

1 **NEW AUTOMOBILE FRANCHISE ACT AMENDMENTS**

2 2012 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Scott K. Jenkins**

5 House Sponsor: Brad L. Dee

6

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies the New Automobile Franchise Act.

10 **Highlighted Provisions:**

11 This bill:

12 ▶ prohibits a franchisor from:

13 • coercing or requiring a franchisee to establish prices at which the franchisee is
14 required to sell certain products or services;

15 • coercing or requiring a franchisee to construct a new dealer facility or materially
16 alter or remodel an existing dealer facility under certain circumstances;

17 • requiring a franchisee to purchase certain goods or services from a specified
18 vendor under certain circumstances; and

19 • coercing or requiring a franchisee to lease a sign or other franchisor image
20 element from the franchisor or affiliate without providing the franchisee the
21 right to purchase from a vendor of the franchisee's choosing.

22 **Money Appropriated in this Bill:**

23 None

24 **Other Special Clauses:**

25 None

26 **Utah Code Sections Affected:**

27 AMENDS:



28 **13-14-201**, as last amended by Laws of Utah 2011, Chapter 203



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

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

32 **13-14-201. Prohibited acts by franchisors -- Affiliates -- Disclosures.**

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

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

37 (b) require a franchisee to:

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

39 (ii) contest, or purchase any promotional materials, display devices, or display
40 decorations or materials;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

80 (A) strict liability;

81 (B) negligence;

82 (C) misrepresentation;

83 (D) express or implied warranty;

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

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

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

88 (l) threaten or coerce a franchisee to waive or forbear its right to protest the
89 establishment or relocation of a same line-make franchisee in the relevant market area of the

90 affected franchisee;

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

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

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

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

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

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

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

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

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

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

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

128 (t) (i) except as provided in Subsection (1)(t)(ii) and notwithstanding any other
129 provisions of this chapter:

130 (A) unreasonably fail or refuse to offer to its same line-make franchised dealers all
131 models manufactured for that line-make;

132 (B) unreasonably require a dealer to:

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

134 (II) purchase unreasonable advertising displays or other materials as a prerequisite to
135 receiving a model or series of vehicles;

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

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

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

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

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

142 or

143 (iv) operate a motor vehicle service facility;

144 (v) fail to timely pay for all reimbursements to a franchisee for incentives and other
145 payments made by the franchisor;

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

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

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

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

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

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

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

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

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

165 (ii) the profitability of a franchisee; or

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

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

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

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

171 and

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

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

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

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

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

181 (dd) compel a franchisee, through a finance subsidiary, to agree to unreasonable
182 operating requirements, except that this Subsection (1)(dd) may not be construed to limit the

183 right of a financing subsidiary to engage in business practices in accordance with the usage of
184 trade in retail and wholesale motor vehicle financing;

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

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

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

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

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

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

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

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

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

212 (D) availability or amount of any discount, credit, rebate, or sales incentive the dealer
213 is eligible to receive from the manufacturer for the purchase of any program, certified, or other

214 motor vehicle offered for sale by the franchisor;

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

218 (A) the franchisor fully identifies in writing the basis for the franchisor's claim or
219 charge back arising from the audit, including notifying the franchisee that the franchisee has 20
220 days from the day on which the franchisee receives the franchisor's claim or charge back to
221 assert a protest in writing to the franchisor identifying the basis for the protest;

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

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

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

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

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

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

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

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

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

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

243 (hh) coerce, or attempt to coerce a franchisee to purchase or sell an aftermarket product
244 manufactured by the franchisor, or obtained by the franchisor for resale from a third-party

245 supplier and the franchisor or its affiliate derives a financial benefit from the franchisee's sale
246 or purchase of the aftermarket product as a condition to obtaining preferential status from the
247 franchisor;

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

250 (jj) impose any fee, surcharge, or other charge on a franchisee designed to recover the
251 cost of a warranty repair for which the franchisee is paid by the franchisor;

252 (kk) directly or indirectly condition any of the following actions on the willingness of a
253 franchisee, prospective new franchisee, or owner of an interest in a dealership facility to enter
254 into a site-control agreement:

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

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

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

258 (iv) the approval of the relocation of an existing franchisee's dealership facility, unless
259 the franchisor pays, and the franchisee voluntarily accepts, additional specified cash
260 consideration to facilitate the relocation; or

