

Report From Agency

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
ADOPTING RULES**

CR 06-135

The Wisconsin Department of Transportation proposes an order to amend TRANS 138.03(1)(a)(intro.) and (6); and create TRANS 138.08(5), relating to dealer facilities, records and licenses.

**REPORT OF THE DEPARTMENT OF TRANSPORTATION
ON THE FINAL RULE DRAFT**

This report is submitted to the chief clerks of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

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PART 1

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: Ch. 218, Stats.

Statutory authority: ss. 85.16(1), 218.0152, 227.11(2), Stats.

Explanation of agency authority: The Department licenses and regulates motor vehicle dealers. This rule making deals with the topic of sales facility locations.

Related statute or rule: Ch. 218, Stats., Ch. Trans 138 and 139, Wis. Admin. Code.

Plain language analysis: This rule amendment relates to temporary sales locations, such as at fairs or auto shows, by licensed Wisconsin motor vehicle dealers. Chapter Trans 138 requires that licensed dealers maintain business facilities in the state. In addition, ch. Trans 138 allows licensed Wisconsin dealers to conduct a certain number of sales at temporary sales locations during a year.

Recently, ch. Trans 138 was amended to permit out-of-state motor vehicle sellers, such as Internet vendors, to be licensed as dealers in this state and to sell vehicles to Wisconsin residents via the Internet or similar methods without having to maintain business facilities in the state.

This rule making clarifies two points. First, a licensed Wisconsin motor vehicle dealer's business facilities must be a permanent building in the state of Wisconsin. Second, persons who avail themselves of the out-of-state dealer licensing provisions available to internet sellers may not conduct face-to-face sales in Wisconsin without first obtaining permanent facilities in this state like any other Wisconsin based dealership. To conduct face-to-face sales within the state, a dealer must have a permanent facility in this state.

An exception to this requirement is proposed for motor home rallies organized by national or state motor home groups having at least 100 members. The Family Motor Coach Association conducts "regional rallies" around the Midwest that a few hundred camping families attend. These rallies typically include motor home shows at which new motor homes are displayed. Manufacturers do not show the motor homes at these rallies, but dealers do so. Because these rallies are held extremely infrequently and there is no history of a regulatory problem with these rallies, the Department has excluded them from the application of this rule making.

This rule making does not, however, negate any contractual geographic limitations upon participating dealers raised by manufacturer franchise agreements. The enforcement of those private agreements is left to the private parties and court system and is not a regulatory function of the Department of Transportation.

Summary of, and preliminary comparison with, existing or proposed federal regulation: Motor vehicle dealers are not licensed by the federal government.

Comparison with Rules in Adjacent States:

Michigan: Does not require out-of-state dealers to obtain a license to attend a temporary sales location at an RV show or event. Michigan dealers are required to obtain an additional application and provide 30 days notice for participation. Different procedures are required for Michigan dealers depending upon if the temporary location is inside or outside the county of licensure.

Minnesota: Allows out-of-state dealers to sell up to five vehicles without a Minnesota license. If more than five vehicles are sold, the out-of-state dealer must consign them to a Minnesota licensed dealer. Minnesota licensed dealers are required to notify the registrar of motor vehicles of each temporary place of business.

Illinois: Out-of-state RV dealers may attend trade shows, including RV owner gatherings, if two Illinois-licensed RV dealers attend. The out-of-state dealers may display only.

Iowa: Requires dealers to be licensed and have an established place of business in the state. Off site sales or display at "Fair," "Vehicle Show," or "Vehicle Exhibition" requires an application and fee. The Department (Transportation) may grant a variance from the requirements of these rules and grant a special limited permit for the display only of motor homes or travel trailers at a convention sponsored by an established national association, if the Department determines that granting the permit would not encourage evasion of these rules and that the public interest so demands. The Department may impose alternative permit requirements.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: From October 1, 2003, to September 30, 2005, there were nine out-of-state dealers that were exempt from the business facility requirement. None currently has approval to conduct sales at a temporary sales location. Of these nine out-of-state dealers, nine had previously received approval to conduct sales at temporary sales locations. All approvals have expired.

