

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE BILL 647

Short Title: Clarify MV Dealer Franchise Laws. (Public)

Sponsors: Senators Hoyle, Apodaca, Thomas; Albertson, Atwater, Berger of Rockingham, Bingham, Blake, Dalton, Dorsett, East, Forrester, Garwood, Jacumin, Jenkins, Presnell, Snow, Swindell, Tillman, and Weinstein.

Referred to: Commerce.

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE MOTOR VEHICLE DEALER FRANCHISE LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-297.1 reads as rewritten:

"§ 20-297.1. Prefiling of franchise agreements and amendments. Franchise-related form agreements.

Any franchise, as defined in G.S. 20-286(8a), offered to a motor vehicle dealer in this State shall provide that all terms and conditions in the agreement inconsistent with any of the laws or rules of this State are of no force and effect. On or before January 1, 1998, every manufacturer, factory branch, distributor, or distributor branch licensed by the Commissioner under this Article which uses an identical or substantially similar form franchise for its dealers or distributors in this State shall file with the Commissioner a copy of the franchise and all supplements. Any applicant for licensing by the Commissioner as a manufacturer, factory branch, distributor, or distributor branch licensed under this Article, which would use an identical or substantially similar form franchise, as defined in G.S. 20-286(8a), for its dealers or distributors in this State, shall, as a condition for the issuance of a license, file with the Commissioner a copy of the franchise and all supplements thereto. Not later than 60 days prior to the date a revision, modification, or addition to a franchise is offered generally to a licensee's franchisees in this State, the licensee shall notify the Commissioner of the proposed revision, modification, or addition to the franchise on file with the Commissioner and include with the notification:

(1) A copy of the form franchise which incorporates all of the proposed revisions, modifications, and additions;

(2) A separate statement which identifies all substantive revisions, modifications, and additions proposed.

1 ~~It shall be unlawful for a franchise or any addendum or supplement thereto to be~~
2 ~~offered to a motor vehicle dealer in this State after January 1, 1998, until an applicant or~~
3 ~~licensee has complied with all of the requirements of this section. The Commissioner is~~
4 ~~authorized and directed to investigate and prevent violations of this section, including~~
5 ~~inconsistencies of any manufacturer's franchise with the provisions of this Article.~~

6 (a) All franchise-related form agreements, as defined in this subdivision, offered
7 to a motor vehicle dealer in this State shall provide that all terms and conditions in the
8 agreement inconsistent with any of the laws or rules of this State are of no force and
9 effect. For purposes of this section, the term "franchise-related form agreements" means
10 any and all identical or substantially similar form agreements relating to franchise
11 offerings, letters of intent, franchise agreements, framework agreements, dealer
12 agreements, sales and service agreements, performance agreements, facilities
13 construction or improvement agreements, loan agreements, floor plan agreements, and
14 agreements related to the financing of vehicles sold or leased by the dealer.

15 (b) Notwithstanding the terms of any franchise or agreement, it shall be unlawful
16 for any manufacturer, factory branch, distributor, or distributor branch, or any other
17 person, corporation, or other entity that is owned, operated, or controlled by such
18 manufacturer, factory branch, distributor, or distributor branch, to offer to a dealer,
19 revise, modify, or replace a franchise-related form agreement, as defined above in this
20 section, which agreement, modification, or replacement may adversely affect or alter the
21 rights, obligations, or liability of a motor vehicle dealer or may impair the sales, service
22 obligations, investment, or profitability of any motor vehicle dealer located in this State,
23 unless:

24 (1) The manufacturer, factory branch, distributor, or distributor branch
25 provides prior written notice by registered or certified mail to each
26 affected dealer, the Commissioner, and the North Carolina Automobile
27 Dealers Association, Inc., of the modification or replacement in the
28 form and within the time frame set forth within this subsection and in
29 subsection (d) of this section; and

30 (2) If a protest is filed under this section, the Commissioner approves the
31 modification or replacement.

