

1 **NEW AUTOMOBILE FRANCHISE ACT**

2 **AMENDMENTS**

3 2005 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: Stephen H. Urquhart**

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6  
7 **LONG TITLE**

8 **General Description:**

9 This bill adds to the list of prohibited acts in the New Automobile Franchise Act.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ expands the prohibition on a franchisor that requires a franchisee to release the  
14 franchisor from liability;
- 15 ▶ prohibits a franchisor from controlling of a franchisee's funds without a description  
16 of the franchisor's claim to the funds and written approval from the franchisee;
- 17 ▶ prohibits a franchisor from requiring written approval for the franchisor to control a  
18 franchisee's funds as a condition of a franchise agreement or delivery of products  
19 and services;
- 20 ▶ prohibits a franchisor from conditioning preferential status on the sale of a product  
21 originating from a third-party supplier if the franchisor receives a financial benefit  
22 from the franchisee's sale of that product; and
- 23 ▶ makes technical changes.

24 **Monies Appropriated in this Bill:**

25 None

26 **Other Special Clauses:**

27 None



28 **Utah Code Sections Affected:**

29 AMENDS:

30 **13-14-102**, as last amended by Chapter 123, Laws of Utah 2004

31 **13-14-201**, as last amended by Chapter 68, Laws of Utah 2002



33 *Be it enacted by the Legislature of the state of Utah:*

34 Section 1. Section **13-14-102** is amended to read:

35 **13-14-102. Definitions.**

36 As used in this chapter:

37 (1) "Affiliate" has the meaning set forth in Section 16-10a-102.

38 (2) "Aftermarket product" means any product or service not included in the  
39 manufacturer's suggested retail price of the new motor vehicle, as that price appears on the  
40 label required by 15 U.S.C. Sec. 1232(f).

41 [~~2~~] (3) "Board" means the Utah Motor Vehicle Franchise Advisory Board created in  
42 Section 13-14-103.

43 [~~3~~] (4) "Dealership" means a site or location in this state:

44 (a) at which a franchisee conducts the business of a new motor vehicle dealer; and

45 (b) that is identified as a new motor vehicle dealer's principal place of business for  
46 licensing purposes under Section 41-3-204.

47 [~~4~~] (5) "Department" means the Department of Commerce.

48 [~~5~~] (6) "Executive director" means the executive director of the Department of  
49 Commerce.

50 [~~6~~] (7) "Franchise" or "franchise agreement" means a written agreement, for a definite  
51 or indefinite period, in which:

52 (a) a person grants to another person a license to use a trade name, trademark, service  
53 mark, or related characteristic; and

54 (b) a community of interest exists in the marketing of new motor vehicles, new motor  
55 vehicle parts, and services related to the sale or lease of new motor vehicles at wholesale or  
56 retail.

57 [~~7~~] (8) "Franchisee" means a person with whom a franchisor has agreed or permitted,  
58 in writing or in practice, to purchase, sell, or offer for sale new motor vehicles manufactured,

59 produced, represented, or distributed by the franchisor.

60 ~~[(8)]~~ (9) "Franchisor" means a person who has, in writing or in practice, agreed with or  
61 permits a franchisee to purchase, sell, or offer for sale new motor vehicles manufactured,  
62 produced, represented, or distributed by the franchisor, and includes:

- 63 (a) the manufacturer or distributor of the new motor vehicles;  
64 (b) an intermediate distributor; and  
65 (c) an agent, officer, or field or area representative of the franchisor.

66 ~~[(9)]~~ (10) "Lead" means the referral by a franchisor to a franchisee of a potential  
67 customer whose contact information was obtained from a franchisor's program, process, or  
68 system designed to generate referrals for the purchase or lease of a new motor vehicle, or for  
69 service work related to the franchisor's vehicles.

70 ~~[(10)]~~ (11) "Line-make" means the motor vehicles that are offered for sale, lease, or  
71 distribution under a common name, trademark, service mark, or brand name of the franchisor,  
72 or manufacturer of the motor vehicle.

