

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 189

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

AN ACT

RELATING TO MOTOR VEHICLE DEALERS FRANCHISING; MAKING CERTAIN
UNFAIR ACTS AND PRACTICES UNLAWFUL FOR MOTOR VEHICLE
MANUFACTURERS OR DISTRIBUTORS OR THEIR REPRESENTATIVES;
DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 57-16-5 NMSA 1978 (being Laws 1973,
Chapter 6, Section 5, as amended) is amended to read:

"57-16-5. UNLAWFUL ACTS--MANUFACTURERS--DISTRIBUTORS--
REPRESENTATIVES.--It is unlawful for ~~any~~ a manufacturer,
distributor or representative to:

A. coerce or attempt to coerce a dealer to order or
accept delivery of a motor vehicle, appliances, equipment,
parts or accessories therefor or any other commodity that the
motor vehicle dealer has not voluntarily ordered;

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underscored material = new
[bracketed material] = delete

1 B. coerce or attempt to coerce a dealer to order or
2 accept delivery of a motor vehicle with special features,
3 appliances, accessories or equipment not included in the list
4 price of the motor vehicles as publicly advertised by the
5 manufacturer;

6 C. coerce or attempt to coerce a dealer to order
7 for any person any parts, accessories, equipment, machinery,
8 tools, appliances or any commodity whatsoever;

9 D. refuse to deliver, in reasonable quantities and
10 within a reasonable time after receipt of dealer's order, to a
11 motor vehicle dealer having a franchise or contractual
12 arrangement for the retail sale of motor vehicles sold or
13 distributed by the manufacturer, distributor or representative,
14 those motor vehicles, parts or accessories covered by the
15 franchise or contract specifically publicly advertised by the
16 manufacturer, distributor or representative to be available for
17 immediate delivery; provided, however, the failure to deliver a
18 motor vehicle, parts or accessories shall not be considered a
19 violation of Chapter 57, Article 16 NMSA 1978 if the failure is
20 due to an act of God, work stoppage or delay due to a strike or
21 labor difficulty, shortage of materials, freight embargo or
22 other cause over which the manufacturer, distributor or
23 representative or an agent thereof has no control;

24 E. coerce or attempt to coerce a motor vehicle
25 dealer to enter into an agreement with the manufacturer,

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1 distributor or representative or to do any other act
2 prejudicial to the dealer by threatening to cancel a franchise
3 or a contractual agreement existing between the manufacturer,
4 distributor or representative and the dealer; provided,
5 however, that notice in good faith to a motor vehicle dealer of
6 the dealer's violation of the terms or provisions of the
7 franchise or contractual agreement does not constitute a
8 violation of Chapter 57, Article 16 NMSA 1978;

9 F. terminate or cancel the franchise or selling
10 agreement of a dealer without due cause. "Due cause" means a
11 material breach by a dealer, due to matters within the dealer's
12 control, of a lawful provision of a franchise or selling
13 agreement. As used in this subsection, "material breach" means
14 a contract violation that is substantial and significant. In
15 determining whether due cause exists under this subsection, the
16 court shall take into consideration only the dealer's sales in
17 relation to the business available to the dealer; the dealer's
18 investment and obligations; injury to the public welfare; the
19 adequacy of the dealer's sales and service facilities,
20 equipment and parts; the qualifications of the management,
21 sales and service personnel to provide the consumer with
22 reasonably good service and care of new motor vehicles; the
23 dealer's failure to comply with the requirements of the
24 franchise; and the harm to the manufacturer or distributor.
25 The nonrenewal of a franchise or selling agreement, without due

