

FINANCING MOTOR VEHICLE PURCHASES

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Gage Froerer

Senate Sponsor: _____

LONG TITLE

General Description:

This bill enacts a provision relating to the financing of motor vehicles.

Highlighted Provisions:

This bill:

▶ prohibits a franchisor from offering, by itself or through an affiliate, vehicle financing to customers of a franchisee that finances inventory through the franchisor or affiliate on terms that are more favorable than terms offered to customers of a franchisee that does not finance inventory through the franchisor or affiliate.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-14-201, as last amended by Laws of Utah 2011, Chapter 203

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

Section 1. Section **13-14-201** is amended to read:

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

(1) A franchisor may not in this state:



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

31 (b) require a franchisee to:

32 (i) participate monetarily in any advertising campaign; or

33 (ii) contest, or purchase any promotional materials, display devices, or display
34 decorations or materials;

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

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

41 (i) maintains a reasonable line of credit for each make or line of vehicles; and

42 (ii) complies with reasonable capital and facilities requirements of the franchisor;

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

45 (i) relieve a franchisor from any liability, including notice and hearing rights imposed
46 on the franchisor by this chapter; or

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

49 (f) require a franchisee to change the location of the principal place of business of the
50 franchisee's dealership or make any substantial alterations to the dealership premises, if the
51 change or alterations would be unreasonable or cause the franchisee to lose control of the
52 premises or impose any other unreasonable requirement related to the facilities or premises;

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

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

59 (i) adopt, change, establish, enforce, modify, or implement a plan or system for the
60 allocation, scheduling, or delivery of new motor vehicles, parts, or accessories to its franchisees
61 so that the plan or system is not fair, reasonable, and equitable, including a plan or system that
62 imposes a vehicle sales objective, goal, or quota on a franchisee, or that evaluates a franchisee's
63 sales effectiveness or overall sales performance, without providing a reasonable opportunity for
64 the franchisee to acquire the necessary vehicles in a timely manner from the franchisor on
65 commercially reasonable terms;

66 (j) increase the price of any new motor vehicle that the franchisee has ordered from the
67 franchisor and for which there exists at the time of the order a bona fide sale to a retail
68 purchaser if the order was made prior to the franchisee's receipt of an official written price
69 increase notification;

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

72 (i) including court costs and attorney fees arising out of actions, claims, or proceedings
73 including those based on:

74 (A) strict liability;

75 (B) negligence;

76 (C) misrepresentation;

77 (D) express or implied warranty;

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

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

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

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

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

90 (n) require or otherwise coerce a franchisee to under-utilize the franchisee's existing
91 dealer facility or facilities, including by:

92 (i) requiring or otherwise coercing a franchisee to exclude or remove from the
93 franchisee's facility operations the selling or servicing of a line-make of vehicles for which the
94 franchisee has a franchise agreement to utilize the facilities; or

95 (ii) prohibiting the franchisee from locating, relocating, or occupying a franchise or
96 line-make in an existing facility owned or occupied by the franchisee that includes the selling
97 or servicing of another franchise or line-make at the facility provided that the franchisee gives
98 the franchisor written notice of the franchise co-location;

99 (o) fail to include in any franchise agreement or other agreement governing a
100 franchisee's ownership of a dealership or a franchisee's conduct of business under a franchise
101 the following language or language to the effect that: "If any provision in this agreement
102 contravenes the laws or regulations of any state or other jurisdiction where this agreement is to
103 be performed, or provided for by such laws or regulations, the provision is considered to be
104 modified to conform to such laws or regulations, and all other terms and provisions shall
105 remain in full force.";

106 (p) engage in the distribution, sale, offer for sale, or lease of a new motor vehicle to
107 purchasers who acquire the vehicle in this state except through a franchisee with whom the
108 franchisor has established a written franchise agreement, if the franchisor's trade name,
109 trademark, service mark, or related characteristic is an integral element in the distribution, sale,
110 offer for sale, or lease;

111 (q) engage in the distribution or sale of a recreational vehicle that is manufactured,
112 rented, sold, or offered for sale in this state without being constructed in accordance with the
113 standards set by the American National Standards Institute for recreational vehicles and
114 evidenced by a seal or plate attached to the vehicle;

