claims or chargebacks for customer or dealer incentives. An audit of incentive payments may apply only for a period of one year after the claims are paid to the dealer. The limitations of this section do not apply if the franchisor can prove fraud.

Section 16. That § 32-6B-77 be amended to read as follows:

32-6B-77. A dealer whose application to transfer is rejected may file an objection as provided for in § 32-6B-53, or the dealer may file a civil proceeding to challenge the denial of the transfer. In an action brought under §§ 32-6B-73 to 32-6B-78, inclusive, the burden is on the manufacturer or franchisor to prove that the prospective transferee is not qualified. An objection filed under §§ 32-6B-73 to 32-6B-78, inclusive, is a contested case.

Section 17. That § 32-6B-84 be repealed.

Section 18. That § 32-6B-78 be amended to read as follows:

32-6B-78. The issue in an objection filed under §§ 32-6B-73 to 32-6B-78, inclusive, either with the department or in a separate civil proceeding, is whether or not the prospective transferee is qualified. The department, or a court in a separate civil proceeding, shall enter an order holding that

the prospective transferee either is qualified or is not qualified. If the department's or a court's order is that the prospective transferee is qualified, the dealer's franchise agreement is amended to reflect the change in franchisee and the manufacturer or franchisor shall accept the transfer for all purposes. If the department's or a court's order is that the prospective transferee is not qualified, the department or a court may include specific reasons why the prospective transferee is not qualified and may include specific conditions under which the prospective transferee would be qualified. If the department's or a court's order that a prospective transferee is not qualified includes specific conditions under which the prospective transferee would be qualified, the department or a court may retain jurisdiction of the dispute for a time certain to allow the dealer and prospective transferee to meet the conditions set forth.

Section 19. That chapter 32-6B be amended by adding thereto a NEW SECTION to read as follows:

The provisions of this chapter as amended on the effective date of this Act apply to each vehicle dealer in any written or oral vehicle dealership agreement existing between a dealer and a manufacturer or distributor on the effective date of this Act which has no expiration date and to any subsequent written or oral vehicle dealership agreement entered into, amended, or renewed between a vehicle dealer and a manufacturer or distributor.

Section 20. That chapter 32-6B be amended by adding thereto a NEW SECTION to read as follows:

Notwithstanding the terms of any vehicle dealer agreement or waiver to the contrary, any vehicle dealer whose business or property is injured, or is about to be injured, by any violation of § 32-6B-45 to 32-6B-84, inclusive, may bring a civil action to enjoin any such violation, without having to prove irreparable injury, and to recover actual damages sustained, together with costs, disbursements, and reasonable attorney fees.

Section 21. That § 37-5-12.2 be amended to read as follows:

37-5-12.2. For the purposes of §§ 37-5-1 to 37-5-12, inclusive, the term, merchandise, means:

(1) Automobiles, trucks, motorcycles, motor homes or travel trailers of the type and kind required to be titled and registered pursuant to chapters 32-3 and 32-5, and accessories;

(2) Farm tractors, farm implements, farm machinery, and attachments;

(3) Industrial and construction equipment and attachments;

(4) Boats and personal watercraft;

(5) Snowmobiles and all-terrain vehicles, including multipurpose utility vehicles, side by sides, and similar type vehicles whether powered by electricity or by combustion engine;

(6) Office furniture, equipment, supplies, and attachments;

(7) Outdoor power equipment and attachments;

(8) A temperature control unit; and

(9) An auxiliary idle reduction and temperature management system or auxiliary power unit.

For the purposes of this section, the term, temperature control unit, means a piece of equipment that is mounted on a titled vehicle (trailer, rail car, or container) for the temperature management of temperature sensitive cargo.

For the purposes of this section, the term, auxiliary idle reduction and temperature management system, means a piece of equipment that is mounted on a titled vehicle, usually a semi-tractor, to enable the driver to turn off the engine yet have access to air conditioning, heat, and electric power inside the vehicle's cab.

Section 22. That chapter 37-5 be amended by adding thereto a NEW SECTION to read as follows:

Any manufacturer or supplier of merchandise as defined in subdivision 37-5-12.2(5) that authorizes a dealer of such merchandise to perform the warranty work is obligated to provide that

dealer reasonable compensation for diagnostic work, as well as repair service, parts, and labor to the dealer. Time allowances for diagnostic and performance of warranty work and service shall be adequate for the work to be performed. The hourly labor rate paid to the dealer for warranty services may not be less than the rate charged by the dealer for like service to nonwarranty customers for nonwarranty service. Reimbursement for parts used in the performance of warranty repair may not be less than the current retail rate customarily charged by the dealer for the part or parts.

Section 23. Whereas, this Act is necessary for the immediate preservation of the public peace, health, or safety, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

An Act to revise certain provisions regarding the rights of certain new vehicle dealers and to declare an emergency.

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I certify that the attached Act originated in the

HOUSE as Bill No. 1088

_____
Chief Clerk

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_____
Speaker of the House

Attest:

_____
Chief Clerk

_____
President of the Senate

Attest:

_____
Secretary of the Senate

House Bill No. 1088
File No. ____
Chapter No. _____

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Received at this Executive Office this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor

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The attached Act is hereby approved this _____ day of _____ , A.D., 20___

_____
Governor

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STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____ , 20___
at _____ o'clock __ M.

_____
Secretary of State

By _____
Asst. Secretary of State