32 (c) The notice required by subdivision (b)(1) of this section shall:

33 (1) Be given not later than the 60th day before the effective date of the
34 modification or replacement;

35 (2) Contain on its first page a conspicuous statement that reads: 'NOTICE
36 TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST
37 WITH THE COMMISSIONER OF THE NORTH CAROLINA
38 DIVISION OF MOTOR VEHICLES, AND HAVE A HEARING IN
39 WHICH YOU MAY PROTEST THE PROPOSED INITIAL
40 OFFERING, MODIFICATION, OR REPLACEMENT OF CERTAIN
41 FRANCHISE-RELATED FORM AGREEMENTS UNDER THE
42 TERMS OF THE MOTOR VEHICLE DEALERS AND
43 MANUFACTURERS LICENSING LAW, IF YOU OPPOSE THIS
44 ACTION'; and

(3) Contain a separate letter or statement which identifies all substantive modifications or revisions and the reasons for each such modification or revision.

(d) A franchised dealer may file a protest with the Commissioner of the offering, modification, or replacement pursuant to this section not later than the latter of:

(1) The 60th day after the date of the receipt of the notice; or

(2) The time specified in the notice.

(e) After a protest is filed, the Commissioner shall determine whether the manufacturer, factory branch, distributor, or distributor branch has established by a preponderance of the evidence that there is good cause for the proposed offering, modification, or replacement. The prior franchise-related form agreement, if any, continues in effect until the Commissioner resolves the protest.

(f) The Commissioner is authorized and directed to investigate and prevent violations of this section, including inconsistencies of any franchise-related form agreement with the provisions of this Article.

(g) Nothing contained in this section shall in any way limit a dealer's rights under any other provision of this Article or other applicable law."

SECTION 2. G.S. 20-305(5) reads as rewritten:

"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:

...
(5) To enter into a franchise establishing an additional new motor vehicle dealer or relocating an existing new motor vehicle dealer into a relevant market area where the same line make is then represented without first notifying in writing the Commissioner and each new motor vehicle dealer in that line make in the relevant market area of the intention to establish an additional dealer or to relocate an existing dealer within or into that market area. Within 30 days of receiving such notice or within 30 days after the end of any appeal procedure provided by the manufacturer, any new motor vehicle dealer may file with the Commissioner a protest to the establishing or relocating of the new motor vehicle dealer. When a protest is filed, the Commissioner shall promptly inform the manufacturer that a timely protest has been filed, and that the manufacturer shall not establish or relocate the proposed new motor vehicle dealer until the Commissioner has held a hearing and has determined that there is good cause for permitting the addition or relocation of such new motor vehicle dealer.

a. This section does not apply:

- 1 1. To the relocation of an existing new motor vehicle dealer
2 within that dealer's relevant market area, provided that
3 the relocation not be at a site within 10 miles of a
4 licensed new motor vehicle dealer for the same line
5 make of motor vehicle. If this sub-subdivision is
6 applicable, only dealers trading in the same line-make of
7 vehicle that are located within the 10-mile radius shall be
8 entitled to notice from the manufacturer and have the
9 protest rights afforded under this section; or
- 10 2. If the proposed additional new motor vehicle dealer is to
11 be established at or within two miles of a location at
12 which a former licensed new motor vehicle dealer for the
13 same line make of new motor vehicle had ceased
14 operating within the previous two years;
- 15 3. To the relocation of an existing new motor vehicle dealer
16 within two miles of the existing site of the new motor
17 vehicle dealership if the franchise has been operating on
18 a regular basis from the existing site for a minimum of
19 three years immediately preceding the relocation;
- 20 4. To the relocation of an existing new motor vehicle dealer
21 if the proposed site of the relocated new motor vehicle
22 dealership is further away from all other new motor
23 vehicle dealers of the same line make in that relevant
24 market ~~area~~.or
- 25 5. To the relocation of an existing new motor vehicle dealer
26 to a location within 4.5 miles of the existing site of the
27 new motor vehicle dealership if the line make has been
28 operating on a regular basis from the existing site for a
29 minimum of 50 years immediately preceding the
30 relocation, provided that the relocation site not be
31 located within four miles of another licensed new motor
32 vehicle dealer for the same line make of motor vehicle."