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1 cause, shall constitute an unfair termination or cancellation
2 regardless of the terms or provisions of the franchise or
3 selling agreement. The manufacturer, distributor or
4 representative shall notify a motor vehicle dealer in writing
5 by registered mail of the termination or cancellation of the
6 franchise or selling agreement of the dealer at least sixty
7 days before the effective date thereof, stating the specific
8 grounds for termination or cancellation; and the manufacturer,
9 distributor or representative shall notify a motor vehicle
10 dealer in writing by registered mail at least sixty days before
11 the contractual term of [~~his~~] the dealer's franchise or selling
12 agreement expires that it will not be renewed, stating the
13 specific grounds for nonrenewal in those cases where there is
14 no intention to renew, and in no event shall the contractual
15 term of [~~any~~] a franchise or selling agreement expire without
16 the written consent of the motor vehicle dealer involved prior
17 to the expiration of at least sixty days following the written
18 notice. During the sixty-day period, either party may in
19 appropriate circumstances petition a district court to modify
20 the sixty-day stay or to extend it pending a final
21 determination of proceedings on the merits. The court may
22 grant preliminary and final injunctive relief;

23 G. use false, deceptive or misleading advertising
24 in connection with [~~his~~] the manufacturer's, distributor's or
25 representative's business;

1 H. offer to sell or to sell a motor vehicle to a
2 motor vehicle dealer in this or any other state of the United
3 States at a lower actual price than the actual price offered to
4 any other motor vehicle dealer in this state for the same model
5 vehicle similarly equipped or to utilize [~~any device~~] devices,
6 including sales promotion plans or programs that result in a
7 lesser actual price; provided, however, the provisions of this
8 subsection do not apply to sales to a motor vehicle dealer for
9 resale to a unit of the United States government, the state or
10 its political subdivisions; and provided, further, the
11 provisions of this subsection do not apply to sales to a motor
12 vehicle dealer of a motor vehicle ultimately sold, donated or
13 used by the dealer in a driver education program; and provided,
14 further, that the provisions of this subsection do not apply if
15 a manufacturer, distributor or representative offers to sell or
16 sells new motor vehicles to all motor vehicle dealers at an
17 equal price. As used in this section, "actual price" means the
18 price to be paid by the dealer less any incentive paid by the
19 manufacturer, distributor or representative, whether paid to
20 the dealer or the ultimate purchaser of the vehicle. This
21 provision does not apply to sales by the manufacturer,
22 distributor or representatives to the United States government
23 or its agencies. The provisions of this subsection dealing
24 with vehicle prices in another state and defining actual price
25 do not apply to a manufacturer or distributor if all of the

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1 manufacturer's or distributor's dealers within fifty miles of a
2 neighboring state are given all cash or credit incentives
3 available in the neighboring state, whether the incentives are
4 offered by the manufacturer or distributor or a finance
5 subsidiary of either, affecting the price or financing terms of
6 a vehicle;

7 I. willfully discriminate, either directly or
8 indirectly, in price between different purchasers of a
9 commodity of like grade or quality where the effect of the
10 discrimination may be to lessen substantially competition or
11 tend to create a monopoly or to injure or destroy the business
12 of a competitor;

13 J. offer to sell or to sell parts or accessories to
14 a motor vehicle dealer for use in [~~his~~] the dealer's own
15 business for the purpose of repairing or replacing the same or
16 a comparable part or accessory at a lower actual price than the
17 actual price charged to any other motor vehicle dealer for
18 similar parts or accessories for use in [~~his~~] the dealer's own
19 business; provided, however, in those cases where motor vehicle
20 dealers have a franchise to operate and serve as wholesalers of
21 parts and accessories to retail outlets or other dealers,
22 whether or not the dealer is regularly designated as a
23 wholesaler, nothing in this section prevents a manufacturer,
24 distributor or representative from selling to the motor vehicle
25 dealer who operates and [~~services~~] serves as a wholesaler of

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1 parts and accessories such parts and accessories as may be
2 ordered by the motor vehicle dealer for resale to retail
3 outlets at a lower actual price than the actual price charged a
4 motor vehicle dealer who does not operate or serve as a
5 wholesaler of parts and accessories;

6 K. prevent or attempt to prevent by contract or
7 otherwise a motor vehicle dealer from changing the capital
8 structure of [~~his~~] the dealer's dealership or the means by or
9 through which [~~he~~] the dealer finances the operation of [~~his~~]
10 the dealership, if the dealer at all times meets any reasonable
11 capital standards agreed to between the dealer and the
12 manufacturer, distributor or representative, and if the change
13 by the dealer does not result in a change in the executive
14 management control of the dealership;