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

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

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

- 121 (s) fail to provide a franchisee with a written franchise agreement;
- 122 (t) (i) except as provided in Subsection (1)(t)(ii) and notwithstanding any other
- 123 provisions of this chapter:
- 124 (A) unreasonably fail or refuse to offer to its same line-make franchised dealers all
- 125 models manufactured for that line-make;
- 126 (B) unreasonably require a dealer to:
- 127 (I) pay any extra fee, remodel, renovate, recondition the dealer's existing facilities; or
- 128 (II) purchase unreasonable advertising displays or other materials as a prerequisite to
- 129 receiving a model or series of vehicles;
- 130 (ii) notwithstanding Subsection (1)(t)(i), a recreational vehicle franchisor may split a
- 131 line-make between motor home and travel trailer products;
- 132 (u) except as provided in Subsection (6), directly or indirectly:
- 133 (i) own an interest in a new motor vehicle dealer or dealership;
- 134 (ii) operate or control a new motor vehicle dealer or dealership;
- 135 (iii) act in the capacity of a new motor vehicle dealer, as defined in Section 13-14-102;
- 136 or
- 137 (iv) operate a motor vehicle service facility;
- 138 (v) fail to timely pay for all reimbursements to a franchisee for incentives and other
- 139 payments made by the franchisor;
- 140 (w) directly or indirectly influence or direct potential customers to franchisees in an
- 141 inequitable manner, including:
- 142 (i) charging a franchisee a fee for a referral regarding a potential sale or lease of any of
- 143 the franchisee's products or services in an amount exceeding the actual cost of the referral;
- 144 (ii) giving a customer referral to a franchisee on the condition that the franchisee agree
- 145 to sell the vehicle at a price fixed by the franchisor; or
- 146 (iii) advising a potential customer as to the amount that the potential customer should
- 147 pay for a particular product;
- 148 (x) fail to provide comparable delivery terms to each franchisee for a product of the
- 149 franchisor, including the time of delivery after the placement of an order by the franchisee;
- 150 (y) if personnel training is provided by the franchisor to its franchisees, unreasonably
- 151 fail to make that training available to each franchisee on proportionally equal terms;

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

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

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

159 (ii) the profitability of a franchisee; or

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

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

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

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

165 and

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

168 (A) how the standard or program is designed;

169 (B) how the standard or program will be administered; and

170 (C) the types of data that will be collected and used in the application of the standard or
171 program;

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

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

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

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

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

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

195 (iii) except as provided in Subsection (9), by failing to provide or direct a lead in a fair,
196 equitable, and timely manner; or

197 (iv) if the franchisee complies with any reasonable requirement concerning the sale of
198 new motor vehicles, by using or considering the performance of any of its franchisees located
199 in this state relating to the sale of the franchisor's new motor vehicles in determining the:

200 (A) dealer's eligibility to purchase program, certified, or other used motor vehicles
201 from the franchisor;

202 (B) volume, type, or model of program, certified, or other used motor vehicles the
203 dealer is eligible to purchase from the franchisor;

204 (C) price of any program, certified, or other used motor vehicles that the dealer is
205 eligible to purchase from the franchisor; or

206 (D) availability or amount of any discount, credit, rebate, or sales incentive the dealer
207 is eligible to receive from the manufacturer for the purchase of any program, certified, or other
208 motor vehicle offered for sale by the franchisor;

209 (gg) (i) take control over funds owned or under the control of a franchisee based on the
210 findings of a warranty audit or sales incentive audit unless the following conditions are
211 satisfied:

212 (A) the franchisor fully identifies in writing the basis for the franchisor's claim or
213 charge back arising from the audit, including notifying the franchisee that the franchisee has 20

214 days from the day on which the franchisee receives the franchisor's claim or charge back to
215 assert a protest in writing to the franchisor identifying the basis for the protest;

216 (B) the franchisee's protest shall inform the franchisor that the protest shall be
217 submitted to a mediator in the state who is identified by name and address in the franchisee's
218 notice to the franchisor;

219 (C) if mediation is requested under Subsection (1)(gg)(i)(B), mediation shall occur no
220 later than 30 days after the day on which the franchisor receives the franchisee's protest of a
221 claim or charge back;

222 (D) if mediation does not lead to a resolution of the protest, the protest shall be set for
223 binding arbitration in the same venue in which the mediation occurred;

224 (E) binding arbitration under Subsection (1)(gg)(i)(D) shall be conducted:

225 (I) by an arbitrator mutually agreed upon by the franchisor and the franchisee; and

226 (II) on a date mutually agreed upon by the franchisor and the franchisee, but shall be
227 held no later than 90 days after the franchisor's receipt of the franchisee's notice of protest;

228 (F) this Subsection (1)(gg)(i) applies exclusively to warranty audits and sales incentive
229 audits;

230 (G) Subsections (1)(gg)(i)(A) through (E) do not apply if the franchisor reasonably
231 believes that the amount of the claim or charge back is related to a fraudulent act by the
232 franchisee; and