73 ~~[(11)]~~ (12) "Mile" means 5,280 feet.

74 ~~[(12)]~~ (13) "Motor home" means a self-propelled vehicle, primarily designed as a  
75 temporary dwelling for travel, recreational, or vacation use.

76 ~~[(13)]~~ (14) (a) "Motor vehicle" means:

- 77 (i) a travel trailer;  
78 (ii) a motor vehicle as defined in Section 41-3-102;  
79 (iii) a semitrailer as defined in Section 41-1a-102;  
80 (iv) a trailer as defined in Section 41-1a-102; and  
81 (v) a recreational vehicle.

82 (b) "Motor vehicle" does not include a motorcycle as defined in Section 41-1a-102.

83 ~~[(14)]~~ (15) "New motor vehicle" means a motor vehicle as defined in Subsection ~~[(13)]~~  
84 (14) that has never been titled or registered and has been driven less than 7,500 miles, unless  
85 the motor vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does  
86 not apply.

87 ~~[(15)]~~ (16) "New motor vehicle dealer" is a person who is licensed under Subsection  
88 41-3-202(1)(a) to sell new motor vehicles.

89 ~~[(16)]~~ (17) "Notice" or "notify" includes both traditional written communications and

90 all reliable forms of electronic communication unless expressly prohibited by statute or rule.

91 [~~(17)~~] (18) "Recreational vehicle" means a vehicular unit other than a mobile home,  
92 primarily designed as a temporary dwelling for travel, recreational, or vacation use, which is  
93 either self-propelled or pulled by another vehicle. "Recreational vehicle" includes a travel  
94 trailer, a camping trailer, a motor home, a fifth wheel trailer, and a van.

95 [~~(18)~~] (19) (a) "Relevant market area," except with respect to recreational vehicles,  
96 means:

- 97 (i) the county in which a dealership is to be established or relocated; and
- 98 (ii) the area within a ten-mile radius from the site of the new or relocated dealership.

99 (b) "Relevant market area," with respect to recreational vehicles, means:

- 100 (i) the county in which the dealership is to be established or relocated; and
- 101 (ii) the area within a 35-mile radius from the site of the new or relocated dealership.

102 [~~(19)~~] (20) "Sale, transfer, or assignment" means any disposition of a franchise or an  
103 interest in a franchise, with or without consideration, including a bequest, inheritance, gift,  
104 exchange, lease, or license.

105 [~~(20)~~] (21) "Serve" or "served," unless expressly indicated otherwise by statute or rule,  
106 includes any reliable form of communication.

107 [~~(21)~~] (22) "Travel trailer," "camping trailer," or "fifth wheel trailer" means a portable  
108 vehicle without motive power, designed as a temporary dwelling for travel, recreational, or  
109 vacation use that does not require a special highway movement permit when drawn by a  
110 self-propelled motor vehicle.

111 [~~(22)~~] (23) "Written," "write," "in writing," or other variations of those terms shall  
112 include all reliable forms of electronic communication.

113 Section 2. Section **13-14-201** is amended to read:

114 **13-14-201. Prohibited acts by franchisors -- Affiliates -- Disclosures.**

115 (1) A franchisor may not in this state:

116 (a) except as provided in Subsection (3), require a franchisee to order or accept  
117 delivery of any new motor vehicle, part, accessory, equipment, or other item not otherwise  
118 required by law that is not voluntarily ordered by the franchisee;

119 (b) require a franchisee to participate monetarily in any advertising campaign or  
120 contest, or purchase any promotional materials, display devices, or display decorations or

121 materials;

122 (c) require a franchisee to change the capital structure of the franchisee's dealership or  
123 the means by or through which the franchisee finances the operation of the franchisee's  
124 dealership, if the dealership at all times meets reasonable capital standards determined by and  
125 applied in a nondiscriminatory manner by the franchisor;