15 L. prevent or attempt to prevent by contract or
16 otherwise a motor vehicle dealer or an officer, partner or
17 stockholder of a motor vehicle dealer from selling or
18 transferring a part of the interest of any of them to any other
19 person or party; provided, however, that no dealer, officer,
20 partner or stockholder shall have the right to sell, transfer
21 or assign the franchise or power of management or control
22 thereunder without the consent of the manufacturer, distributor
23 or representative except that the manufacturer, distributor or
24 representative shall not withhold consent to the sale, transfer
25 or assignment of the franchise to a qualified buyer capable of

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1 being licensed in New Mexico and who meets the manufacturer's
2 or distributor's uniformly applied requirement for appointment
3 as a dealer. Uniform application shall not prevent the
4 application of a separate standard of consent for sale,
5 transfer or assignment to minority or women dealer candidates,
6 and shall not require the application of an identical standard
7 to all persons in all situations. The requirement of uniform
8 application shall be met if the manufacturer applies the same
9 set of standards, which takes into account business performance
10 and experience, financial qualifications, facility requirements
11 and other relevant characteristics; provided that, if two
12 dealers, persons or situations are identical, given the
13 characteristics considered in the standards, the two dealers,
14 persons or situations shall be treated identically, except as
15 provided in this subsection. Upon request, a manufacturer or
16 distributor shall provide its dealer with a copy of the
17 standards that are normally relied upon by the manufacturer or
18 distributor to evaluate a proposed sale, transfer or
19 assignment. A manufacturer, distributor or representative
20 shall send a letter by certified mail approving or withholding
21 consent within sixty calendar days of receiving the completed
22 application forms and related information requested by a
23 manufacturer or distributor as provided below. A manufacturer,
24 distributor or representative shall send its existing motor
25 vehicle dealer the necessary application forms and identify the

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1 related information required within twenty calendar days of
 2 receiving written notice from the existing motor vehicle dealer
 3 of the proposed sale or transfer. No manufacturer, distributor
 4 or representative shall require any information not requested
 5 in the twenty-day period, and submission of the information
 6 requested within that period together with a completed form of
 7 the application provided shall constitute a completed
 8 application form. [~~Any~~] A request for consent shall be deemed
 9 granted, and the manufacturer, distributor or representative
 10 shall be estopped from denying the consent, if the consent has
 11 not been expressly withheld during the applicable sixty-day
 12 period;

13 M. obtain money, goods, services, anything of value
 14 or any other benefit from any other person with whom the motor
 15 vehicle dealer does business on account of or in relation to
 16 the transactions between the dealer and the other person,
 17 unless the benefit is promptly accounted for and transmitted to
 18 the motor vehicle dealer;

19 N. require a motor vehicle dealer to assent to a
 20 release, assignment, novation, waiver or estoppel that would
 21 relieve [~~any~~] a person from liability imposed by Chapter 57,
 22 Article 16 NMSA 1978;

23 O. require [~~any~~] a motor vehicle dealer to provide
 24 installment financing with a specified financial institution;

25 P. establish an additional franchise, including any

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1 franchise for a warranty or service facility outside of the
2 relevant market area of the dealer establishing the facility,
3 but excluding the relocation of existing franchises, for the
4 same line-make in a relevant market area where the same line-
5 make is presently being served by an existing motor vehicle
6 dealer if such addition would be inequitable to the existing
7 dealer; provided, however, that the sales and service needs of
8 the public shall be given due consideration in determining the
9 equities of the existing dealer. The sole fact that the
10 manufacturer, distributor or representative desires further
11 penetration of the market is not grounds for establishing an
12 additional franchise; provided, further, that the manufacturer,
13 distributor or representative shall give a ninety-day written
14 notice by registered mail to all same line-make dealers in a
15 relevant market area of its intention to establish an
16 additional franchise;

17 Q. offer to sell or lease or to sell or lease [~~any~~]
18 a new motor vehicle to a person, except a distributor, at a
19 lower actual price therefor than the actual price offered and
20 charged to a motor vehicle dealer for the same model vehicle
21 similarly equipped or to utilize any device that results in a
22 lower actual price;

