

# State of South Dakota

SEVENTY-SEVENTH SESSION  
LEGISLATIVE ASSEMBLY, 2002

527H0262

## SENATE BILL NO. 110

Introduced by: Senators Munson, Albers, Diedrich (Elmer), Hagen, Olson (Ed), and Vitter  
and Representatives Broderick, Abdallah, Brown (Richard), Flowers, Pummel,  
and Solum

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the regulation of  
2 vehicle dealers.

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

4 Section 1. That § 32-6B-49.1 be amended to read as follows:

5 32-6B-49.1. No franchisor may require a franchisee to agree to the inclusion of a franchise  
6 agreement may include any term or condition in a franchise, ~~or in any lease or agreement~~  
7 ~~ancillary or collateral to a franchise as a condition to the offer, grant or renewal of such~~  
8 ~~franchise, lease or agreement~~, that:

- 9 (1) Requires the franchisee to waive trial by jury involving the franchisor;
- 10 (2) Specifies the jurisdictions, venues or tribunals in which disputes arising with respect  
11 to the franchise, lease or agreement shall or may not be submitted for resolution or  
12 otherwise prevents a franchisee from bringing an action in a particular forum  
13 otherwise available under the law;
- 14 (3) Requires that disputes between the franchisor and franchisee be submitted to



1 arbitration or to any other binding alternate dispute resolution procedure. However,  
 2 any franchise, lease or agreement may authorize the submission of a dispute to  
 3 arbitration or to binding alternate dispute resolution if the franchisor and franchisee  
 4 voluntarily agree to submit the dispute to arbitration or binding alternate dispute  
 5 resolution at the time the dispute arises; ~~or~~

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

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

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

11 or

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

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

15 Section 2. That § 32-6B-76 be amended to read as follows:

16 32-6B-76. Approval by a manufacturer or franchisor of an application filed under  
 17 §§ 32-6B-73 to 32-6B-78, inclusive, may not be unreasonably withheld. It is unreasonable for  
 18 a manufacturer or franchisor to reject a prospective transferee ~~who is of good moral character~~  
 19 ~~and~~ who otherwise meets the manufacturer's or franchisor's written, reasonable, and uniformly  
 20 applied standards or qualifications, if any, relating to the prospective transferee's business  
 21 experience and financial qualifications.

22 Section 3. That § 32-6B-79 be amended to read as follows:

23 32-6B-79. In §§ 32-6B-79 to 32-6B-83, inclusive, the term, manufacturer, includes a  
 24 representative or a person or entity who is ~~affiliated with a manufacturer or representative, or~~

1 ~~who, directly or indirectly through an intermediary, is controlled by, or is under common control~~  
2 with, the manufacturer. For purposes of this section, a person or entity is controlled by a  
3 manufacturer if the manufacturer has the authority directly or indirectly, by law or by agreement  
4 of the parties, to direct or influence the management and policies of the person or entity.

5 Section 4. That § 32-6B-82 be amended to read as follows:

6 32-6B-82. For the purpose of broadening the diversity of its dealer body and enhancing  
7 opportunities for qualified persons who are part of a group who have historically been  
8 underrepresented in its dealer body, or other qualified persons who lack the resources to  
9 purchase a dealership outright, or at the request or concurrence of a licensed franchise dealer for  
10 the purpose of revitalizing an underperforming market area, but for no other purpose, a  
11 manufacturer or franchisor may temporarily own an interest in a dealership if the manufacturer's  
12 or franchisor's participation in the dealership is in a bona fide relationship with a franchised  
13 vehicle dealer who:

- 14 (1) Has made a significant investment in the dealership, subject to loss;  
15 (2) Has an ownership interest in the dealership; and  
16 (3) Operates the dealership under a plan to acquire full ownership of the dealership within  
17 a reasonable time and under reasonable terms and conditions.

18 In addition, if an independent franchised dealer selling any line-make of new motor vehicles  
19 sold by the manufacturer or franchisor is located in the relevant market area of a dealership in  
20 which the manufacturer or franchisor proposes to enter into a business relationship meeting the  
21 requirements of this section, the dealer shall be entitled, upon request, to be considered for  
22 selection in such relationship, before the manufacturer or franchisor considers other candidates.

23 For the purposes of this section, an underperforming market area means an area where the  
24 manufacturer's or franchisor's market share has substantially declined or has remained below its

1 state average market share in that line-make for the preceding three years.

2 Section 5. That § 32-6B-84 be amended to read as follows:

3 32-6B-84. Notwithstanding the terms of any franchise agreements, the manufacturer or  
4 franchisor may exercise a right of first refusal to acquire the motor vehicle dealer's assets or  
5 ownership if all of the following conditions are met:

6 (1) In order to exercise the right of first refusal, the manufacturer or franchisor shall  
7 notify the motor vehicle dealer in writing within sixty days of its receipt of the  
8 completed proposal for the sale or transfer and all related agreements;

9 (2) The exercise of the right of first refusal will result in the dealer receiving the same or  
10 greater consideration as the dealer has contracted to receive in connection with the  
11 proposed change of ownership or transfer;

12 (3) The proposed sale or transfer of the dealership's assets does not involve the transfer  
13 or sale to a member or members of the family of one or more dealers, or to a qualified  
14 manager with at least two years management experience at the dealership of one or  
15 more of these dealers, or to a partnership or corporation controlled by such persons;

16 (4) The manufacturer or franchisor agrees to pay the reasonable expenses, including  
17 attorney fees which do not exceed the usual, customary, and reasonable fees charged  
18 for similar work done for other clients, incurred by the proposed owner or transferee  
19 prior to the manufacturer's or franchisor's exercise of its right of first refusal in  
20 negotiating and implementing the contract for the proposed sale or transfer of the  
21 dealership or dealership assets. Such expenses and attorney fees shall be paid to the  
22 proposed new owner or transferee at the time of closing of the sale or transfer for  
23 which the manufacturer or franchisor exercised its right of first refusal. No payment  
24 of such expenses and attorney fees is required if the new owner or transferee has not

1 submitted an accounting of those expenses within thirty days of the dealer's receipt  
2 of the manufacturer's or franchisor's written request for such an accounting. A  
3 manufacturer or franchisor may request such accounting before exercising a right of  
4 first refusal; and

5 (5) The dealer does not have any liability to any person as to any disclosed term,  
6 condition, or issue as a result of a manufacturer or franchisor exercising a right of first  
7 refusal.

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

10 A franchisor may reasonably and periodically audit a franchisee to determine the validity of  
11 paid claims or chargebacks for customer or dealer incentives. An audit of incentive payments  
12 may apply only to the two-year period immediately preceding the date on which the dealer was  
13 notified of an impending audit. The limitations of this section do not apply if the franchisor can  
14 prove fraud.