126 (d) require a franchisee to refrain from participating in the management of, investment  
127 in, or acquisition of any other line of new motor vehicles or related products, if:

128 (i) the franchisee maintains a reasonable line of credit for each make or line of  
129 vehicles; and

130 (ii) the franchisee complies with reasonable capital and facilities requirements of the  
131 franchisor;

132 (e) require a franchisee to prospectively agree to a release, assignment, novation,  
133 waiver, or estoppel that would:

134 (i) relieve a franchisor from any liability, duty, or responsibility imposed on the  
135 franchisor by this chapter; or

136 (ii) require any controversy between the franchisee and a franchisor to be referred to a  
137 third party if the decision by the third party would be binding;

138 (f) require a franchisee to change the location of the principal place of business of the  
139 franchisee's dealership or make any substantial alterations to the dealership premises, if the  
140 change or alterations would be unreasonable;

141 (g) coerce or attempt to coerce a franchisee to join, contribute to, or affiliate with an  
142 advertising association;

143 (h) require, coerce, or attempt to coerce a franchisee to enter into an agreement with the  
144 franchisor or do any other act that is unfair or prejudicial to the franchisee, by threatening to  
145 cancel a franchise agreement or other contractual agreement or understanding existing between  
146 the franchisor and franchisee;

147 (i) adopt, change, establish, modify, or implement a plan or system for the allocation,  
148 scheduling, or delivery of new motor vehicles, parts, or accessories to its franchisees so that the  
149 plan or system is not fair, reasonable, and equitable;

150 (j) increase the price of any new motor vehicle that the franchisee has ordered from the  
151 franchisor and for which there exists at the time of the order a bona fide sale to a retail

152 purchaser if the order was made prior to the franchisee's receipt of an official written price  
153 increase notification;

154 (k) fail to indemnify and hold harmless its franchisee against any judgment for  
155 damages or settlement approved in writing by the franchisor:

156 (i) including court costs and attorneys' fees arising out of actions, claims, or  
157 proceedings including those based on:

158 (A) strict liability;

159 (B) negligence;

160 (C) misrepresentation;

161 (D) express or implied warranty;

162 (E) revocation as described in Section 70A-2-608; or

163 (F) rejection as described in Section 70A-2-602; and

164 (ii) to the extent the judgment or settlement relates to alleged defective or negligent  
165 actions by the franchisor;

166 (l) threaten or coerce a franchisee to waive or forbear its right to protest the  
167 establishment or relocation of a same line-make franchisee in the relevant market area of the  
168 affected franchisee;

169 (m) fail to ship monthly to a franchisee, if ordered by the franchisee, the number of  
170 new motor vehicles of each make, series, and model needed by the franchisee to achieve a  
171 percentage of total new vehicle sales of each make, series, and model equitably related to the  
172 total new vehicle production or importation being achieved nationally at the time of the order  
173 by each make, series, and model covered under the franchise agreement;

174 (n) require or otherwise coerce a franchisee to under-utilize the franchisee's existing  
175 facilities;

176 (o) fail to include in any franchise agreement the following language or language to the  
177 effect that: "If any provision in this agreement contravenes the laws or regulations of any state  
178 or other jurisdiction where this agreement is to be performed, or provided for by such laws or  
179 regulations, the provision is considered to be modified to conform to such laws or regulations,  
180 and all other terms and provisions shall remain in full force.";

181 (p) engage in the distribution, sale, offer for sale, or lease of a new motor vehicle to  
182 purchasers who acquire the vehicle in this state except through a franchisee with whom the

183 franchisor has established a written franchise agreement, if the franchisor's trade name,  
184 trademark, service mark, or related characteristic is an integral element in the distribution, sale,  
185 offer for sale, or lease;