SECTION 3. G.S. 20-305(30) reads as rewritten:

"§ 20-305. **Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.**

It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:

- ...
(30) To vary the price charged to any of its franchised new motor vehicle dealers located in this State for new motor vehicles based on the dealer's purchase of new facilities, supplies, tools, equipment, or other

1 merchandise from the manufacturer, the dealer's relocation,
2 remodeling, repair, or renovation of existing dealerships or
3 construction of a new facility, the dealer's participation in training
4 programs sponsored, endorsed, or recommended by the manufacturer,
5 whether or not the dealer is dualed with one or more other line makes
6 of new motor vehicles, or the dealer's sales penetration. Except as
7 provided in this subdivision, it shall be unlawful for any manufacturer,
8 factory branch, distributor, or distributor branch, or any field
9 representative, officer, agent, or any representative whatsoever of any
10 of them to vary the price charged to any of its franchised new motor
11 vehicle dealers located in this State for new motor vehicles based on
12 the dealer's sales volume, the dealer's level of sales or customer service
13 satisfaction, the dealer's purchase of advertising materials, signage,
14 nondiagnostic computer hardware or software, communications
15 devices, or furnishings, or the dealer's participation in used motor
16 vehicle inspection or certification programs sponsored or endorsed by
17 the manufacturer.

18 The price of the vehicle, for purposes of this subdivision shall
19 include the manufacturer's use of rebates, credits, or other
20 consideration which has the effect of causing a variance in the price of
21 new motor vehicles offered to its franchised dealers located in the
22 State.

23 Notwithstanding the foregoing, nothing in this subdivision shall be
24 deemed to preclude a manufacturer from establishing sales contests or
25 promotions which provide or award dealers or consumers rebates or
26 incentives; provided, however, that the manufacturer complies with all
27 of the following conditions:

28 a. With respect to manufacturer to consumer rebates and
29 incentives, the manufacturer's criteria for determining eligibility
30 shall:

- 31 1. Permit all of the manufacturer's franchised new motor
32 vehicle dealers in this State to offer the rebate or
33 incentive; and
- 34 2. Be uniformly applied and administered to all eligible
35 consumers.

36 b. With respect to manufacturer to dealer rebates and incentives,
37 the rebate or incentive program shall:

- 38 1. Be based solely on the dealer's actual or reasonably
39 anticipated sales volume or on a uniform per vehicle sold
40 or leased basis;
- 41 2. Be uniformly available, applied, and administered to all
42 of the manufacturer's franchised new motor vehicle
43 dealers in this State; and

- 1 3. Provide that any of the manufacturer's franchised new
2 motor vehicle dealers in this State may, upon written
3 request, obtain the method or formula used by the
4 manufacturer in establishing the sales volumes for
5 receiving the rebates or incentives and the specific
6 calculations for determining the required sales volumes
7 of the inquiring dealer and any of the manufacturer's
8 other franchised new motor vehicle dealers located
9 within 75 miles of the inquiring dealer.

10 Nothing contained in this subdivision shall prohibit a manufacturer
11 from providing assistance or encouragement to a franchised dealer to
12 remodel, renovate, recondition, or relocate the dealer's existing
13 facilities, provided that this assistance, encouragement, or rewards are
14 not determined on a per vehicle basis.

15 It is unlawful for any manufacturer to charge or include the cost of
16 any program or policy prohibited under this subdivision in the price of
17 new motor vehicles that the manufacturer sells to its franchised dealers
18 or purchasers located in this State.

19 In the event that as of October 1, 1999, a manufacturer was
20 operating a program that varied the price charged to its franchised
21 dealers in this State in a manner that would violate this subdivision, or
22 had in effect a documented policy that had been conveyed to its
23 franchised dealers in this State and that varied the price charged to its
24 franchised dealers in this State in a manner that would violate this
25 subdivision, it shall be lawful for that program or policy, including
26 amendments to that program or policy that are consistent with the
27 purpose and provisions of the existing program or policy, or a program
28 or policy similar thereto implemented after October 1, 1999, to
29 continue in effect as to the manufacturer's franchised dealers located in
30 this State until June 30, ~~2006~~2010.