Analysis and supporting documentation used to determine effect on small businesses: This rule will affect any out-of-state dealers who are required to have a Wisconsin motor vehicle dealer license in order to sell to Wisconsin residents via face-to-face sales. This rule making will require such dealers to establish permanent offices in this state. So long as these dealers confine their sales to Internet, telephone or other remote sale methods, those dealers will be exempt from requirement of keeping a Wisconsin business facility. Such dealers will, however, be prohibited from selling vehicles at temporary sales locations, fairs and conventions. There are no businesses that hold a Wisconsin dealer license and are exempt from business facility requirement, which are currently allowed to hold sales at temporary sales locations.

Effect on small business: This proposed rule will have no impact on licensed Wisconsin motor vehicle dealers who have business facilities in Wisconsin and sell to Wisconsin residents. These businesses will continue to be able to sell vehicles at temporary sales locations. This proposed rule will affect businesses not located in Wisconsin that wish to be exempt from the Wisconsin business facility requirement. There are currently no licensees that lack permanent facilities in this state.

This rule making may also limit out-of-state participants at car shows, conventions and fairs from selling motor vehicles at those events without first establishing Wisconsin business facilities. This will not affect manufacturer shows where motor vehicles are displayed but not sold. The Department's Regulatory Review Coordinator may be contacted by e-mail at ralph.sanders@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect and anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands. The Department estimates that there will be no fiscal impact on state revenues or liabilities. There will be no fiscal impact or anticipated costs incurred by the private sector as a result of this rule.

Agency contact person and copies of proposed rule: Copies of the proposed rule may be obtained, without cost, by writing to Carson Frazier, Department of Transportation, Division of Motor Vehicles, Bureau of Vehicle Services, Room 253, P. O. Box 7911, Madison, WI 53707-7911. You may also contact Ms. Frazier by phone at (608) 266-7857.

PART 2 **TEXT OF PROPOSED RULE**

SECTION 1. Trans 138.03(1)(a)(intro.) and (6) are amended to read:

Trans 138.03(1)(a)(intro.) A permanent building in this state wherein there are facilities for:

(6) A motor vehicle dealer who is not located in this state, who accepts vehicle purchase orders or lease agreements placed by fax, telephone, the Internet, mail, or some other remote means from persons within this state, and who delivers vehicles to persons within this state is exempt from the dealer business facilities requirements of sub. (1), provided that the dealer maintains a business office in another jurisdiction at which the books, records and files pertaining to vehicle sales or leases to persons in this state are

maintained and the dealer makes these documents available to the department for inspection upon demand. Nothing in this section shall be construed to exempt the dealer from the license requirement of s. 218.0114(1), Stats.

SECTION 2. Trans 138.08(5) is created to read:

Trans 138.08(5)(a) *Permanent facilities required.* The dealer maintains a permanent facility in this state in the manner required by s. Trans 138.03(1)(a), except as provided in par. (b).

NOTE: Dealers without permanent facilities in the state may not conduct any sales in this state, including sales at temporary locations, except as provided in s. Trans 138.03(6).

(b) *Motor home exemption.* The department may exempt a dealer from the facility requirement in par. (a), but not from any other requirement of state law, if the dealer is selling motor homes at a rally or show sponsored by an established state, national or international motor home or camping association with a minimum membership of 100 members. An exemption under this paragraph may not be granted by the department more than once in any 4-year period. Any license issued by the department containing the exemption described in this paragraph shall be limited to one specific event and may not exceed 10 days duration. An exemption granted under this paragraph will not exempt a dealer from geographic sales restrictions contained in a dealer franchise agreement or other private contractual obligation.

Note: All off-premise sales in Wisconsin are limited to 10 days. s. Trans 138.08(2), Stats. All other licensing and permit requirements of state law, including administrative rules issued by the Department, apply to a motor home dealer granted an exemption under this paragraph. A Wisconsin dealer having franchise rights in the area in which the show is conducted is not prevented from enforcing those rights by the exemption in par. (b).