186 (q) engage in the distribution or sale of a recreational vehicle [~~which~~] that is  
187 manufactured, rented, sold, or offered for sale in this state without being constructed in  
188 accordance with the standards set by the American National Standards Institute for recreational  
189 vehicles and evidenced by a seal or plate attached to the vehicle;

190 (r) except as provided in Subsection (2), authorize or permit a person to perform  
191 warranty service repairs on motor vehicles, except warranty service repairs:

192 (i) by a franchisee with whom the franchisor has entered into a franchise agreement for  
193 the sale and service of the franchisor's motor vehicles; or

194 (ii) on owned motor vehicles by a person or government entity who has purchased new  
195 motor vehicles pursuant to a franchisor's or manufacturer's fleet discount program;

196 (s) fail to provide a franchisee with a written franchise agreement;

197 (t) (i) except as provided in Subsection (1)(t)(ii) and notwithstanding any other  
198 provisions of this chapter[;];

199 (A) unreasonably fail or refuse to offer to its same line-make franchised dealers all  
200 models manufactured for that line-make[ ~~or~~];

201 (B) unreasonably require a dealer to:

202 (I) pay any extra fee, remodel, renovate, recondition the dealer's existing facilities[;]; or

203 (II) purchase unreasonable advertising displays or other materials as a prerequisite to  
204 receiving a model or series of vehicles[ ~~except that~~];

205 (ii) notwithstanding Subsection (1)(t)(i), a recreational vehicle manufacturer may split  
206 a line-make between motor home and travel trailer products;

207 (u) except as provided in Subsection (6), directly or indirectly:

208 (i) own an interest in a new motor vehicle dealer or dealership;

209 (ii) operate or control a new motor vehicle dealer or dealership;

210 (iii) act in the capacity of a new motor vehicle dealer, as defined in Section 13-14-102;

211 or

212 (iv) operate a motor vehicle service facility;

213 (v) fail to timely pay for all reimbursements to a franchisee for incentives and other

214 payments made by the franchisor;

215 (w) directly or indirectly influence or direct potential customers to franchisees in an  
216 inequitable manner, including:

217 (i) charging a franchisee a fee for a referral regarding a potential sale or lease of any of  
218 the franchisee's products or services in an amount exceeding the actual cost of the referral;

219 (ii) giving a customer referral to a franchisee on the condition that the franchisee agree  
220 to sell the vehicle at a price fixed by the franchisor; or

221 (iii) advising a potential customer as to the amount that the potential customer should  
222 pay for a particular product;

223 (x) fail to provide comparable delivery terms to each franchisee for a product of the  
224 franchisor, including the time of delivery after the placement of an order by the franchisee;

225 (y) if personnel training is provided by the franchisor to its franchisees, unreasonably  
226 fail to make that training available to each franchisee on proportionally equal terms;

227 (z) condition a franchisee's eligibility to participate in a sales incentive program on the  
228 requirement that a franchisee use the financing services of the franchisor or a subsidiary or  
229 affiliate of the franchisor for inventory financing;

230 (aa) make available for public disclosure, except with the franchisee's permission or  
231 under subpoena or in any administrative or judicial proceeding in which the franchisee or the  
232 franchisor is a party, any confidential financial information regarding a franchisee, including:

233 (i) monthly financial statements provided by the franchisee;

234 (ii) the profitability of a franchisee; or

235 (iii) the status of a franchisee's inventory of products;

236 (bb) use any performance standard, incentive program, or similar method to measure  
237 the performance of franchisees unless the standard or program:

238 (i) is designed and administered in a fair, reasonable, and equitable manner;

239 (ii) if based upon a survey, utilizes an actuarially generally acceptable, valid sample;

240 and

241 (iii) is, upon request by a franchisee, disclosed and explained in writing to the  
242 franchisee, including:

243 (A) how the standard or program is designed[;];

244 (B) how [it] the standard or program will be administered[;]; and



245           (C) the types of data that will be collected and used in [its] the application of the  
246 standard or program;

