

1 SENATE BILL 140

2 **54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019**

3 INTRODUCED BY

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10 AN ACT

11 RELATING TO TRADE PRACTICES AND REGULATIONS; PERMITTING  
12 MANUFACTURERS OF ALL-ELECTRIC MOTOR VEHICLES TO SELL ALL-  
13 ELECTRIC MOTOR VEHICLES AND PROVIDE WARRANTY AND OTHER  
14 SERVICES; DECLARING AN EMERGENCY.

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

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

19 "57-16-5. UNLAWFUL ACTS--MANUFACTURERS--DISTRIBUTORS--  
20 REPRESENTATIVES.--It is unlawful for a manufacturer,  
21 distributor or representative to:

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

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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 a dealer's order, to  
11 a 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 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 a franchise or selling agreement expire without the  
16 written consent of the motor vehicle dealer involved prior to  
17 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 the manufacturer's, distributor's or  
25 representative's business;

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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 devices, including  
6 sales promotion plans or programs that result in a lesser  
7 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 the dealer's own business for  
15 the purpose of repairing or replacing the same or a comparable  
16 part or accessory at a lower actual price than the actual price  
17 charged to any other motor vehicle dealer for similar parts or  
18 accessories for use in the dealer's own business; provided,  
19 however, in those cases where motor vehicle dealers have a  
20 franchise to operate and serve as wholesalers of parts and  
21 accessories to retail outlets or other dealers, whether or not  
22 the dealer is regularly designated as a wholesaler, nothing in  
23 this section prevents a manufacturer, distributor or  
24 representative from selling to the motor vehicle dealer who  
25 operates and serves as a wholesaler of parts and accessories

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

6 K. prevent or attempt to prevent by contract or  
7 otherwise a motor vehicle dealer from changing the capital  
8 structure of the dealer's dealership or the means by or through  
9 which the dealer finances the operation of the dealership, if  
10 the dealer at all times meets any reasonable capital standards  
11 agreed to between the dealer and the manufacturer, distributor  
12 or representative, and if the change by the dealer does not  
13 result in a change in the executive management control of the  
14 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. 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 a person from liability imposed by Chapter 57, Article  
22 16 NMSA 1978;

23 O. require 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 a new  
18 motor vehicle to a person, except a distributor, at a lower  
19 actual price therefor than the actual price offered and charged  
20 to a motor vehicle dealer for the same model vehicle similarly  
21 equipped or to utilize any device that results in a lower  
22 actual price;

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

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

5 S. offer a finance program, either directly or  
6 through an affiliate, based on the physical location of the  
7 selling dealer or the residence of the buyer. The provisions  
8 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) meet the manufacturer's capitalization  
23 requirements;

24 (2) meet the manufacturer's facilities  
25 requirements; and

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1 (3) not have committed fraudulent acts;

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

6 V. be licensed as a dealer or perform warranty or  
7 other service or own an interest, directly or indirectly, in a  
8 person licensed as a dealer or performing warranty or other  
9 service; provided that a manufacturer or distributor may own a  
10 person licensed as a dealer for a reasonable time in order to  
11 dispose of an interest acquired as a secured party or as part  
12 of a dealer development program. Notwithstanding the  
13 provisions of this subsection, a manufacturer may sell or  
14 perform or provide warranty, repair, retail financing or other  
15 services; provided that the manufacturer:

16 (1) does not have a franchise agreement with a  
17 dealer in the state;

18 (2) manufactures only motor vehicles that are  
19 powered solely by electricity;

20 (3) sells at retail only all-electric motor  
21 vehicles manufactured by the manufacturer;

22 (4) does not sell or service new or used all-  
23 electric motor vehicles at more than three locations within the  
24 state;

25 (5) does not hold a controlling interest in

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1 another manufacturer or a subsidiary, affiliate or entity owned  
2 or controlled by another manufacturer; and

3 (6) is not owned or controlled by another  
4 manufacturer or a subsidiary, affiliate or entity owned or  
5 controlled by another manufacturer;