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of
May, 2007.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation

PART 4
CR 06-135

ANALYSIS OF FINAL DRAFT OF TRANS 138

(a) **Basis and Purpose of Rule.** This rule amendment relates to temporary sales locations, such as at fairs or auto shows, by licensed Wisconsin motor vehicle dealers. Chapter Trans 138 requires that licensed dealers maintain business facilities in the state. In addition, ch. Trans 138 allows licensed Wisconsin dealers to conduct a certain number of sales at temporary sales locations during a year.

Recently, ch. Trans 138 was amended to permit out-of-state motor vehicle sellers, such as Internet vendors, to be licensed as dealers in this state and to sell vehicles to Wisconsin residents via the Internet or similar methods without having to maintain business facilities in the state.

This rule making clarifies two points. First, a licensed Wisconsin motor vehicle dealer's business facilities must be a permanent building in the state of Wisconsin. Second, persons who avail themselves of the out-of-state dealer licensing provisions available to internet sellers may not conduct face-to-face sales in Wisconsin without first obtaining permanent facilities in this state like any other Wisconsin based dealership. To conduct face-to-face sales within the state, a dealer must have a permanent facility in this state.

An exemption is provided for infrequent motor home shows that are part of regional or national camping or motor home rallies.

Background: In 2003, the Family Motor Coach Association (FMCA) held a regional rally or RV show in Elkhorn. Nine out-of-state RV dealers were scheduled to exhibit and sell vehicles at the show. Wisconsin law does not permit unlicensed dealers to sell vehicles in this state. WisDOT was contacted to determine if there was a provision in the law to license the dealers so that they could participate in the show. The show would have been cancelled without the participation of these dealers.

The Department required bonds and licensed the dealers at that show so that they could participate in the show while protecting Wisconsin consumers under the law. The last dealer license held by this group of dealers expired in September of 2005.

In December of 2005 Representatives Robin Vos and Samantha Kerkman wrote to the Secretary on behalf of their constituent, Tim Wegge of the Burlington RV Superstore. Mr. Wegge was concerned that an out-of-state dealer licensed in this way was at an unfair advantage in that it did not have to maintain a business facility and pay property taxes in Wisconsin, and that it, under the Department's existing regulations, could conceivably conduct up to six sales at temporary locations. The Representatives asked the Department to amend ch. Trans 138 to prohibit such sales.

This request led to further review of the law by WisDOT legal staff which concluded that the Department's original interpretation of law that allowed the licensing of the out-of-state dealers was in error and not permissible under existing Ch. Trans 138. However, it was decided that clarifying the language of the existing regulation would be beneficial and the Department began the process of amending ch. Trans 138 in response to the petition of the Representatives and Mr. Wegge.

(b) **Modifications as a Result of Testimony at Public Hearing.** The public hearing was held in Madison on January 18, 2007. As a result of the testimony at hearing and other written testimony and communications, the Department modified the proposed rule to prevent interference with camping and motor home rallies and shows. Testimony demonstrated that the economics of the motor home industry results in dealers, rather than manufacturers, showing vehicles at such events. Testimony regarding motor homes also showed that the repair and maintenance industry for motor homes is dramatically different from that of typical automobile manufacturers and dealers.

The proposed rule was modified as a result of that testimony to permit the Department to exempt a motor home dealer from the facility requirements for vehicle dealers (but not from any other requirement of state law) if the dealer is selling motor homes at a rally or show sponsored by an established state, national or international motor home or camping association with a minimum membership of 100 members. The exemption may be exercised no more than once in any four-year period. Any license issued by the Department containing this exemption will be limited to one specific event and may not exceed 10 days duration. An exemption granted under this paragraph does not exempt a dealer from geographic sales restrictions contained in a dealer franchise agreement or other private contractual obligation. The parties to such contracts may exercise their private contract remedies with respect to breaches of such contract provisions.

(c) **List of Persons who Appeared or Registered at Public Hearing.** The following persons appeared/registered at the hearing:

Timothy Wegge, President, Burlington RV Superstore, Sturtevant, WI—spoke in favor of the proposed regulation. Mr. Wegge explained the dynamics of vehicle service for the motor home industry, how it differs from that of other automobile manufacturers, and how that difference would affect Wisconsin consumers who bought vehicles from distant out-of-state dealers.

