

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009**

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HOUSE BILL 1435*

Short Title: Clarify Motor Vehicle Franchise Laws. (Public)

Sponsors: Representatives Cole, Sutton, Owens (Primary Sponsors); Cotham, E. Floyd, Goforth, Hill, Lucas, McCormick, McLawhorn, Mills, Randleman, and Wray.

Referred to: Transportation, if favorable, Judiciary III.

April 13, 2009

A BILL TO BE ENTITLED
AN ACT TO CLARIFY MOTOR VEHICLE DEALERS AND MANUFACTURERS
LICENSING LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-305(4) 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:

...

(4) Notwithstanding the terms of any franchise agreement, 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, the relocation or addition of another franchise to the dealership facility, or the relocation of the dealership to another site within the dealership's relevant market area, if the Commissioner has determined, if requested in writing by the dealer within 30 days after receipt of an objection to the proposed transfer, sale, assignment, relocation, or change, and after a hearing on the matter, that the failure to permit or honor the transfer, sale, assignment, relocation, or change is unreasonable under the circumstances. No franchise may be transferred, sold, assigned, relocated, or the executive management or principal operators changed, unless the franchisor has been given at least 30 days' prior written notice as to the proposed transferee's name and address, financial ability, and qualifications of the proposed transferee, a copy of the purchase agreement between the dealership and the proposed transferee, the identity and qualifications of the persons proposed to be involved in executive management or as principal operators, and the location and site plans of any proposed relocation. The franchisor shall send the dealership and the proposed transferee notice of objection, by registered or certified mail, return receipt requested, to the proposed transfer, sale, assignment, relocation, or change within 30 days after receipt of notice from the dealer, as provided in this section. The notice of objection shall state in detail all factual and legal bases for the objection on the part of the franchisor to the proposed transfer,



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1 sale, assignment, relocation, or change that is specifically referenced in this
2 subdivision. An objection to a proposed transfer, sale, assignment,
3 relocation, or change in the executive management or principal operator of
4 the dealership may only be premised upon the factual and legal bases
5 specifically referenced in this subdivision. A manufacturer's notice of
6 objection which is based upon factual or legal issues that are not specifically
7 referenced in this subdivision as being issues upon which the Commissioner
8 shall base his determination shall not be effective to preserve the franchisor's
9 right to object to the proposed transfer sale, assignment, relocation, or
10 change, provided the dealership or proposed transferee has submitted written
11 notice, as required above, as to the proposed transferee's name and address,
12 financial ability, and qualifications of the proposed transferee, a copy of the
13 purchase agreement between the dealership and the proposed transferee, the
14 identity and qualifications of the persons proposed to be involved in the
15 executive management or as principal operators, and the location and site
16 plans of any proposed relocation. Failure by the franchisor to send notice of
17 objection within 30 days shall constitute waiver by the franchisor of any
18 right to object to the proposed transfer, sale, assignment, relocation, or
19 change. If the franchisor requires additional information to complete its
20 review, the franchisor shall notify the dealership within 15 days after receipt
21 of the proposed transferee's name and address, financial ability, and
22 qualifications, a copy of the purchase agreement between the dealership and
23 the proposed transferee, the identity and qualifications of the persons
24 proposed to be involved in executive management or as principal operators,
25 and the location and site plans of any proposed relocation. If the franchisor
26 fails to request additional information from the dealer or proposed transferee
27 within 15 days of receipt of this initial information, the 30-day time period
28 within which the franchisor may provide notice of objection shall be deemed
29 to run from the initial receipt date. Otherwise, the 30-day time period within
30 which the franchisor may provide notice of objection shall run from the date
31 the franchisor has received the supplemental information requested from the
32 dealer or proposed transferee; provided, however, that failure by the
33 franchisor to send notice of objection within 60 days of the franchisor's
34 receipt of the initial information from the dealer shall constitute waiver by
35 the franchisor of any right to object to the proposed transfer, sale,
36 assignment, relocation, or change. With respect to a proposed transfer of
37 ownership, sale, or assignment, the sole issue for determination by the
38 Commissioner and the sole issue upon which the Commissioner shall hear or
39 consider evidence is whether, by reason of lack of good moral character,
40 lack of general business experience, or lack of financial ability, the proposed
41 transferee is unfit to own the dealership. For purposes of this subdivision, the
42 refusal by the manufacturer to accept a proposed transferee who is of good
43 moral character and who otherwise meets the written, reasonable, and
44 uniformly applied business experience and financial requirements, if any,
45 required by the manufacturer of owners of its franchised automobile
46 dealerships is presumed to demonstrate the manufacturer's failure to prove
47 that the proposed transferee is unfit to own the dealership. With respect to a
48 proposed change in the executive management or principal operator of the
49 dealership, the sole issue for determination by the Commissioner and the
50 sole issue on which the Commissioner shall hear or consider evidence shall
51 be whether, by reason of lack of training, lack of prior experience, poor past