6 W. fail to recognize and approve the transfer of a  
7 dealership to a person named as a successor, donee, beneficiary  
8 or devisee in a valid testamentary or trust instrument;  
9 provided that a manufacturer or distributor may impose  
10 standards or criteria used in a transfer;

11 X. impose capitalization requirements not necessary  
12 to assure that the dealer can meet its financial obligations;

13 Y. compel a dealer through a finance subsidiary of  
14 the manufacturer or distributor to agree to unreasonable  
15 operating requirements or directly or indirectly to terminate a  
16 dealer, except as allowed by Subsection F of this section,  
17 through the actions of a finance subsidiary of the manufacturer  
18 or distributor. This subsection shall not limit the right of a  
19 financing entity to engage in business practices in accordance  
20 with the usage of the trade in which it is engaged;

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

22 (1) construct a new dealership, require the  
23 relocation of an existing dealership or substantially change,  
24 alter or remodel a dealer's facility except as necessary to  
25 comply with health or safety laws or to comply with technology

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1 requirements necessary to sell or service vehicles; or

2 (2) construct a new dealership, require  
3 relocation of an existing dealership or substantially change,  
4 alter or remodel an existing dealership before the tenth  
5 anniversary of the date that the construction or change,  
6 alteration or remodel of the dealership at that location was  
7 completed if the construction was in substantial compliance  
8 with standards or plans provided by a manufacturer, distributor  
9 or representative;

10 AA. unreasonably withhold approval for a dealer to  
11 purchase substantially similar goods or services related to the  
12 construction, alteration, remodel or renovation of a dealership  
13 facility from vendors of the dealer's choice. This subsection  
14 shall not be construed to allow a dealer or vendor to infringe  
15 upon or impair a manufacturer's trademark rights or to erect or  
16 maintain a sign that does not conform to the manufacturer's  
17 reasonable fabrication specifications and trademark usage  
18 guidelines;

19 BB. use an unreasonable, arbitrary or unfair sales  
20 or other performance standard in determining a franchise motor  
21 vehicle dealer's compliance with a franchise agreement. The  
22 manufacturer has the burden of proving the reasonableness of  
23 its performance standards;

24 CC. fail to compensate a motor vehicle dealer for  
25 labor and parts required for a dealer to perform necessary

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1 repairs on an affected new or used motor vehicle pursuant to a  
2 recall, do not drive order or stop sale order, if the dealer  
3 holds a franchise of the same line-make as the subject vehicle;

4 DD. fail to compensate a motor vehicle dealer as  
5 prescribed by Chapter 57, Article 16 NMSA 1978 for a delay in  
6 delivering parts or equipment needed to perform recall-related  
7 repairs on an affected used motor vehicle in the dealer's  
8 inventory that is subject to a do not drive order or stop sale  
9 order, if the dealer holds a franchise of the same line-make as  
10 the vehicle;

11 EE. subject to the manufacturer's audit rights  
12 provided in Section 57-16-7 NMSA 1978, reduce compensation to a  
13 motor vehicle dealer, process a charge back to a dealer, reduce  
14 the amount of compensation that the manufacturer otherwise owes  
15 to an individual dealer under an incentive program or remove an  
16 individual dealer from an incentive program solely because the  
17 motor vehicle dealer submitted a claim or received compensation  
18 for a claim. This subsection does not prohibit a manufacturer  
19 from modifying or discontinuing an incentive program  
20 prospectively or from making ordinary business decisions; or

21 FF. use data, calculations or statistical  
22 determinations of the sales performance of a motor vehicle  
23 dealer to take adverse action against the motor vehicle dealer  
24 for any period of time during which the dealer has at least  
25 five percent of its total new and used motor vehicle inventory

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1 subject to a stop sale order or do not drive order; provided  
2 that the motor vehicle dealer's performance, as reflected in  
3 the data, calculations or statistical determinations, is  
4 adversely affected by the stop sale order or do not drive  
5 order."

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

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