233 (H) the costs of the mediator or arbitrator instituted under this Subsection (1)(gg) shall
234 be shared equally by the franchisor and the franchisee; or

235 (ii) require a franchisee to execute a written waiver of the requirements of Subsection
236 (1)(gg)(i);

237 (hh) coerce, or attempt to coerce a franchisee to purchase or sell an aftermarket product
238 manufactured by the franchisor, or obtained by the franchisor for resale from a third-party
239 supplier and the franchisor or its affiliate derives a financial benefit from the franchisee's sale
240 or purchase of the aftermarket product as a condition to obtaining preferential status from the
241 franchisor;

242 (ii) through an affiliate, take any action that would otherwise be prohibited under this
243 chapter;

244 (jj) impose any fee, surcharge, or other charge on a franchisee designed to recover the

245 cost of a warranty repair for which the franchisee is paid by the franchisor;

246 (kk) directly or indirectly condition any of the following actions on the willingness of a

247 franchisee, prospective new franchisee, or owner of an interest in a dealership facility to enter

248 into a site-control agreement:

249 (i) the awarding of a franchise to a prospective new franchisee;

250 (ii) the addition of a line-make or franchise to an existing franchisee;

251 (iii) the renewal of an existing franchisee's franchise;

252 (iv) the approval of the relocation of an existing franchisee's dealership facility, unless

253 the franchisor pays, and the franchisee voluntarily accepts, additional specified cash

254 consideration to facilitate the relocation; or

255 (v) the approval of the sale or transfer of a franchise's ownership, unless the franchisor

256 pays, and the buyer voluntarily accepts, additional specified cash consideration to facilitate the

257 sale or transfer;

258 (ll) subject to Subsection (11), deny a franchisee the right to return any or all parts or

259 accessories that:

260 (i) were specified for and sold to the franchisee under an automated ordering system

261 required by the franchisor; and

262 (ii) (A) are in good, resalable condition; and

263 (B) (I) the franchisee received within the previous 12 months; or

264 (II) are listed in the current parts catalog; [~~or~~]

265 (mm) subject to Subsection (12), obtain from a franchisee a waiver of a franchisee's

266 right, by threatening:

267 (i) to impose a detriment upon the franchisee's business; or

268 (ii) to withhold any entitlement, benefit, or service:

269 (A) to which the franchisee is entitled under a franchise agreement, contract, statute,

270 rule, regulation, or law; or

271 (B) that has been granted to more than one other franchisee of the franchisor in the

272 state[-]; or

273 (nn) itself or through an affiliate, offer vehicle financing to the customers of a

274 franchisee that finances inventory through the franchisor or affiliate on terms that are more

275 favorable than terms offered to the customers of a franchisee that does not finance inventory

276 through the franchisor or affiliate.

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

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

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

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

284 (4) Subsection (1)(d) does not prevent a franchisor from requiring that a franchisee
285 maintain separate sales personnel or display space.

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

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

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

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

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

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

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

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

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

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

306 (b) After receipt of the advisory board's recommendation, the executive director may,

307 for good cause shown, extend the time limit set forth in Subsection (6)(a) for an additional
308 period not to exceed 12 months.

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

313 (d) Notwithstanding Subsection (1)(u), a franchisor may own, operate, or control a new
314 motor vehicle dealership trading in a line-make of motor vehicle if:

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

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

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

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

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

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

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

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

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

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

338 (10) Subsection (1)(ii) does not limit the right of an affiliate to engage in business
339 practices in accordance with the usage of trade in which the affiliate is engaged.

340 (11) (a) Subsection (1)(ll) does not apply to parts or accessories that the franchisee
341 ordered and purchased outside of an automated parts ordering system required by the
342 franchisor.

343 (b) In determining whether parts or accessories in a franchisee's inventory were
344 specified and sold under an automated ordering system required by the franchisor, the parts and
345 accessories in the franchisee's inventory are presumed to be the most recent parts and
346 accessories that the franchisor sold to the franchisee.

347 (12) (a) Subsection (1)(mm) does not apply to a good faith settlement of a dispute,
348 including a dispute relating to contract negotiations, in which the franchisee gives a waiver in
349 exchange for fair consideration in the form of a benefit conferred on the franchisee.

350 (b) Subsection (12)(a) may not be construed to defeat a franchisee's claim that a waiver
351 has been obtained in violation of Subsection (1)(mm).

Legislative Review Note
as of 2-16-12 4:22 PM

Office of Legislative Research and General Counsel