

VIRGINIA ACTS OF ASSEMBLY -- 2010 SESSION

CHAPTER 610

An Act to amend and reenact §§ 46.2-1993 and 46.2-1993.67 of the Code of Virginia, relating to motorcycle dealers.

[S 522]

Approved April 11, 2010

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-1993 and 46.2-1993.67 of the Code of Virginia are amended and reenacted as follows:

§ 46.2-1993. Definitions.

Unless the context otherwise requires, the following words and terms for the purpose of this chapter shall have the following meanings:

"All-terrain vehicle" shall have the meaning ascribed in § 46.2-100.

"Certificate of origin" means the document provided by the manufacturer of a new motorcycle, or its distributor, which is the only valid indication of ownership between the manufacturer, its distributor, its franchised motorcycle dealers, and the original purchaser not for resale.

"Dealer-operator" means the individual who works at the established place of business of a dealer and who is responsible for and in charge of day-to-day operations of that place of business.

"Distributor" means a person who sells or distributes new motorcycles pursuant to a written agreement with the manufacturer, to franchised motorcycle dealers in the Commonwealth.

"Distributor branch" means a branch office maintained by a distributor for the sale of motorcycles to motorcycle dealers or for directing or supervising, in whole or in part, its representatives in the Commonwealth.

"Distributor representative" means a person employed by a distributor or by a distributor branch, for the purpose of making or promoting the sale of motorcycles or for supervising or contacting its dealers, prospective dealers, or representatives in the Commonwealth.

"Factory branch" means a branch office maintained by a person for the sale of motorcycles to distributors or for the sale of motorcycles to motorcycle dealers, or for directing or supervising, in whole or in part, its representatives in the Commonwealth.

"Factory representative" means a person employed by a person who manufactures or assembles motorcycles, or by a factory branch for the purpose of making or promoting the sale of its motorcycles, or for supervising or contacting its dealers, prospective dealers, or representatives in the Commonwealth.

"Factory repurchase motorcycle" means a motorcycle sold, leased, rented, consigned, or otherwise transferred to a person under an agreement that the motorcycle will be resold or otherwise retransferred only to the manufacturer or distributor of the motorcycle, and which is reacquired by the manufacturer or distributor, or its agents.

"Family member" means a person who either (i) is the spouse, child, grandchild, spouse of a child, spouse of a grandchild, brother, sister, or parent of the dealer or owner, or (ii) has been employed continuously by the dealer for at least five years.

"Farm utility vehicle" shall have the meaning ascribed in § 46.2-100.

"Franchise" means a written contract or agreement between two or more persons whereby one person, the franchisee, is granted the right to engage in the business of offering and selling, servicing, or offering, selling, and servicing new motorcycles of a particular line-make or late model or factory repurchase motorcycles of a particular line-make manufactured or distributed by the grantor of the right, the franchisor, and where the operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor, the motorcycle or its manufacturer or distributor. The term shall include any severable part or parts of a franchise agreement which separately provides for selling and servicing different line-makes of the franchisor.

"Franchised late model or factory repurchase motorcycle dealer" means a dealer in late model or factory repurchase motorcycles, including a franchised new motorcycle dealer, that has a franchise agreement with a manufacturer or distributor of the line-make of the late model or factory repurchase motorcycles.

"Franchised motorcycle dealer" or "franchised dealer" means a dealer in new motorcycles that has a franchise agreement with a manufacturer or distributor of new motorcycles.

"Independent motorcycle dealer" means a dealer in used motorcycles.

"Late model motorcycle" means a motorcycle of the current model year and the immediately preceding model year.

"Line-make" means the name of the motorcycle manufacturer or distributor and a brand or name

plate marketed by the manufacturer or distributor. For the purposes of this chapter, the "line-make" of a motorcycle manufacturer, factory branch, distributor, or distributor branch shall include every brand of all-terrain vehicle and off-road motorcycle manufactured or distributed bearing the name of the motorcycle manufacturer or distributor.

"Manufacturer" means a person engaged in the business of constructing or assembling new motorcycles.

"Motorcycle" means every motor vehicle designed to travel on not more than three wheels in contact with the ground, except any vehicle included within the term "farm vehicle" or "moped" as defined in § 46.2-100. Except as otherwise provided in this chapter, for the purposes of this chapter "all-terrain vehicles" and "off-road motorcycles" shall be deemed to be "motorcycles."