31 In the event that as of June 30, 2001, a manufacturer was operating
32 a program that varied the price charged to its franchised dealers in this
33 State in a manner that would violate this subdivision, or had in effect a
34 documented policy that had been conveyed to its franchised dealers in
35 this State and that varied the price charged to its franchised dealers in
36 this State in a manner that would violate this subdivision, and the
37 program or policy was implemented in this State subsequent to
38 October 1, 1999, and prior to June 30, 2001, and provided that the
39 program or policy is in compliance with this subdivision as it existed
40 as of June 30, 2001, it shall be lawful for that program or policy,
41 including amendments to that program or policy that comply with this
42 subdivision as it existed as of June 30, 2001, to continue in effect as to
43 the manufacturer's franchised dealers located in this State until June
44 30, ~~2006~~2010.

1 Any manufacturer shall be required to pay or otherwise compensate
2 any franchise dealer who has earned the right to receive payment or
3 other compensation under a program in accordance with the
4 manufacturer's program or policy.

5 The provisions of this subdivision shall not be applicable to
6 multiple or repeated sales of new motor vehicles made by a new motor
7 vehicle dealer to a single purchaser under a bona fide fleet sales policy
8 of a manufacturer, factory branch, distributor, or distributor branch."

9 **SECTION 4.** G.S. 20-305 is amended by adding a new subdivision to read:

10 **"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to**
11 **cancel franchise; preventing transfer of ownership; granting additional**
12 **franchises; terminating franchises without good cause; preventing family**
13 **succession.**

14 It shall be unlawful for any manufacturer, factory branch, distributor, or distributor
15 branch, or any field representative, officer, agent, or any representative whatsoever of
16 any of them:

17 ...

18 "(41) Notwithstanding the terms, provisions, or conditions of any agreement
19 or franchise, to require any of its franchised dealers located in this
20 State to agree to any terms, conditions, or requirements that are
21 unreasonable or onerous in order for any such dealer to floor plan any
22 of the dealer's inventory, finance the sale or lease of any motor
23 vehicles purchased or leased by any of the dealer's customers, finance
24 the acquisition, construction, or renovation of any of the dealer's
25 property or facilities, or to be able to participate in, or otherwise,
26 directly or indirectly, obtain the benefits of any incentive program
27 offered by or through any financial source that is, directly or indirectly,
28 owned, operated, or controlled by such manufacturer, factory branch,
29 distributor, or distributor branch ("captive finance source"). Such
30 unreasonable or onerous terms, conditions, or requirements include,
31 but are not limited to, those which provide that:

32 a. The dealer grant such captive finance source a power of
33 attorney to do anything on behalf of the dealer other than sign
34 the dealer's name on any check, draft, or other instrument
35 received in payment or proceeds under any contract for the sale
36 or lease of a motor vehicle that is made payable to the dealer
37 but which is properly payable to the captive finance source;

38 b. The dealer warrant or guaranty the veracity, accuracy, or
39 sufficiency of any representation made or information provided
40 by a customer of the dealer in the course of applying for credit,
41 including, but not limited to, any representations made about
42 the actual identity of the person or persons seeking credit;

43 c. The dealer indemnify or hold harmless the captive finance
44 source for settlements, judgments, damages, litigation expenses,

1 or other costs or expenses incurred by such captive finance
2 source other than those settlements, judgments, damages,
3 litigation expenses, or other costs or expenses incurred which
4 have either:

5 1. Been agreed to by the dealer in writing subsequent to the
6 making of demand, filing of a claim, or commencement
7 of an administrative or judicial proceeding by or on
8 behalf of one or more purchasers or lessees of a motor
9 vehicle; or

10 2. Arisen from a claim, demand, or commencement of an
11 administrative or judicial proceeding by or on behalf of
12 one or more purchasers or lessees of a motor vehicle
13 against the captive finance source that: (i) is directly
14 based upon or is alleged to be directly based upon the
15 conduct of the dealer; and (ii) in which the conduct of
16 the dealer forming the basis of said claim, demand, or
17 administrative or judicial proceeding violates the specific
18 terms of the agreement between the dealer and the
19 captive finance source.