Wegge testified that the supply of repair personnel and facilities for the motor home industry is very constrained. As a result, responsiveness to requests for repair may vary widely depending on the time of the year. A typical automobile, such as a Chevrolet, could be repaired promptly at virtually any of the many Chevrolet dealers in a buyer's vicinity. In contrast, he testified that there can be long waits for service at motor home dealer facilities because of the seasonal nature of the business. Local dealers, he said, usually give preference to customers to which they sold vehicles. Customers who bought vehicles from distant out-of-state dealers may have to wait long periods or until the busy season winds down to have repairs performed.

Al Talbott (retired), Family Motor Coach Association (FMCA), Springfield, IL—spoke in opposition and provided written testimony related to the possible negative effects of the proposed regulation on FMCA events.

Chris Snyder, General Counsel/Lobbyist, Wisconsin Automobile and Truck Dealers Association, Madison, WI—spoke in favor and proposed additional changes to WisDOT regulations.

John Flynn, Legislative Aide to Rep. John Townsend, State Capitol, Madison, WI—registered for information.

Robin Vos, State Representative, State Capitol, Madison, WI—spoke in favor of the proposed rule amendment and provided written testimony.

Eugene and Rose Huhndorf, Past President & Secretary, Badger Chapter, Family Motor Coach Association, Oakfield, WI—registered in opposition. Spoke about the possible negative effects of the proposed regulation on FMCA events.

(d) Summary of Public Comments and Agency Response to those Comments: Main points by speakers at the hearing included:

In favor of the change:

- Allowing out-of-state dealers to sell in Wisconsin is unfair competition to local businesses that have investments in Wisconsin.
- Trans 138 only allows an exemption to the facility requirement for sales/lease orders taken by remote means.
- Would close a loophole for face-to-face selling by out-of-state dealers at “tent shows.”
- Consumers who buy from out-of-state dealers may have difficulty in obtaining warranty service since their dealer is not close by.
- Wisconsin dealers have limited capacity for servicing RVs and feel an obligation to serve their own customers first. Service for vehicles purchased from out-of-state dealers may be a problem.
- Wisconsin dealers are not able to participate in shows in some other states.

Chris Snyder, Wisconsin Automobile and Truck Dealers Association, proposed additional changes with regards to temporary sale locations (for all dealer types) including:

- Restricting temporary sales locations for used vehicles to 20 miles from the dealer’s licensed permanent facilities.

- Limiting new vehicle dealers from displaying or selling outside of their assigned area of sales responsibility as designated by their franchise manufacturer.
- Create an exemption for display and sales activity for auto shows, RV rallies and car clubs and collector shows if hosted by a state licensed association.
- Allowing dealers to establish temporary sales locations in the event of a temporary change of location due to road construction.

Opposed to the change:

Comments and testimony in opposition to the proposed rule were focused on the effect the proposed rule might have on Family Motor Coach Association, Inc. (FMCA) sponsored events. The FMCA orchestrated a letter writing campaign to the Department encouraging members to write to WisDOT regarding the proposed regulation. A copy of that letter is attached. WisDOT did receive many letters and e-mail messages from FMCA members expressing the sentiments set forth in that letter.

In addition, testimony regarding the FMCA opposition to the proposed rule discussed the following points:

- Participating dealers pay a fee to attend and help cover costs of the FMCA rallies. Dealers would have no incentive/interest in attending without being able to sell vehicles. Without the fees generated from dealers, the FMCA rallies would probably not occur.
- There aren't enough in-state dealers interested in attending in any state to provide enough support or variety to support an FMCA rally.
- Annual area rallies are held with 300 to 500 FMCA memberships (600-1,000 members) plus the general public, other vender/dealer personnel, equipment rentals, etc.
- FMCA has held rallies in Wisconsin six times since 1971, including 2 international rallies and 4 area rallies in Madison and Elkhorn. FMCA considered Wisconsin for a 2009 rally but selected another state because of concerns regarding Wisconsin dealer facility requirements.
- Because of the size of the location needed for the rally, it is usually held at a public property such as a fairground. Property rental fee for local government can range from \$15,000 to \$30,000.
- Estimated economic impact is estimated by FMCA at up to \$300,000 for an area rally and up to \$15-30 million for an international rally.
- FMCA supports licensing of out-of-state dealers to provide regulation and consumer protection.
- FMCA has received no complaints from consumers about sales at the rallies.

