

CHECKLIST FOR FRANCHISOR AGREEMENTS AND DOCUMENTS

As a franchised dealer, you often receive agreements and other documents your franchisor asks that you sign. When you receive these, consider your response. Here is a checklist of considerations.

What is the Purpose?

- What does the document provide?
- What are the franchisor's obligations under the document? Ask yourself what the franchisor commits to do
- What are the dealer's obligations?

Consistency with Law and Your Franchise

- Federal Law – Does the document impose obligations on the dealer that may conflict with the dealer's compliance with federal law, e.g. protection of customer information?
- State Law – Does the agreement change the dealer's obligations or impair the dealer's rights under state law? Consult your state trade association or a knowledgeable dealer attorney with any concerns
- Is it consistent with your existing dealer sales and service agreement or does it make a change in a fundamental provision of the DSSA?
- Do you have an individualized agreement with your franchisor, e.g. a facility development agreement, that is affected by the document?

Business Considerations

- Does the agreement make financial sense? Do a cost benefit analysis for any agreement a franchisor asks you to sign.
- Does the document make sense given the existing business atmosphere, e.g. a pandemic? If so, seek a delay with respect to the franchisor request that you sign the document so you consider it in a more normal business atmosphere
- Can the dealership comply? An agreement often has requirements the dealership cannot meet
- If the requirements are greater than you can meet, seek a review of the factors generating the requirements

What Are the Penalties if You Cannot Comply

- Is the failure to comply deemed a breach of the DSSA? If so, that could eventually lead to a claim by the manufacturer that the failure to

comply is a reason for termination of the dealership's DSSA; agree only if the terms are in your interest and you can satisfy the requirements

- If there is a monetary payback, what is it? Paying back an amount advanced when you do not comply with the agreement may be reasonable, but a penalty amount is not.
- Does it affect the dealership's ability to participate in franchisor programs? Disqualification for programs may simply be a penalty rather than a reasonable response to the failure to meet a requirement

Is the Boilerplate for the Agreement Fair?

- Does it claim the document is not a part of the DSSA? That is often the case, even though the document has an effect on the DSSA and should be subject to the same terms, particularly the applicable state law
- What state law applies to the agreement? Is it your state law or a separate state law chosen for the benefit of the franchisor?
- How and where are disputes decided?
- Is there a mandatory pre-dispute arbitration agreement? Those are prohibited in a franchise agreement under federal law.

Special Circumstances

- If you agree to facility improvements, are the milestones overly ambitious? Franchisors often include unrealistic time deadlines for goals in a facility improvement agreement
- Is the document a demand that you commit to cure a breach of the DSSA? If so, consult a knowledgeable attorney since you should never acknowledge a breach of your franchise agreement.
- Ensure any communication on an audit preserves your rights to challenge through the franchisor's internal process and through your state process