261 (v) the approval of the sale or transfer of a franchise's ownership, unless the franchisor
262 pays, and the buyer voluntarily accepts, additional specified cash consideration to facilitate the
263 sale or transfer;

264 (ll) subject to Subsection (11), deny a franchisee the right to return any or all parts or
265 accessories that:

266 (i) were specified for and sold to the franchisee under an automated ordering system
267 required by the franchisor; and

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

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

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

271 (mm) subject to Subsection (12), obtain from a franchisee a waiver of a franchisee's
272 right, by threatening:

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

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

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

276 rule, regulation, or law; or

277 (B) that has been granted to more than one other franchisee of the franchisor in the
278 state[-];

279 (nn) coerce or require a franchisee, including by agreement, program, or incentive
280 provision, to establish a price at which the franchisee is required to sell a product or service
281 that is:

282 (i) sold in connection with the franchisee's sale of a motor vehicle; and

283 (ii) (A) in the case of a product, not manufactured, provided, or distributed by the
284 franchisor or an affiliate; or

285 (B) in the case of a service, not provided by the franchisor or an affiliate;

286 (oo) except as necessary to comply with a health or safety law, or to comply with a
287 technology requirement compliance with which is necessary to sell or service a motor vehicle
288 that the franchisee is authorized or licensed by the franchisor to sell or service, coerce or
289 require a franchisee, including through a penalty or other detriment to the franchisee's business,
290 to:

291 (i) construct a new dealer facility or materially alter or remodel an existing dealer
292 facility before the date that is 10 years after the date the construction of the new dealer facility
293 at that location was completed, if the construction substantially complied with standards or
294 plans that the franchisor or its predecessor provided or approved; or

295 (ii) materially alter or remodel an existing dealer facility before the date that is 10 years
296 after the date the previous alteration or remodeling at that location was completed, if the
297 previous alteration or remodeling substantially complied with standards or plans that the
298 franchisor or its predecessor provided or approved; or

299 (pp) notwithstanding the terms of a franchise agreement providing otherwise and
300 subject to Subsection (14):

301 (i) coerce or require a franchisee, including by agreement, program, or incentive
302 provision, to purchase a good or service, relating to a facility construction, alteration, or
303 remodel, from a vendor that a franchisor or its affiliate selects, identifies, or designates, without
304 allowing the franchisee to obtain a like good or service of substantially similar quality from a
305 vendor that the franchisee chooses; or

306 (ii) coerce or require a franchisee, including by agreement, program, or incentive

307 provision, to lease a sign or other franchisor image element from the franchisor or an affiliate
308 without providing the franchisee the right to purchase a sign or other franchisor image element
309 of like kind and quality from a vendor that the franchisee chooses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

337 (E) operates the new motor vehicle dealership under a plan to acquire full ownership of

338 the dealership within a reasonable period of time and under reasonable terms and conditions.

339 (b) After receipt of the advisory board's recommendation, the executive director may,
340 for good cause shown, extend the time limit set forth in Subsection (6)(a) for an additional
341 period not to exceed 12 months.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

385 (13) As used in Subsection (1)(oo), "materially alter":

386 (a) means to make a material architectural, structural, or aesthetic alteration; and

387 (b) does not include routine maintenance, such as interior painting, reasonably
388 necessary to keep a dealership facility in attractive condition.

389 (14) (a) Subsection (1)(pp)(i) does not apply to a good used in a facility construction,
390 alteration, or remodel that is:

391 (i) a moveable interior display that contains material subject to a franchisor's
392 intellectual property right; or

393 (ii) specifically eligible for reimbursement of over one-half its cost pursuant to a
394 franchisor or distributor program or incentive granted to the franchisee on reasonable, written
395 terms, if the reimbursement is paid within one year after the franchisee incurs the cost.

396 (b) Subsection (1)(pp)(ii) may not be construed to allow a franchisee to:

397 (i) impair or eliminate a franchisor's intellectual property right; or

398 (ii) erect or maintain a sign that does not conform to the franchisor's reasonable
399 fabrication specifications and intellectual property usage guidelines.

Legislative Review Note
as of 2-10-12 4:05 PM

Office of Legislative Research and General Counsel