

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009**

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HOUSE BILL 1436*

Short Title: Clarify MV Dealer Termination Assistance. (Public)

Sponsors: Representatives Cole, Sutton, Owens (Primary Sponsors); Cotham, Goforth, Hill, Lucas, McCormick, McLawhorn, Mills, Randleman, and Wray.

Referred to: Transportation, if favorable, Judiciary III.

April 13, 2009

A BILL TO BE ENTITLED
AN ACT TO CLARIFY DEALER TERMINATION ASSISTANCE RIGHTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-305 reads as rewritten:

"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:

...

(6) Notwithstanding the terms, provisions or conditions of any franchise or notwithstanding the terms or provisions of any waiver, to terminate, cancel or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has satisfied the notice requirements of subparagraph c. and the Commissioner has determined, if requested in writing by the dealer within (i) the time period specified in G.S. 20-305(6)c.1.II., III., or IV., as applicable, or (ii) the effective date of the franchise termination specified or proposed by the manufacturer in the notice of termination, whichever period of time is longer, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise and that the manufacturer has acted in good faith as defined in this act regarding the termination, cancellation or nonrenewal. When such a petition is made to the Commissioner by a dealer for determination as to the existence of good cause and good faith for the termination, cancellation or nonrenewal of a franchise, the Commissioner shall promptly inform the manufacturer that a timely petition has been filed, and the franchise in question shall continue in effect pending the Commissioner's decision. The Commissioner shall try to conduct the hearing and render a final determination within 180 days after a petition has been filed. If the termination, cancellation or nonrenewal is pursuant to G.S. 20-305(6)c.1.III. then the Commissioner shall give the proceeding priority consideration and shall try to render his final determination no later than 90 days after the petition has been filed. Any parties to a hearing by the Commissioner under this section shall have a right of review of the decision in a court of competent jurisdiction pursuant to Chapter 150B of the General Statutes. Any determination of the Commissioner under this section finding



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1 that good cause exists for the nonrenewal, cancellation, or termination of any
2 franchise shall automatically be stayed during any period that the affected
3 dealer shall have the right to judicial review or appeal of the determination
4 before the superior court or any other appellate court and during the
5 pendency of any appeal; provided, however, that within 30 days of entry of
6 the Commissioner's order, the affected dealer provide such security as the
7 reviewing court, in its discretion, may deem appropriate for payment of such
8 costs and damages as may be incurred or sustained by the manufacturer by
9 reason of and during the pendency of the stay. Although the right of the
10 affected dealer to such stay is automatic, the procedure for providing such
11 security and for the award of damages, if any, to the manufacturer upon
12 dissolution of the stay shall be in accordance with G.S. 1A-1, Rule 65(d) and
13 (e). No such security provided by or on behalf of any affected dealer shall be
14 forfeited or damages awarded against a dealer who obtains a stay under this
15 subdivision in the event the ownership of the affected dealership is
16 subsequently transferred, sold, or assigned to a third party in accordance
17 with this subdivision or subdivision (4) of this section and the closing on
18 such transfer, sale, or assignment occurs no later than 180 days after the date
19 of entry of the Commissioner's order. Furthermore, unless and until the
20 termination, cancellation, or nonrenewal of a dealer's franchise shall finally
21 become effective, in light of any stay or any order of the Commissioner
22 determining that good cause exists for the termination, cancellation, or
23 nonrenewal of a dealer's franchise as provided in this paragraph, a dealer
24 who receives a notice of termination, cancellation, or nonrenewal from a
25 manufacturer as provided in this subdivision shall continue to have the same
26 rights to assign, sell, or transfer the franchise to a third party under the
27 franchise and as permitted under G.S. 20-305(4) as if notice of the
28 termination had not been given by the manufacturer. Any franchise under
29 notice or threat of termination, cancellation, or nonrenewal by the
30 manufacturer which is duly transferred in accordance with G.S. 20-305(4)
31 shall not be subject to termination by reason of failure of performance or
32 breaches of the franchise on the part of the transferor.

