

1 SENATE BILL 243

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

3 INTRODUCED BY

4 Gerald Ortiz y Pino and Bill Tallman

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10 AN ACT

11 RELATING TO MOTOR VEHICLES; ALLOWING MOTOR VEHICLE
12 MANUFACTURERS TO BE LICENSED AS MOTOR VEHICLE DEALERS UNDER
13 CERTAIN CONDITIONS.

14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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

18 "57-16-5. UNLAWFUL ACTS--MANUFACTURERS--DISTRIBUTORS--
19 REPRESENTATIVES.--It is unlawful for a manufacturer,
20 distributor or representative to:

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

25 B. coerce or attempt to coerce a dealer to order or

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1 accept delivery of a motor vehicle with special features,
2 appliances, accessories or equipment not included in the list
3 price of the motor vehicles as publicly advertised by the
4 manufacturer;

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

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

23 E. coerce or attempt to coerce a motor vehicle
24 dealer to enter into an agreement with the manufacturer,
25 distributor or representative or to do any other act

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

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

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

22 G. use false, deceptive or misleading advertising
23 in connection with the manufacturer's, distributor's or
24 representative's business;

25 H. offer to sell or to sell a motor vehicle to a

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

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

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

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

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

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

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

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

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

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

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

22 O. require a motor vehicle dealer to provide
23 installment financing with a specified financial institution;

24 P. establish an additional franchise, including any
25 franchise for a warranty or service facility outside of the

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

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

25 R. sell, lease or provide motorcycles, parts or

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1 accessories to a person not a dealer or distributor for the
2 line-make sold, leased or provided. The provisions of this
3 subsection do not apply to sales, leases or provisions of motor
4 vehicles, parts or accessories by a manufacturer, distributor
5 or representative to the United States government or its
6 agencies or the state or its political subdivisions;

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

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

24 (1) meet the manufacturer's capitalization
25 requirements;

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

3 (3) not have committed fraudulent acts;

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

8 V. be licensed as a dealer or perform warranty or
9 other service or own an interest, directly or indirectly, in a
10 person licensed as a dealer or performing warranty or other
11 service; provided that a manufacturer:

12 (1) or distributor may own a person licensed
13 as a dealer for a reasonable time in order to dispose of an
14 interest acquired as a secured party or as part of a dealer
15 development program; and

16 (2) may be licensed as a dealer and may
17 perform warranty and other service, directly or indirectly
18 through a wholly owned entity; provided that the manufacturer:

19 (a) does not have any independent
20 franchise dealers in this state; and

21 (b) sells and services only the line-
22 make of motor vehicles that it manufactures;

23 W. fail to recognize and approve the transfer of a
24 dealership to a person named as a successor, donee, beneficiary
25 or devisee in a valid testamentary or trust instrument;

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1 provided that a manufacturer or distributor may impose
2 standards or criteria used in a transfer;

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

5 Y. compel a dealer through a finance subsidiary of
6 the manufacturer or distributor to agree to unreasonable
7 operating requirements or directly or indirectly to terminate a
8 dealer, except as allowed by Subsection F of this section,
9 through the actions of a finance subsidiary of the manufacturer
10 or distributor. This subsection shall not limit the right of a
11 financing entity to engage in business practices in accordance
12 with the usage of the trade in which it is engaged;

13 Z. require a dealer or the dealer's successor to
14 [~~(1)~~] construct a new dealership, require the relocation of an
15 existing dealership or substantially change, alter or remodel:

16 (1) a dealer's facility except as necessary to
17 comply with health or safety laws or to comply with technology
18 requirements necessary to sell or service vehicles; or

19 (2) [~~construct a new dealership, require~~
20 ~~relocation of an existing dealership or substantially change,~~
21 ~~alter or remodel~~] an existing dealership before the tenth
22 anniversary of the date that the construction or change,
23 alteration or remodel of the dealership at that location was
24 completed if the construction was in substantial compliance
25 with standards or plans provided by a manufacturer, distributor

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1 or representative;

2 AA. unreasonably withhold approval for a dealer to
3 purchase substantially similar goods or services related to the
4 construction, alteration, remodel or renovation of a dealership
5 facility from vendors of the dealer's choice. This subsection
6 shall not be construed to allow a dealer or vendor to infringe
7 upon or impair a manufacturer's trademark rights or to erect or
8 maintain a sign that does not conform to the manufacturer's
9 reasonable fabrication specifications and trademark usage
10 guidelines;

11 BB. use an unreasonable, arbitrary or unfair sales
12 or other performance standard in determining a franchise motor
13 vehicle dealer's compliance with a franchise agreement. The
14 manufacturer has the burden of proving the reasonableness of
15 its performance standards;

16 CC. fail to compensate a motor vehicle dealer for
17 labor and parts required for a dealer to perform necessary
18 repairs on an affected new or used motor vehicle pursuant to a
19 recall, do not drive order or stop sale order, if the dealer
20 holds a franchise of the same line-make as the subject vehicle;

21 DD. fail to compensate a motor vehicle dealer as
22 prescribed by Chapter 57, Article 16 NMSA 1978 for a delay in
23 delivering parts or equipment needed to perform recall-related
24 repairs on an affected used motor vehicle in the dealer's
25 inventory that is subject to a do not drive order or stop sale

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1 order, if the dealer holds a franchise of the same line-make as
2 the vehicle;

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

13 FF. use data, calculations or statistical
14 determinations of the sales performance of a motor vehicle
15 dealer to take adverse action against the motor vehicle dealer
16 for any period of time during which the dealer has at least
17 five percent of its total new and used motor vehicle inventory
18 subject to a stop sale order or do not drive order; provided
19 that the motor vehicle dealer's performance, as reflected in
20 the data, calculations or statistical determinations, is
21 adversely affected by the stop sale order or do not drive
22 order."