"Motorcycle dealer" or "dealer" means any person who:

1. For commission, money, or other thing of value, buys, sells, exchanges, either outright or on conditional sale, bailment lease, chattel mortgage, or otherwise or arranges or offers or attempts to solicit or negotiate on behalf of others a sale, purchase, or exchange of an interest in new motorcycles, new and used motorcycles, or used motorcycles alone, whether or not the motorcycles are owned by him;

2. Is wholly or partly engaged in the business of selling new motorcycles, new and used motorcycles, or used motorcycles only, whether or not the motorcycles are owned by him; or

3. Offers to sell, sells, displays, or permits the display for sale, of five or more motorcycles within any 12 consecutive months.

The term "motorcycle dealer" does not include:

1. Receivers, trustees, administrators, executors, guardians, conservators or other persons appointed by or acting under judgment or order of any court or their employees when engaged in the specific performance of their duties as employees.

2. Public officers, their deputies, assistants, or employees, while performing their official duties.

3. Persons other than business entities primarily engaged in the leasing or renting of motorcycles to others when selling or offering such motorcycles for sale at retail, disposing of motorcycles acquired for their own use and actually so used, when the motorcycles have been so acquired and used in good faith and not for the purpose of avoiding the provisions of this chapter.

4. Any financial institution chartered or authorized to do business under the laws of the Commonwealth or the United States which may have received title to a motorcycle in the normal course of its business by reason of a foreclosure, other taking, repossession, or voluntary reconveyance to that institution occurring as a result of any loan secured by a lien on the motorcycle.

5. An employee of an organization arranging for the purchase or lease by the organization of motorcycles for use in the organization's business.

6. Any person who permits the operation of a motorcycle show or permits the display of motorcycles for sale by any motorcycle dealer licensed under this chapter.

7. An insurance company authorized to do business in the Commonwealth that sells or disposes of motorcycles under a contract with its insured in the regular course of business.

8. Any publication, broadcast, or other communications media when engaged in the business of advertising, but not otherwise arranging for the sale of motorcycles owned by others.

9. Any credit union authorized to do business in Virginia, provided the credit union does not receive a commission, money, or other thing of value directly from a motorcycle dealer.

"Motorcycle salesperson" or "salesperson" means any person who is licensed as and employed as a salesperson by a motorcycle dealer to sell or exchange motorcycles.

"Motorcycle show" means a display of motorcycles to the general public at a location other than a dealer's location licensed under this chapter where the motorcycles are not being offered for sale or exchange during or as part of the display.

"New motorcycle" means any motorcycle which (i) has not been previously sold except in good faith for the purpose of resale, (ii) has not been used as a rental, driver education, or demonstration motorcycle, or for the personal and business transportation of the manufacturer, distributor, dealer, or any of his employees, (iii) has not been used except for limited use necessary in moving or road testing the motorcycle prior to delivery to a customer, (iv) is transferred by a certificate of origin, and (v) has the manufacturer's certification that it conforms to all applicable federal motorcycle safety and emission standards. Notwithstanding provisions (i) and (iii), a motorcycle that has been previously sold but not titled shall be deemed a new motorcycle if it meets the requirements of provisions (ii), (iv), and (v).

"Off-road motorcycle" shall have the meaning ascribed in § 46.2-100.

"Original license" means a motorcycle dealer license issued to an applicant who has never been licensed as a motorcycle dealer in Virginia or whose Virginia motorcycle dealer license has been expired for more than 30 days.

"Relevant market area" means as follows:

1. ~~In metropolitan localities with populations of 250,000 or more, the relevant market area shall be a circular area around an existing franchised dealer not to exceed a radius of 10 miles~~ *That area within a circle having a radius of 20 miles around an existing franchised dealer location, except as provided in*

subdivisions 2 and 3.

2. If the population in an area within a radius of 10 miles around an existing franchised dealer is less than 250,000, but the population in an area within a radius of 15 miles around an existing franchised dealer is 150,000 or more, the relevant market area shall be that area within the 15-mile radius.

3. In all other cases the relevant market area shall be an area within a radius of 20 miles around an existing franchised dealer or the area of responsibility defined in the franchise, whichever is greater. In any case where the franchise agreement is silent as to area responsibility, the relevant market area shall be the greater of an area within a radius of 20 miles around an existing franchised dealer or that area in which the franchisor otherwise requires the franchisee to make significant retail sales or sales efforts.

2. That area within a circle having a radius of 30 miles around an existing franchised dealer location if the population within that circle is less than one million but more than 750,000.

3. If the population within a circle having a radius of 30 miles around an existing franchised dealer location is less than 750,000, "relevant market area" means that area within a circle around such dealer having a radius of 40 miles.