Max Durbin, Chairman, Governmental and Legislative Affairs Committee, Family Motor Coach Association, Inc., Cincinnati, OH, also filed written comments on the proposed regulation.

Written comments were received from the following individuals:

Gloria and James Landrie (via e-mail)

Alan and Sharon Bennett, LaCrosse, WI—the Bennetts are in opposition to the proposed rule as it would result in loss of tourist dollars to in-state businesses; fewer dealers means less choice for potential RV purchasers; adjoining states would only benefit from this restriction; and Rver's living in Wisconsin would be forced to spend more of their dollars to attend out of state MAC rallies.

Representative Samantha J. Kerkman, 66th Assembly District—Rep. Kerkman wrote in support of the proposed rule.

The following commenters reiterated the points set forth in the January 5 FMCA memo encouraging members to contact WisDOT, and other reasons motor home owners might oppose the change which are summarized above. The following is a list of persons who identified themselves as Wisconsin members of the FMCA who filed comments with the Department:

Ed Schubring, Site Committee Chair of Midwest Area, Family Motor Coach Association, Cincinnati, OH.

Bonnie Sue Lewis, OakTree Kennels, Sarona, WI.

Roger and LeeAnn LeRoy, Green Bay, WI.

George and Bonnie Halverson, Vesper, WI.

William Wetzel, Sheboygan, WI.

Sue and Lou LeCalsey, DePere, WI.

John Amann, Stevens Point, WI.

Clyde Scott, Land O'Lakes, WI.

Walter Gustavson, Prescott, WI.

Bob Meulemans (via e-mail)

Mark T. Radl, CEO, Marco Agency, Oshkosh, WI (via e-mail)

Tom and Wendy Donnelly, Chilton, WI.

R. W. Parker, Hubertus, WI.
Gary and Mary Nesheim, Delafield, WI.
Arne and Eleanor Finhert, Oregon, WI.
Michael W. Van Rooy, Green Bay, WI.
William C. and Julie M. Hallam, Eleva, WI.
Nancy L. Hanson, Washburn, WI.
Louis H. and Janet A. Frase, New Auburn, WI.
Carol L. Claussen, Menomonee Falls, WI.
Michael and Cheryl Bean, Menomonie, WI.
Dan Collins, Janesville, WI.
Joanne I. Baker, Racine, WI.
Horst H. Schaller, Racine, WI.
Gloria McInturff, Watertown, WI.
Robert H. Winkel, Elcho, WI.
Jo Ellen and William Reese, Spring Green, WI.
Pat and Pat Williams, Sheboygan, WI.
Karen F. Mickler (via e-mail)
Jerry and Diana Jansen, Waunakee, WI.
Eugene Huhndorf, Oakfield, WI.
Leonard B. Vogel, Manitowoc, WI.
Richard F. Luxton, Green Bay, WI.
Donald and Beverly Morgan, Weyauwega, WI.
David and Karen McGivern, Marshfield, WI.

Robert Patterson, Janesville, WI.
Jerry Wanty, Jackson, WI.
Chip Buehrle, Hartland, WI.
James G. Wiley, Racine, WI.
Dennis L. Walbrandt, Elkhorn, WI (via e-mail)
Gerald and Katherine Nease, Waterloo, WI.
John Kimball, Edgerton, WI.
Chris and Carolyn Schanel, Fitchburg, WI.
James A. Taylor, Mequon, WI.
Jack R. Huebschen, Menomonee Falls, WI.
Edwin W. Ewers, Lone Rock, WI.
Ralph Loehr, Fond du Lac, WI.
Irene Kabitzke, Sussex, WI.
Jack and Alice Styza, Greendale, WI.
Glenn and Marjory Curtis, Cuba City, WI.
Wilbert Curtis, Platteville, WI.
Walter E. Gilomen, Land O Lakes, WI.
Guilford M. Wiley, Jr., Oskosh, WI.
Paula Bradich, Eagle River, WI.
Ken Hoege, Wisconsin Dells, WI.
Everett White, Madison, WI.
Swede Lagerwall, Wilmot, WI.
Marie and Don Genzmer, Mukwonago, WI.
Walter Przeworski, Oconomowoc, WI.

