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HOUSE BILL 93

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Al Park

AN ACT

RELATING TO MOTOR VEHICLE DEALER FRANCHISING; MAKING CERTAIN
UNFAIR ACTS AND PRACTICES UNLAWFUL FOR MOTOR VEHICLE
MANUFACTURERS; DECLARING AN EMERGENCY.

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

Section 1. Section 57-16-3 NMSA 1978 (being Laws 1973,
Chapter 6, Section 3, as amended) is amended to read:

"57-16-3. DEFINITIONS.--As used in Chapter 57, Article 16
NMSA 1978:

A. "motor vehicle" means every self-propelled
vehicle, having two or more wheels, by which a person or
property may be transported on a public highway and includes
recreational vehicles;

B. "motor vehicle dealer" or "dealer" means any
person who sells or solicits or advertises the sale of new or

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1 used motor vehicles. "Motor vehicle dealer" or "dealer" shall
2 not include:

3 (1) receivers, trustees, administrators,
4 executors, guardians or other persons appointed by or acting
5 under judgment, decree or order of any court;

6 (2) public officers while performing their
7 duties as such officers;

8 (3) persons making casual sales of their own
9 vehicles duly registered and licensed to them by the state; or

10 (4) finance companies, banks and other lending
11 institutions covering sales of repossessed vehicles;

12 C. "person" means every natural person,
13 partnership, corporation, association, trust, estate or any
14 other legal entity;

15 D. "prospective purchaser" means a person who has a
16 bona fide written agreement to purchase a franchise;

17 E. "manufacturer" means any person who manufactures
18 or assembles new motor vehicles either within or outside of
19 this state and may include a predecessor manufacturer or a
20 successor manufacturer;

21 F. "distributor" means any person who distributes
22 or sells new or used motor vehicles to dealers and who is not a
23 manufacturer;

24 G. "representative" means any person who is or acts
25 as an agent, employee or representative of a manufacturer or

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1 distributor and who performs any duties in this state relating
2 to promoting the distribution or sale of new or used motor
3 vehicles or contacts dealers in this state on behalf of a
4 manufacturer or distributor;

5 H. "franchise" means an oral or written arrangement
6 for a definite or indefinite period in which a manufacturer,
7 distributor or representative grants to a motor vehicle dealer
8 a license to use a trade name, service mark or related
9 characteristic and in which there is a community of interest in
10 the marketing of motor vehicles or services related to
11 marketing, service or repair of motor vehicles at wholesale,
12 retail, leasing or otherwise;

13 I. "fraud" includes, in addition to its normal
14 legal connotation, the following:

15 (1) a misrepresentation in any manner, whether
16 intentionally false or due to gross negligence, of a material
17 fact;

18 (2) a promise or representation not made
19 honestly and in good faith; and

20 (3) an intentional failure to disclose a
21 material fact;

22 J. "sale" includes:

23 (1) the issuance, transfer, agreement for
24 transfer, exchange, pledge, hypothecation or mortgage in any
25 form, whether by transfer in trust or otherwise, of any motor

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1 vehicle or interest therein or of any franchise related
2 thereto; and

3 (2) any option, subscription or other contract
4 or solicitation looking to a sale or offer or attempt to sell
5 in any form, whether spoken or written. A gift or delivery of
6 any motor vehicle or franchise with respect thereto with, or
7 as, a bonus on account of the sale of anything shall be deemed
8 a sale of such motor vehicle or franchise;

9 K. "motorcycle" means any motor vehicle used on or
10 off a public highway that has an unladen weight of less than
11 one thousand five hundred pounds;

12 L. "recreational vehicle" means any motor vehicle
13 with a camping body that either has its own motive power or is
14 drawn by another vehicle;

15 M. "designated family member" means a spouse,
16 child, grandchild, parent, brother or sister of a deceased or
17 incapacitated dealer who is entitled to inherit the dealer's
18 ownership interest in the dealership under the terms of a will
19 or the laws of intestate succession in this state. In the case
20 of an incapacitated dealer, the term means the person appointed
21 by a court as the legal representative of the dealer's
22 property. The term also includes the appointed and qualified
23 personal representative and the testamentary trustee of a
24 deceased dealer. However, the term shall be limited to mean
25 only that individual designated by [~~the motorcycle~~] a dealer in

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1 a written document filed with the manufacturer, distributor or
2 representative in the event that such a document has been
3 filed;

4 N. "current price" means an amount equal to the
5 price listed in the manufacturer's or distributor's printed
6 price list in effect when the franchise is terminated, less
7 applicable trade and cash discounts;