In any case in which the franchise agreement or the manufacturer requires the franchisee to make significant retail sales or marketing efforts in geographic areas beyond the franchisee's relevant market area, then such geographic areas shall be added to the relevant market area of the dealer.

In determining population for this definition, the most recent census by the U.S. Bureau of the Census or the most recent population update, either from the National Planning Data Corporation or other similar recognized source, shall be accumulated for all census tracts either wholly or partially within the relevant market area.

"Retail installment sale" means every sale of one or more motorcycles to a buyer for his use and not for resale, in which the price of the motorcycle is payable in one or more installments and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under form of contract designated either as a security agreement, conditional sale, bailment lease, chattel mortgage, or otherwise.

"Sale at retail" or "retail sale" means the act or attempted act of selling, bartering, exchanging, or otherwise disposing of a motorcycle to a buyer for his personal use and not for resale.

"Sale at wholesale" or "wholesale" means a sale to motorcycle dealers or wholesalers other than to consumers, or a sale to one who intends to resell.

"Used motorcycle" means any motorcycle other than a new motorcycle as defined in this section.

"Wholesale auction" means an auction of motorcycles restricted to sales at wholesale.

§ 46.2-1993.67. Other coercion of dealers; transfer, grant, succession to and cancellation of dealer franchises; delivery of motorcycles, parts, and accessories.

It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:

1. To coerce or attempt to coerce any dealer to accept delivery of any motorcycle or motorcycles, parts or accessories therefor, or any other commodities, which have not been ordered by the dealer.

2. To coerce or attempt to coerce any dealer to enter into an agreement with the manufacturer, factory branch, distributor, or distributor branch, or representative thereof, or do any other act unfair to the dealer, by threatening to cancel any franchise existing between the manufacturer, factory branch, distributor, distributor branch, or representative thereof and the dealer.

3. To coerce or attempt to coerce any dealer to join, contribute to, or affiliate with any advertising association.

4. To prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale, or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, unless the franchisor provides written notice to the dealer of its objection and the reasons therefor at least ~~thirty~~ 30 days prior to the proposed effective date of the transfer, sale, assignment, or change. No such objection shall be effective to prevent the sale, transfer, assignment, or change if the Commissioner has determined, if requested in writing by the dealer within ~~thirty~~ 30 days after receipt of an objection to the proposed sale, transfer, or change, and after a hearing on the matter, that the failure to permit or honor the sale, transfer, assignment, or change is unreasonable under the circumstances. No franchise may be sold, assigned, or transferred unless (i) the franchisor has been given at least ~~ninety~~ 90 days' prior written notice by the dealer as to the identity, financial ability, and qualifications of the proposed transferee and (ii) the sale or transfer of the franchise and business will not involve, without the franchisor's consent, a relocation of the business.

5. To grant an additional franchise for a particular line-make of motorcycle in a relevant market area in which a dealer or dealers in that line-make are already located unless the franchisor has first advised in writing, *by certified mail, return receipt requested*, all other dealers in the line-make in the relevant market area. No such additional franchise may be established at the proposed site unless the Commissioner has determined, if requested by a dealer of the same line-make in the relevant market area within ~~thirty~~ 30 days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the

new franchise, the market will support all of the dealers in that line-make in the relevant market area. Establishing a franchised dealer in a relevant market area to replace a franchised dealer that has not been in operation for more than two years shall constitute the establishment of a new franchise subject to the terms of this subdivision. The two-year period for replacing a franchised dealer shall begin on the day the franchise was terminated, or, if a termination hearing was held, on the day the franchisor was legally permitted finally to terminate the franchise. This subdivision shall not apply to (i) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be more than ~~ten~~ 10 miles distant from any other dealer for the same line-make; (ii) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be more distant than the existing site from all other dealers of the same line-make in that relevant market area; or (iii) the relocation of an existing new motorcycle dealer within two miles of the existing site of the relocating dealer.