James R. Mulleady, Minocqua, WI.

Dean Schmalz, Central Beer Distributors, Inc., Rothschild, WI.

Thomas L. Tyne, Friendship, WI.

June and John Reville, Superior, WI.

Mandrow Wenzel, New Berlin, WI.

Thomas Mileski, Green Bay, WI.

Terry and Marilyn Bohler, Birchwood, WI.

Norbert and Antoinette Kirschling, Stevens Point, WI.

Robert and Frances Goff, Pewaukee, WI.

David Schneck, Greendale, WI.

Emery L. Barnes, East Troy, WI.

Ralph P. Knittel, Mount Horeb, WI.

Charles A. Kiddy, Stoughton, WI.

R. Neal and Beverly Melvin (via e-mail)

Scott and Rose Niles, Glendale, WI.

Tom and Janice Fassbender (via e-mail)

Nicki and Steve Borquist, Madison, WI.

Dennis and Diane O'Brien, Trempealeau, WI.

Howard and Suzanne Inglefield (via e-mail)

NOTE: A number of persons filed comments by e-mail and provided no street address. Their e-mail addresses are not provided because to include them in this document, which will be posted on the internet, would expose them to SPAM. The addresses are available upon request from Julie Johnson at the Department of Transportation, phone 608-267-3703.

Agency Response: To balance the competing interests of a fair playing field for Wisconsin businesses which have invested in facilities in the state with the interest of many Wisconsin residents wishing to attend an RV rally in their home state and tourism

and economic development considerations, amend ch. Trans 138 to allow infrequent participation by out-of-state dealers in Wisconsin motor home rallies. This rule now proposes to allow such activity subject to the following restrictions:

- A dealer without Wisconsin facilities could participate in one motor home rally or show in any 4-year period.
- The rally or show must be hosted by an established state, area or national association.
- Participating motor home dealers must meet Wisconsin bond and license requirements.
- Dealer license does not permit the dealer to hold other off-premise or temporary location sales in Wisconsin.

This essentially incorporates the suggestion of Chris Snyder of the Wisconsin Automobile and Truck Dealer Association. Mr. Snyder's other suggestions were not adopted because the Department considered them beyond the scope of this proposed rule change.

(e) **Explanation of any Changes Made to the Plain Language Analysis or Fiscal Estimate:** As to the Comparison with Rules in Adjacent States, Department staff surveyed the regulations in surrounding states in 2006 as part of the rule process. The survey was updated in 2007. The 2007 updates are now reflected in the plain language analysis. In addition, the analysis was changed to reflect the proposed limited motor home dealer exemption created as a result of the public hearing process.

(f) **Response to Legislative Council Recommendations:** The Legislative Council Clearinghouse report contained a number of recommendations, all of which have been incorporated into the proposed rule.

(g) **Final Regulatory Flexibility Analysis.** The Department believes the proposed rule will have no impact on the vast majority of licensed Wisconsin motor vehicle dealers who sell automobiles, except to the extent it protects them from unfair competition from persons attempting to sell vehicles in Wisconsin without permanent facilities here.

Wisconsin currently does not have any business that holds a Wisconsin dealer license without business facilities in this state. Therefore, the Department does not anticipate any impact from making the business facility requirement more evident in the controlling regulations.

The amendment to the rule making which permits out-of-state motor home dealers to participate in a limited number of Wisconsin motor home rallies is not expected to have a material effect on Wisconsin motor home dealers. Moreover, dealer franchise agreements provide additional protection to Wisconsin dealers beyond the provisions of this regulation. Nothing in this regulation prohibits dealers from enforcing the geographic restrictions of their franchise agreements.