8 O. "dealer cost" means an amount equal to the sum
9 of the original invoice price that the dealer paid for
10 inventory and the cost of the delivery of the inventory from
11 the manufacturer or distributor to the dealer, less applicable
12 discounts;

13 P. "inventory" means new or unused motorcycles,
14 motor vehicles, motorcycle attachments and motorcycle and motor
15 vehicle repair parts that are provided by a manufacturer or
16 distributor to a dealer under a franchise agreement and that
17 are purchased within thirty-six months of the termination of
18 the franchise or are listed in the manufacturer's or
19 distributor's current sales manual or price list at the time
20 that the franchise is terminated; [~~and~~]

21 Q. "relevant market area" means an area of a size
22 specified in this subsection around an existing motor vehicle
23 dealer's place of business. The size of the area shall be the
24 greater of the area of responsibility specified in the dealer's
25 franchise or a circle with a center at the dealer's place of

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1 business and a radius of:

2 (1) seven miles, if the population of the
3 county in which the dealership is located is two hundred fifty
4 thousand or more;

5 (2) fifteen miles, if the population of the
6 county in which the dealership is located is less than two
7 hundred fifty thousand but is thirty-five thousand or more; or

8 (3) twenty miles in all other cases.

9 If the existing and proposed dealerships are in different
10 counties, the lesser of the applicable mileage limitations
11 shall be used. For purposes of this subsection, the population
12 of any area shall be determined in accordance with the most
13 recent decennial census or the most recent population update
14 from the national planning data corporation or other similar
15 recognized source, whichever is later;

16 R. "successor manufacturer" means a motor vehicle
17 manufacturer that, on or after January 1, 2010, acquires,
18 succeeds to or assumes any part of the business of a
19 predecessor manufacturer as the result of:

20 (1) a change in ownership, operation or
21 control of the predecessor manufacturer;

22 (2) the termination, suspension or cessation
23 of all or a part of the business operation of the predecessor
24 manufacturer;

25 (3) the discontinuance of the sale of a

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1 product line; or

2 (4) a change in the distribution system by the
3 predecessor manufacturer, whether through a change in
4 distributor or the predecessor manufacturer's decision to cease
5 conducting business through a distributor;

6 S. "predecessor manufacturer" means a manufacturer
7 that is acquired, succeeded by or assumed by a successor
8 manufacturer; and

9 T. "former franchisee":

10 (1) means a dealer that has entered into a
11 franchise agreement with a manufacturer and that has:

12 (a) entered into a termination agreement
13 or deferred termination agreement with the manufacturer related
14 to the franchise; or

15 (b) has had the franchise canceled,
16 terminated or otherwise ended; and

17 (2) includes the designated successor of the
18 former franchisee in the event the former franchisee is
19 deceased or disabled."

20 Section 2. Section 57-16-8 NMSA 1978 (being Laws 1973,
21 Chapter 6, Section 8) is amended to read:

22 "57-16-8. UNREASONABLE RESTRICTIONS--SITE CONTROL
23 AGREEMENTS--EXCLUSIVE USE AGREEMENTS.--

24 A. It [shall be] is unlawful [directly or
25 indirectly] to, directly or indirectly, impose unreasonable

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1 restrictions on the motor vehicle dealer or franchise relative
2 to transfer, sale, right to renew, termination discipline,
3 noncompetitive covenants, site-control whether by sublease,
4 collateral pledge of lease or otherwise, right of first refusal
5 to purchase, option to purchase, compliance with subjective
6 standards and assertion of legal or equitable rights.

7 B. It is unlawful to, directly or indirectly,
8 require a site control agreement or exclusive use agreement as
9 a condition of:

10 (1) awarding a franchise to a prospective
11 motor vehicle dealer;

12 (2) adding a line make or franchise to an
13 existing dealer;

14 (3) renewing the franchise of an existing
15 dealer;

16 (4) approving the relocation of an existing
17 dealer's facility; or

18 (5) approving the sale or transfer of
19 ownership of a franchise.

20 C. As used in this section, "site control
21 agreement" or "exclusive use agreement" means any agreement
22 that has the effect of:

23 (1) requiring a dealer to establish or
24 maintain exclusive dealership facilities;

25 (2) restricting the ability of a dealer or a

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1 dealer's lessor to transfer, sell, lease or change the use of
2 the dealership premises; or

3 (3) preventing or attempting to prevent a
4 dealer from acquiring, adding or maintaining a sales or service
5 operation for another line make of motor vehicles at the same
6 or expanded facility at which the dealer currently operates a
7 dealership, provided that the dealer complies with any
8 reasonable facilities requirements of the manufacturer,
9 successor manufacturer or distributor."