~~No new or additional motorcycle dealer franchise shall be established in any county, city or town unless the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative gives advance notice to any existing franchised dealers of the same line-make. The notice shall be in writing and sent by certified mail, return receipt requested, at least forty-five days prior to the establishment of the new or additional franchise. Any existing franchise dealer may file a protest within thirty days of the date the notice is received. The burden of proof in establishing inadequate representation of such line-make motorcycles shall be on the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative.~~

6. Except as otherwise provided in this subdivision and notwithstanding the terms of any franchise, to terminate, cancel, or refuse to renew the franchise of any dealer without good cause and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least ~~sixty~~ 60 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for the action, and (ii) the Commissioner has determined, if requested in writing by the dealer within the ~~sixty-day~~ 60-day period, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise. In any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision or, if that decision is appealed to the circuit court, pending the decision of the circuit court. In any case in which a franchisor neither advises a dealer that it does not intend to renew a franchise nor takes any action to renew a franchise beyond its expiration date, the franchise in question shall continue in effect on the terms last agreed to by the parties. Notwithstanding the other provisions of this subdivision, notice of termination, cancellation, or nonrenewal may be provided to a dealer by a franchisor not less than ~~fifteen~~ 15 days prior to the effective date of such termination, cancellation, or nonrenewal when the grounds for such action are any of the following:

a. Insolvency of the franchised motorcycle dealer or filing of any petition by or against the franchised motorcycle dealer, under any bankruptcy or receivership law, leading to liquidation or which is intended to lead to liquidation of the franchisee's business;

b. Failure of the franchised motorcycle dealer to conduct its customary sales and service operations during its posted business hours for seven consecutive business days, except where the failure results from acts of God or circumstances beyond the direct control of the franchised motorcycle dealer;

c. Revocation of any license which the franchised motorcycle dealer is required to have to operate a dealership;

d. Conviction of the dealer or any principal of the dealer of a felony.

The change or discontinuance of a marketing or distribution system of a particular line-make product by a manufacturer or distributor, while the name identification of the product is continued in substantial form by the same or different manufacturer or distributor, may be considered to be a franchise termination, cancellation, or nonrenewal. The provisions of this paragraph shall apply to changes and discontinuances made after January 1, 1989, but they shall not be considered by any court in any case in which such a change or discontinuance occurring prior to that date has been challenged as constituting a termination, cancellation or nonrenewal.

7. To fail to provide continued parts and service support to a dealer which holds a franchise in a discontinued line-make for at least five years from the date of such discontinuance. This requirement shall not apply to a line-make which was discontinued prior to January 1, 1989.

8. To fail to allow a dealer the right at any time to designate a member of his family as a successor to the dealership in the event of the death or incapacity of the dealer. It shall be unlawful to prevent or refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated dealer if the franchisor has not provided to the member of the family previously designated by the dealer as his successor written notice of its objections to the succession and of such person's right to seek a hearing on the matter before the Commissioner pursuant to this article, and the Commissioner determines, if requested in writing by such member of the family within ~~thirty~~ 30 days of receipt of such notice from the franchisor, and after a hearing on the matter before the Commissioner pursuant to this article, that the failure to permit or honor the succession is unreasonable under the circumstances. No member of the family may succeed to a franchise unless (i) the franchisor has been given written

notice as to the identity, financial ability, and qualifications of the member of the family in question and (ii) the succession to the franchise will not involve, without the franchisor's consent, a relocation of the business.

9. To fail to ship monthly to any dealer, if ordered by the dealer, the number of new motorcycles of each make, series, and model needed by the dealer to receive a percentage of total new motorcycle sales of each make, series, and model equitably related to the total new motorcycle production or importation currently being achieved nationally by each make, series, and model covered under the franchise. Upon the written request of any dealer holding its sales or sales and service franchise, the manufacturer or distributor shall disclose to the dealer in writing the basis upon which new motorcycles are allocated, scheduled, and delivered to the dealers of the same line-make. If allocation is at issue in a request for a hearing, the dealer may demand the Commissioner to direct that the manufacturer or distributor provide to the dealer, within ~~thirty~~ 30 days of such demand, all records of sales and all records of distribution of all motorcycles to the same line-make dealers who compete with the dealer requesting the hearing.

10. To require or otherwise coerce a dealer to underutilize the dealer's facilities.

11. To include in any franchise with a motorcycle dealer terms that are contrary to, prohibited by, or otherwise inconsistent with the requirements of this chapter.

12. For any franchise agreement to require a motorcycle dealer to pay the attorney's fees of the manufacturer or distributor related to hearings and appeals brought under this article.

13. To fail to include in any franchise with a motorcycle dealer the following language: "If any provision herein contravenes the laws or regulations of any state or other jurisdiction wherein this agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by such laws or regulations, such provision shall be deemed to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force," or words to that effect.

14. To include in any franchise agreement with a motorcycle dealer terms that prohibit a motorcycle dealer from exercising his right to a trial by jury in any action where such right otherwise exists.