20 d. The dealer repurchase, pay off, or guaranty any contract for the
21 sale or lease of a motor vehicle unless such repurchase or
22 guaranty by the dealer has either been:

23 1. Agreed to by the dealer in writing subsequent to the
24 making of demand, filing of a claim, or commencement
25 of an administrative or judicial proceeding by or on
26 behalf of one or more purchasers or lessees of a motor
27 vehicle; or

28 2. Judicially or administratively determined (i) to arise
29 from a successful claim against the captive finance
30 source, (ii) that arose as a direct result of the conduct of
31 the dealer, and (iii) that such conduct violates the
32 specific terms of the agreement between the dealer and
33 the captive finance source, or gives rise to the dealer's
34 indemnification obligations under its agreement with the
35 captive finance source.

36 e. The dealer waives any defenses that may be available to it
37 under its agreements with the captive finance source or under
38 any applicable laws;

39 f. The dealer settles or contributes any of its own funds or
40 financial resources toward the settlement of any multiparty or
41 class action litigation without obtaining the dealer's voluntary
42 and written consent subsequent to the filing of such litigation;

43 g. The dealer contributes to any reserve or contingency account
44 established or maintained by the captive finance source in any

1 amount or on any basis other than the reasonable expected cost
2 of future finance reserve chargebacks to the dealer's account; or
3 h. The dealer be required to repossess or otherwise gain
4 possession of a motor vehicle at the request of or on behalf of
5 the captive finance source.

6 Any clause or provision in any franchise or agreement between a
7 dealer and a manufacturer, factory branch, distributor, or distributor
8 branch, or between a dealer and any captive finance source, that is in
9 violation of or that is inconsistent with any of the provisions of this
10 subdivision shall be voidable at anytime at the election of the dealer."

11 **SECTION 5.** Chapter 20 of the General Statutes is amended by adding a new
12 section to read:

13 **"§ 20-305.7. Unlawful equipment leases, contracts for computer services, and**
14 **access to dealership information.**

15 (a) It shall be unlawful for any person, corporation, or other entity to enter into a
16 contract or agreement with a motor vehicle dealer located in this State that provides for
17 or relates to the lease of computer-related equipment or computer-related services which
18 contains any terms or conditions that are unreasonable or onerous to the dealer. For
19 purposes of this subdivision, the term "computer-related equipment" is defined as
20 computers, servers, network and digital communications equipment, routers, switches,
21 terminal servers, printers, software, or other computer-related programs, equipment,
22 forms, or supplies. For purposes of this section, the term "computer-related services" is
23 defined as repair, maintenance, or update services performed on computer-related
24 equipment. Such unreasonable or onerous terms or conditions include, but are not
25 limited to, the following:

26 (1) Terms or conditions that prohibit a dealer from terminating the
27 contract or agreement within five years from the initial commencement
28 date of the agreement or that require the dealer to pay an unreasonable
29 amount of consideration in order to terminate the agreement within
30 five years from the initial commencement date of the agreement.

31 (2) Terms or conditions that extend the term of the contract or agreement
32 in excess of three years beyond the initial term of the agreement, or
33 that require the dealer to pay an unreasonable amount of consideration
34 in order to terminate the agreement within three years beyond the
35 initial term of the agreement.

36 (3) Terms or conditions that allow a manufacturer, factory branch,
37 distributor, or distributor branch, or any third party acting on their
38 behalf to access or obtain data from, or write data to, a dealer's
39 computer system or network that does not enable the dealer to:

40 a. Maintain the security, integrity, and confidentiality of the
41 customer and dealership information collected or generated by
42 the dealer;

43 b. Monitor the specific data accessed from or written to the
44 dealer's computer system or network by the manufacturer,

1 factory branch, distributor, or distributor branch, or any third
2 party acting on their behalf; and

3 c. Comply with any applicable state and federal laws and any
4 rules or regulations promulgated thereunder.