10 Section 3. Section 57-16-9 NMSA 1978 (being Laws 1973,
11 Chapter 6, Section 9, as amended) is amended to read:

12 "57-16-9. FRANCHISE RENEWAL--TERMINATION--ANTICIPATORY
13 TERMINATION.--

14 A. Anything to the contrary notwithstanding, it is
15 unlawful for the manufacturer, distributor or representative
16 without due cause to fail to renew a franchise on terms then
17 equally available to all its motor vehicle dealers or their
18 prospective purchasers, to terminate a franchise or to restrict
19 the transfer of a franchise unless the dealer receives fair and
20 reasonable compensation for the value of the business. A
21 prospective purchaser may enforce the provisions of this
22 section whether or not the person is a dealer.

23 B. A public announcement by a manufacturer or
24 distributor of an intention to cease manufacturing or
25 distribution of a motor vehicle brand within three years of the

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1 announcement or upon expiration of a dealers' current franchise
2 or selling agreement may at the option of an affected dealer be
3 deemed an anticipatory involuntary termination of the dealer's
4 franchise."

5 Section 4. Section 57-16-9.2 NMSA 1978 (being Laws 1991,
6 Chapter 49, Section 2, as amended) is amended to read:

7 "57-16-9.2. MOTOR VEHICLE DEALERS--TERMINATION OF
8 FRANCHISE--RETURN OF INVENTORY.--

9 A. If on termination of a franchise the dealer
10 delivers to the manufacturer or distributor the inventory,
11 vehicle brand-specific tools, signage and other specialized
12 systems, equipment and real estate required by the manufacturer
13 that was purchased from the manufacturer or distributor and
14 that is held by the dealer on the date of termination, the
15 manufacturer or distributor shall pay to the dealer:

16 (1) the dealer cost of the new, unsold and
17 undamaged motorcycles [~~current model year~~] and motor vehicles
18 [~~and motor vehicles~~] from the preceding two model years or
19 purchased from the manufacturer or distributor [~~six~~] eighteen
20 months prior to receipt of a notice of termination;

21 (2) an amount equal to ninety-five percent of
22 the current price of new, unused and undamaged motorcycle
23 attachments and motor vehicle repair parts; [~~and~~]

24 (3) an amount equal to an additional five
25 percent of the current price of new, unused and undamaged

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1 motorcycle attachments and motor vehicle repair parts, unless
2 the manufacturer or distributor performs the handling, packing
3 and loading of the parts, in which case no additional amount is
4 required under this paragraph;

5 (4) the fair market value, determined by
6 appraisal as if installed for continuous use in an operating
7 dealership, of all vehicle brand-specific parts, accessories,
8 special tools, signage and other specialized systems and
9 equipment required by the manufacturer or distributor for
10 dealership operations. The fair market value will be
11 determined by a qualified independent appraiser agreed upon by
12 the manufacturer or distributor and the dealer; and

13 (5) the economic loss to the dealer resulting
14 from idled or underused dealer facility real estate due to
15 termination, determined by any reasonable means, including
16 appraisal. Economic loss is presumed to be at least equal to
17 the value of two years of dealer facility rent, as if the
18 facility were an operating dealership; real estate property
19 tax; and property insurance.

20 B. The manufacturer or distributor may subtract
21 from the sum due under Subsection A of this section the amount
22 of debts owed by the dealer to the manufacturer or distributor.
23 The manufacturer or distributor and the dealer are each
24 responsible for one-half of the cost of delivering the
25 inventory to the manufacturer or distributor.

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1 C. The manufacturer or distributor shall pay the
2 amount due under this section before the sixty-first day after
3 the day that the manufacturer or distributor receives inventory
4 from the dealer.

5 D. On payment of the amount due under this section,
6 title to the inventory is transferred to the manufacturer or
7 distributor.

8 E. The provisions of this section shall not apply
9 to recreational travel trailer or motor home manufacturers or
10 dealers.

11 F. For the purposes of this section, a vehicle
12 shall be considered new if that vehicle's manufacturer's
13 certificate of origin has not been surrendered and the vehicle
14 has no significant damage and has never been registered."

15 Section 5. EMERGENCY.--It is necessary for the public
16 peace, health and safety that this act take effect immediately.