23 R. sell, lease or provide motorcycles, parts or
24 accessories to [~~any~~] a person not a dealer or distributor for
25 the line-make sold, leased or provided. The provisions of this

1 subsection [~~does~~] do not apply to sales, leases or provisions
2 of motor vehicles, parts or accessories by a manufacturer,
3 distributor or representative to the United States government
4 or its agencies or the state or its political subdivisions;

5 S. offer [~~any~~] a finance program, either directly
6 or through [~~any~~] an affiliate, based on the physical location
7 of the selling dealer or the residence of the buyer. The
8 provisions of this subsection do not apply to a manufacturer or
9 distributor that has no dealer within fifty miles of a state
10 line or if all of the manufacturer's or distributor's dealers
11 within that fifty miles are given all cash or credit incentives
12 available in the neighboring state, whether the incentives are
13 offered by the manufacturer or the distributor or a finance
14 subsidiary of either, affecting the price or financing terms of
15 a vehicle;

16 T. force a dealer to sell or relocate a franchise
17 with another manufacturer located at the same physical location
18 or consider the existence of another line-make at a dealership
19 for product allocation, successorship, location approval and
20 capitalization; provided that a manufacturer or distributor may
21 require that the dealer:

22 (1) [~~that the dealer~~] meet the manufacturer's
23 capitalization requirements;

24 (2) [~~that the dealer~~] meet the manufacturer's
25 facilities requirements; and

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1 (3) [~~that the dealer~~] not have committed
2 fraudulent acts;

3 U. enforce a right of first refusal or option to
4 purchase the dealership by a manufacturer or distributor or to
5 require a dealer to grant a right or option to a manufacturer
6 or distributor;

7 V. be licensed as a dealer or perform warranty or
8 other service or own an interest, directly or indirectly, in a
9 person licensed as a dealer or performing warranty or other
10 service; provided that a manufacturer or distributor may own a
11 person licensed as a dealer for a reasonable time in order to
12 dispose of an interest acquired as a secured party or as part
13 of a dealer development program;

14 W. fail to recognize and approve the transfer of a
15 dealership to a person named as a successor, donee, beneficiary
16 or devisee in a valid testamentary or trust instrument;
17 provided that a manufacturer or distributor may impose
18 standards or criteria used in a transfer;

19 X. impose capitalization requirements not necessary
20 to assure that the dealer can meet its financial obligations;
21 [~~or~~]

22 Y. compel a dealer through a finance subsidiary of
23 the manufacturer or distributor to agree to unreasonable
24 operating requirements or directly or indirectly to terminate a
25 dealer, except as allowed by Subsection F of this section,

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1 through the actions of a finance subsidiary of the manufacturer
2 or distributor. This subsection shall not limit the right of a
3 financing entity to engage in business practices in accordance
4 with the usage of the trade in which it is engaged;

5 Z. require a dealer or the dealer's successor to:

6 (1) construct a new dealership, require the
7 relocation of an existing dealership or substantially change,
8 alter or remodel a dealer's facility except as necessary to
9 comply with health or safety laws or to comply with technology
10 requirements necessary to sell or service vehicles; or

11 (2) construct a new dealership, require
12 relocation of an existing dealership or substantially change,
13 alter or remodel an existing dealership before the tenth
14 anniversary of the date that the construction or change,
15 alteration or remodel of the dealership at that location was
16 completed if the construction was in substantial compliance
17 with standards or plans provided by a manufacturer, distributor
18 or representative; or

19 AA. unreasonably withhold approval for a dealer to
20 purchase substantially similar goods or services related to the
21 construction, alteration, remodel or renovation of a dealership
22 facility from vendors of the dealer's choice. This subsection
23 shall not be construed to allow a dealer or vendor to infringe
24 upon or impair a manufacturer's trademark rights or to erect or
25 maintain a sign that does not conform to the manufacturer's

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1 reasonable fabrication specifications and trademark usage
2 guidelines."

3 SECTION 2. EMERGENCY.--It is necessary for the public
4 peace, health and safety that this act take effect immediately.

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