1 performance, or poor character, the proposed candidate for a position within
2 the executive management or as principal operator of the dealership is unfit
3 for the position. For purposes of this subdivision, the refusal by the
4 manufacturer to accept a proposed candidate for executive management or as
5 principal operator who is of good moral character and who otherwise meets
6 the written, reasonable, and uniformly applied standards or qualifications, if
7 any, of the manufacturer relating to the business experience and prior
8 performance of executive management required by the manufacturers of its
9 dealers is presumed to demonstrate the manufacturer's failure to prove the
10 proposed candidate for executive management or as principal operator is
11 unfit to serve the capacity. With respect to a proposed relocation or other
12 proposed change, the issue for determination by the Commissioner is
13 whether the proposed relocation or other change is unreasonable under the
14 circumstances. For purposes of this subdivision, the refusal by the
15 manufacturer to agree to a proposed relocation which meets the written,
16 reasonable, and uniformly applied standards or criteria, if any, of the
17 manufacturer relating to dealer relocations is presumed to demonstrate that
18 the manufacturer's failure to prove the proposed relocation is unreasonable
19 under the circumstances. The manufacturer shall have the burden of proof
20 before the Commissioner under this subdivision. It is unlawful for a
21 manufacturer to, in any way, condition its approval of a proposed transfer,
22 sale, assignment, change in the dealer's executive management, principal
23 operator, or appointment of a designated successor, on the existing or
24 proposed dealer's willingness to construct a new facility, renovate the
25 existing facility, acquire or refrain from acquiring one or more line-makes of
26 vehicles, separate or divest one or more line-makes of vehicle, or establish or
27 maintain exclusive facilities, personnel, or display space. It is unlawful for a
28 manufacturer to, in any way, condition its approval of a proposed relocation
29 on the existing or proposed dealer's willingness to acquire or refrain from
30 acquiring one or more line-makes of vehicles, separate or divest one or more
31 line-makes of vehicle, or establish or maintain exclusive facilities, personnel,
32 or display space. The opinion or determination of a franchisor that the
33 continued existence of one of its franchised dealers situated in this State is
34 not viable, or that the dealer holds or fails to hold licensing rights for the sale
35 of other line-makes of vehicles in a manner consistent with the franchisor's
36 existing or future distribution or marketing plans, shall not constitute a
37 lawful basis for the franchisor to fail or refuse to approve a dealer's proposed
38 relocation: provided, however, that nothing contained in this subdivision
39 shall be deemed to prevent or prohibit a franchisor from failing to approve a
40 dealer's proposed relocation on grounds that the specific site or facility
41 proposed by the dealer is otherwise unreasonable under the circumstances.
42 Approval of a relocation pursuant to this subdivision shall not in itself
43 constitute the franchisor's representation or assurance of the dealer's viability
44 at that location.

45"

46 **SECTION 2.** G.S. 20-305(28) reads as rewritten:

47 **"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel**
48 **franchise; preventing transfer of ownership; granting additional franchises;**
49 **terminating franchises without good cause; preventing family succession.**

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

1 ...
 2 (28) To require, coerce, or attempt to coerce any new motor vehicle dealer to
 3 purchase or order any new motor vehicle as a precondition to purchasing,
 4 ordering, or receiving any other new motor vehicle or vehicles. Nothing
 5 herein shall prevent a manufacturer from requiring that a new motor vehicle
 6 dealer fairly represent and inventory the full line current model year new
 7 motor vehicles which are covered by the franchise ~~agreement~~agreement,
 8 and which the dealer could reasonably be expected to sell in the dealer's
 9 market, provided that such inventory representation requirements are not
 10 unreasonable under the circumstances.