247           (cc) other than sales to the federal government, directly or indirectly, sell, lease, offer  
248 to sell, or offer to lease, a new motor vehicle or any motor vehicle owned by the franchisor,  
249 except through a franchised new motor vehicle dealer;

250           (dd) compel a franchisee, through a finance subsidiary, to agree to unreasonable  
251 operating requirements, except that this Subsection (1)(dd) shall not be construed to limit the  
252 right of a financing subsidiary to engage in business practices in accordance with the usage of  
253 trade in retail and wholesale motor vehicle financing;

254           (ee) condition the franchisor's participation in co-op advertising for a product category  
255 on the franchisee's participation in any program related to another product category or on the  
256 franchisee's achievement of any level of sales in a product category other than that which is the  
257 subject of the co-op advertising;

258           (ff) except as provided in Subsections (7) through (9), discriminate against a franchisee  
259 in the state in favor of another franchisee of the same line-make in the state by:

260           (i) selling or offering to sell a new motor vehicle to one franchisee at a higher actual  
261 price, including the price for vehicle transportation, than the actual price at which the same  
262 model similarly equipped is offered to or is made available by the franchisor to another  
263 franchisee in the state during a similar time period;

264           (ii) except as provided in Subsection (8), using a promotional program or device or an  
265 incentive, payment, or other benefit, whether paid at the time of the sale of the new motor  
266 vehicle to the franchisee or later, that results in the sale of or offer to sell a new motor vehicle  
267 to one franchisee in the state at a higher price, including the price for vehicle transportation,  
268 than the price at which the same model similarly equipped is offered or is made available by  
269 the franchisor to another franchisee in the state during a similar time period; or

270           (iii) except as provided in Subsection (9), failing to provide or direct a lead in a fair,  
271 equitable, and timely manner; ~~[or]~~

272           ~~[(gg) through an affiliate, take any action that would otherwise be prohibited under this~~  
273 ~~chapter:]~~

274           ~~(gg) take or assert control over funds belonging to a franchisee without:~~

275           ~~(i) fully identifying in writing the basis for the franchisor's claim; and~~

276 (ii) obtaining the franchisee's written approval for the franchisor taking or asserting  
277 control over the funds;

278 (hh) require execution of the written approval required by Subsection (1)(gg) by a  
279 franchisee or prospective franchisee as a condition precedent to:

280 (i) a franchise agreement; or

281 (ii) delivery of a product or service by the franchisor under a franchise agreement;

282 (ii) condition a franchisor's preferential status for the acquisition of a new motor  
283 vehicle, product, or service upon the franchisee's sale of an aftermarket product if:

284 (i) the aftermarket product is:

285 (A) manufactured by the franchisor; or

286 (B) obtained by the franchisor for resale from a third-party supplier; and

287 (ii) the franchisor or its affiliate derives a financial benefit from the franchisee's sale of  
288 the aftermarket product; or

289 (jj) through an affiliate, take any action that would otherwise be prohibited under this  
290 chapter.

291 (2) Notwithstanding Subsection (1)(r), a franchisor may authorize or permit a person to  
292 perform warranty service repairs on motor vehicles if the warranty services is for a franchisor  
293 of recreational vehicles.

294 (3) Subsection (1)(a) does not prevent the franchisor from requiring that a franchisee  
295 carry a reasonable inventory of:

296 (a) new motor vehicle models offered for sale by the franchisor; and

297 (b) parts to service the repair of the new motor vehicles.

298 (4) Subsection (1)(d) does not prevent a franchisor from:

299 (a) requiring that a franchisee maintain separate sales personnel or display space; or

300 (b) refusing to permit a combination of new motor vehicle lines, if justified by  
301 reasonable business considerations.

302 (5) Upon the written request of any franchisee, a franchisor shall disclose in writing to  
303 the franchisee the basis on which new motor vehicles, parts, and accessories are allocated,  
304 scheduled, and delivered among the franchisor's dealers of the same line-make.