5 Any clause or provision in any contract or agreement between a dealer
6 and any person, corporation, or other entity, that is in violation of or
7 that is inconsistent with any of the provisions of this section shall be
8 voidable at any time at the election of the dealer.

9 (b) Notwithstanding the terms of any franchise or agreement, it shall be unlawful
10 for any manufacturer, factory branch, distributor, or distributor branch to access or
11 obtain data from or write data to a dealer's computer system or network, or require or
12 coerce a dealer to utilize any computer-related equipment, computer-related services,
13 network design, communication system, third-party provider, third-party vendor, or
14 other means of accessing, exchanging, or transferring data relating to the dealer or the
15 dealer's customers or transferring data from any manufacturer, factory branch,
16 distributor, or distributor branch to a dealer's computer system or network, that does not
17 enable the dealer to:

18 (1) Maintain the security, integrity, and confidentiality of the customer
19 and dealership information collected or generated by the dealer;

20 (2) Monitor the specific data accessed from or written to the dealer's
21 computer system or network by the manufacturer, factory branch,
22 distributor, or distributor branch; and

23 (3) Comply with any applicable state and federal laws and any rules or
24 regulations promulgated thereunder.

25 (c) It shall be unlawful for any vendor of computer-related equipment or
26 computer-related services or any third party acting on behalf of any vendor of
27 computer-related equipment, vendor of computer-related services, manufacturer, factory
28 branch, distributor, or distributor branch to either:

29 (1) Provide access to any customer or dealership information collected,
30 received, or generated by the dealer without first obtaining the dealer's
31 explicit written consent in an agreement between the dealer and all
32 entities accessing or handling this customer or dealership information.
33 Such consent must be in written form and contain the original
34 signature of the dealer or the dealer's authorized representative and
35 reference by name and provide authorization for the specific vendor of
36 computer-related equipment, vendor of computer-related services, or
37 third party to whom such consent is given and describe the scope of
38 the consent given. No vendor of computer-related equipment,
39 computer-related services, or any third party acting on behalf of any
40 vendor of computer-related equipment, vendor of computer-related
41 services, manufacturer, factory branch, distributor, or distributor
42 branch shall have any right to obtain, utilize, copy, view, or modify
43 information stored in or traversing computer-related equipment owned

1 or utilized by a dealer without first obtaining this explicit written
2 consent.

3 (2) Notwithstanding the terms of any contract, agreement, or consent,
4 access or obtain data from or write data to a dealer's computer system
5 or network that does not enable the dealer to:

6 a. Maintain the security, integrity, and confidentiality of the
7 customer and dealership information collected or generated by
8 the dealer;

9 b. Monitor the specific data accessed from or written to the
10 dealer's computer system or network by the vendor of
11 computer-related equipment or computer-related services, or the
12 manufacturer, factory branch, distributor, or distributor branch;
13 and

14 c. Comply with any applicable state and federal laws and any
15 rules or regulations promulgated thereunder."

16 **SECTION 6.** G.S. 20-308.2 is amended by adding a new subsection to read:

17 "(e) The provisions of this Article shall apply to all written or oral agreements
18 between any manufacturer, factory branch, distributor, or distributor branch and any
19 other person, corporation, or other entity that is owned, operated, or controlled by such
20 manufacturer, factory branch, distributor, or distributor branch, on the one part, and any
21 franchised motor vehicle dealer located in this State, on the other part, including, but not
22 limited to: franchise offerings, letters of intent, franchise agreements, sales and service
23 agreements, performance agreements, side agreements, sales of goods, services, or
24 advertising, leases or mortgages of real or personal property, promises to pay, security
25 interests, pledges, insurance contracts, advertising contracts, construction or installation
26 contracts, servicing contracts, and all other such agreements that contemplate or require
27 commercial or business activities in this State in which a manufacturer, factory branch,
28 distributor, or distributor branch has any direct or indirect interest."

29 **SECTION 7.** This act is effective when it becomes law.