11"

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

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

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

18 ...

19 (30) To vary the price charged to any of its franchised new motor vehicle dealers
 20 located in this State for new motor vehicles based on the dealer's purchase of
 21 new facilities, supplies, tools, equipment, or other merchandise from the
 22 manufacturer, the dealer's relocation, remodeling, repair, or renovation of
 23 existing dealerships or construction of a new facility, the dealer's
 24 participation in training programs sponsored, endorsed, or recommended by
 25 the manufacturer, whether or not the dealer is dualed with one or more other
 26 line makes of new motor vehicles, or the dealer's sales penetration. Except as
 27 provided in this subdivision, it shall be unlawful for any manufacturer,
 28 factory branch, distributor, or distributor branch, or any field representative,
 29 officer, agent, or any representative whatsoever of any of them to vary the
 30 price charged to any of its franchised new motor vehicle dealers located in
 31 this State for new motor vehicles based on the dealer's sales volume, the
 32 dealer's level of sales or customer service satisfaction, the dealer's purchase
 33 of advertising materials, signage, nondiagnostic computer hardware or
 34 software, communications devices, or furnishings, or the dealer's
 35 participation in used motor vehicle inspection or certification programs
 36 sponsored or endorsed by the manufacturer.

37 The price of the vehicle, for purposes of this subdivision shall include
 38 the manufacturer's use of rebates, credits, or other consideration that has the
 39 effect of causing a variance in the price of new motor vehicles offered to its
 40 franchised dealers located in the State.

41 Notwithstanding the foregoing, nothing in this subdivision shall be
 42 deemed to preclude a manufacturer from establishing sales contests or
 43 promotions that provide or award dealers or consumers rebates or incentives;
 44 provided, however, that the manufacturer complies with all of the following
 45 conditions:

- 46 a. With respect to manufacturer to consumer rebates and incentives, the
 47 manufacturer's criteria for determining eligibility shall:
 - 48 1. Permit all of the manufacturer's franchised new motor vehicle
 49 dealers in this State to offer the rebate or incentive; and
 - 50 2. Be uniformly applied and administered to all eligible
 51 consumers.

- 1 b. With respect to manufacturer to dealer rebates and incentives, the
2 rebate or incentive program shall:
- 3 1. Be based solely on the dealer's actual or reasonably
4 anticipated sales volume or on a uniform per vehicle sold or
5 leased basis;
 - 6 2. Be uniformly available, applied, and administered to all of the
7 manufacturer's franchised new motor vehicle dealers in this
8 State; and
 - 9 3. Provide that any of the manufacturer's franchised new motor
10 vehicle dealers in this State may, upon written request, obtain
11 the method or formula used by the manufacturer in
12 establishing the sales volumes for receiving the rebates or
13 incentives and the specific calculations for determining the
14 required sales volumes of the inquiring dealer and any of the
15 manufacturer's other franchised new motor vehicle dealers
16 located within 75 miles of the inquiring dealer.

17 Nothing contained in this subdivision shall prohibit a manufacturer from
18 providing assistance or encouragement to a franchised dealer to remodel,
19 renovate, recondition, or relocate the dealer's existing facilities, provided that
20 this assistance, encouragement, or rewards are not determined on a per
21 vehicle basis.