305 (6) (a) A franchisor may engage in any of the activities listed in Subsection (1)(u), for a  
306 period not to exceed 12 months if:

307 (i) (A) the person from whom the franchisor acquired the interest in or control of the  
308 new motor vehicle dealership was a franchised new motor vehicle dealer; and

309 (B) the franchisor's interest in the new motor vehicle dealership is for sale at a  
310 reasonable price and on reasonable terms and conditions; or

311 (ii) the franchisor is engaging in the activity listed in Subsection (1)(u) for the purpose  
312 of broadening the diversity of its dealer body and facilitating the ownership of a new motor  
313 vehicle dealership by a person who:

314 (A) is part of a group that has been historically underrepresented in the franchisor's  
315 dealer body;

316 (B) would not otherwise be able to purchase a new motor vehicle dealership;

317 (C) has made a significant investment in the new motor vehicle dealership which is  
318 subject to loss;

319 (D) has an ownership interest in the new motor vehicle dealership; and

320 (E) operates the new motor vehicle dealership under a plan to acquire full ownership of  
321 the dealership within a reasonable period of time and under reasonable terms and conditions.

322 (b) The board may, for good cause shown, extend the time limit set forth in Subsection  
323 (6)(a) for an additional period not to exceed 12 months.

324 (c) A franchisor who was engaged in any of the activities listed in Subsection (1)(u) in  
325 this state prior to May 1, 2000, may continue to engage in that activity, but shall not expand  
326 that activity to acquire an interest in any other new motor vehicle dealerships or motor vehicle  
327 service facilities after May 1, 2000.

328 (d) Notwithstanding [~~the provisions of~~] Subsection (1)(u), a franchisor may own,  
329 operate, or control a new motor vehicle dealership trading in a line-make of motor vehicle if:

330 (i) as to that line-make of motor vehicle, there are no more than four franchised new  
331 motor vehicle dealerships licensed and in operation within the state as of January 1, 2000;

332 (ii) the franchisor does not own directly or indirectly, more than a 45% interest in the  
333 dealership;

334 (iii) at the time the franchisor first acquires ownership or assumes operation or control  
335 of the dealership, the distance between the dealership thus owned, operated, or controlled and  
336 the nearest unaffiliated new motor vehicle dealership trading in the same line-make is not less  
337 than 150 miles;

338 (iv) all the franchisor's franchise agreements confer rights on the franchisee to develop  
339 and operate as many dealership facilities as the franchisee and franchisor shall agree are  
340 appropriate within a defined geographic territory or area; and

341 (v) as of January 1, 2000, no fewer than half of the franchisees of the line-make within  
342 the state own and operate two or more dealership facilities in the geographic area covered by  
343 the franchise agreement.

344 (7) Subsection (1)(ff) does not apply to recreational vehicles.

345 (8) Subsection (1)(ff)(ii) does not prohibit a promotional or incentive program that is  
346 functionally available to all competing franchisees of the same line-make in the state on  
347 substantially comparable terms.

348 (9) Subsection (1)(ff)(iii) may not be construed to:

349 (a) permit provision of or access to customer information that is otherwise protected  
350 from disclosure by law or by contract between a franchisor and a franchisee; or

351 (b) require a franchisor to disregard the preference volunteered by a potential customer  
352 in providing or directing a lead.

353 (10) Subsection (1)(~~gg~~)(jj) does not limit the right of an affiliate to engage in  
354 business practices in accordance with the usage of trade in which the affiliate is engaged.

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**Legislative Review Note**

**as of 12-22-04 9:45 AM**

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

**Office of Legislative Research and General Counsel**

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**Fiscal Note**  
**Bill Number HB0047**

**New Automobile Franchise Act Amendments**

*14-Jan-05*

*2:32 PM*

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**State Impact**

No fiscal impact.

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**Individual and Business Impact**

No fiscal impact.

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**Office of the Legislative Fiscal Analyst**