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

26 In the event that as of October 1, 1999, a manufacturer was operating a
27 program that varied the price charged to its franchised dealers in this State in
28 a manner that would violate this subdivision, or had in effect a documented
29 policy that had been conveyed to its franchised dealers in this State and that
30 varied the price charged to its franchised dealers in this State in a manner
31 that would violate this subdivision, it shall be lawful for that program or
32 policy, including amendments to that program or policy that are consistent
33 with the purpose and provisions of the existing program or policy, or a
34 program or policy similar thereto implemented after October 1, 1999, to
35 continue in effect as to the manufacturer's franchised dealers located in this
36 State until June 30, ~~2010-2014.~~

37 In the event that as of June 30, 2001, a manufacturer was operating a
38 program that varied the price charged to its franchised dealers in this State in
39 a manner that would violate this subdivision, or had in effect a documented
40 policy that had been conveyed to its franchised dealers in this State and that
41 varied the price charged to its franchised dealers in this State in a manner
42 that would violate this subdivision, and the program or policy was
43 implemented in this State subsequent to October 1, 1999, and prior to June
44 30, 2001, and provided that the program or policy is in compliance with this
45 subdivision as it existed as of June 30, 2001, it shall be lawful for that
46 program or policy, including amendments to that program or policy that
47 comply with this subdivision as it existed as of June 30, 2001, to continue in
48 effect as to the manufacturer's franchised dealers located in this State until
49 June 30, ~~2010-2014.~~

50 Any manufacturer shall be required to pay or otherwise compensate any
51 franchise dealer who has earned the right to receive payment or other

1 compensation under a program in accordance with the manufacturer's
2 program or policy.

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

7"

8 **SECTION 4.** G.S. 20-305.1 is amended by adding a new subsection to read:

9 "(b3) Notwithstanding the terms of any franchise or other agreement, or the terms of any
10 program, policy, or procedure of any manufacturer, it shall be unlawful for a manufacturer to
11 take or threaten to take any adverse action against a dealer located in this State, or to otherwise
12 discriminate against any dealer located in this State, on the basis that the dealer sold or leased a
13 motor vehicle to a customer who either exported the vehicle to a foreign country or who resold
14 the vehicle to a third party, unless the dealer possessed actual knowledge that the customer
15 intended to export or resell the motor vehicle prior to the customer's purchase of the vehicle
16 from the dealer. The conduct prohibited under this subsection includes, but is not limited to, a
17 manufacturer's actual or threatened: (i) failure or refusal to allocate, sell, or deliver motor
18 vehicles to the dealer; or (ii) discrimination against any dealer in the allocation of vehicles; or
19 (iii) charging back or withholding payments or other compensation or consideration for which a
20 dealer is otherwise eligible for warranty reimbursement or under a sales promotion, incentive
21 program, or contest; or (iv) disqualification of a dealer from participating in or discrimination
22 against any dealer relating to any sales promotion, incentive program, or contest; or termination
23 of a franchise. In any proceeding brought pursuant to this subsection, there shall be a
24 conclusive presumption that the dealer, prior to the customer's purchase of the vehicle, had no
25 actual knowledge the customer intended to export or resell the motor vehicle, if (i) following
26 the sale, the vehicle is titled or registered in any state or territory within the United States in the
27 name of a customer who was physically present at the dealership at or prior to the time of sale
28 and (ii) the dealer did not know, prior to the consummation of the sale, that the vehicle would
29 be shipped to a foreign country. In any proceeding brought pursuant to this subsection, there
30 shall be a rebuttable presumption that the dealer, prior to the customer's purchase of the vehicle,
31 had no actual knowledge the customer intended to ship the vehicle to a foreign country, if the
32 vehicle is titled in any state or territory within the United States."

33 **SECTION 5.** G.S. 20-305.1 is amended by adding a new subsection to read:

34 "(f1) The provisions of subsections (a), (b), (b1), (b2), and (c) of this section applicable to
35 a motor vehicle manufacturer shall also apply to a component parts manufacturer. For
36 purposes of this section, a component parts manufacturer means a person, resident, or
37 nonresident of this State, who manufactures or assembles new motor vehicle "component parts"
38 and directly warrants the component parts to the consumer. For purposes of this section,
39 component parts means an engine, power train, rear axle, or other part of a motor vehicle that is
40 not warranted by the final manufacturer of the motor vehicle."

41 **SECTION 6.** This act is effective when it becomes law.

42 **SECTION 7.** If any provision of this act or its application is held invalid, the
43 invalidity does not affect other provisions or applications of this act that can be given effect
44 without the invalid provisions or application, and to this end the provisions of this act are
45 severable.