33 a. Notwithstanding the terms, provisions or conditions of any franchise
34 or the terms or provisions of any waiver, good cause shall exist for
35 the purposes of a termination, cancellation or nonrenewal when:

36 1. There is a failure by the new motor vehicle dealer to comply
37 with a provision of the franchise which provision is both
38 reasonable and of material significance to the franchise
39 relationship provided that the dealer has been notified in
40 writing of the failure within 180 days after the manufacturer
41 first acquired knowledge of such failure;

42 2. If the failure by the new motor vehicle dealer relates to the
43 performance of the new motor vehicle dealer in sales or
44 service, then good cause shall be defined as the failure of the
45 new motor vehicle dealer to comply with reasonable
46 performance criteria established by the manufacturer if the
47 new motor vehicle dealer was apprised by the manufacturer
48 in writing of the failure; and

49 I. The notification stated that notice was provided of
50 failure of performance pursuant to this section;

- 1 II. The new motor vehicle dealer was afforded a
2 reasonable opportunity, for a period of not less than
3 180 days, to comply with the criteria; and
- 4 III. The new motor vehicle dealer failed to demonstrate
5 substantial progress towards compliance with the
6 manufacturer's performance criteria during such
7 period and the new motor vehicle dealer's failure was
8 not primarily due to economic or market factors
9 within the dealer's relevant market area which were
10 beyond the dealer's control.
- 11 b. The manufacturer shall have the burden of proof under this section.
- 12 c. Notification of Termination, Cancellation and Nonrenewal. –
- 13 1. Notwithstanding the terms, provisions or conditions of any
14 franchise prior to the termination, cancellation or nonrenewal
15 of any franchise, the manufacturer shall furnish notification
16 of termination, cancellation or nonrenewal to the new motor
17 vehicle dealer as follows:
- 18 I. In the manner described in G.S. 20-305(6)c2 below;
19 and
- 20 II. Not less than 90 days prior to the effective date of
21 such termination, cancellation or nonrenewal; or
- 22 III. Not less than 15 days prior to the effective date of
23 such termination, cancellation or nonrenewal with
24 respect to any of the following:
- 25 A. Insolvency of the new motor vehicle dealer, or
26 filing of any petition by or against the new
27 motor vehicle dealer under any bankruptcy or
28 receivership law;
- 29 B. Failure of the new motor vehicle dealer to
30 conduct its customary sales and service
31 operations during its customary business hours
32 for seven consecutive business days, except
33 for acts of God or circumstances beyond the
34 direct control of the new motor vehicle dealer;
- 35 C. Revocation of any license which the new
36 motor vehicle dealer is required to have to
37 operate a dealership;
- 38 D. Conviction of a felony involving moral
39 turpitude, under the laws of this State or any
40 other state, or territory, or the District of
41 Columbia.
- 42 IV. Not less than 180 days prior to the effective date of
43 such termination, cancellation, or nonrenewal which
44 occurs as a result of any change in ownership,
45 operation, or control of all or any part of the business
46 of the manufacturer, factory branch, distributor, or
47 distributor branch whether by sale or transfer of
48 assets, corporate stock or other equity interest,
49 assignment, merger, consolidation, combination, joint
50 venture, redemption, operation of law or otherwise; or
51 the termination, suspension, or cessation of a part or

- 1 all of the business operations of the manufacturers,
2 factory branch, distributor, or distributor branch; or
3 discontinuance of the sale of the product line or a
4 change in distribution system by the manufacturer
5 whether through a change in distributors or the
6 manufacturer's decision to cease conducting business
7 through a distributor altogether.
- 8 V. Unless the failure by the new motor vehicle dealer
9 relates to the performance of the new motor vehicle
10 dealer in sales or service, not more than one year after
11 the manufacturer first acquired knowledge of the basic
12 facts comprising the failure.
- 13 2. Notification under this section shall be in writing; shall be by
14 certified mail or personally delivered to the new motor
15 vehicle dealer; and shall contain:
- 16 I. A statement of intention to terminate, cancel or not to
17 renew the franchise;
- 18 II. A detailed statement of all of the material reasons for
19 the termination, cancellation or nonrenewal; and
- 20 III. The date on which the termination, cancellation or
21 nonrenewal takes effect.
- 22 3. Notification provided in G.S. 20-305(6)c1II of 90 days prior
23 to the effective date of such termination, cancellation or
24 renewal may run concurrent with the 180 days designated in
25 G.S. 20-305(6)a2II provided the notification is clearly
26 designated by a separate written document mailed by certified
27 mail or personally delivered to the new motor vehicle dealer.
- 28 d. Payments.
- 29 1. Notwithstanding the terms of any franchise, agreement, or
30 waiver, upon ~~Upon~~ the termination, nonrenewal or
31 cancellation of any franchise by the manufacturer or
32 distributor, ~~pursuant to this section, the cessation of business~~
33 or the termination, nonrenewal, or cancellation of any
34 franchise by any new motor vehicle dealer located in this
35 State, or upon any of the occurrences set forth in
36 G.S. 20-305(6)c.1.IV., the manufacturer or distributor shall
37 purchase from and compensate the new motor vehicle dealer
38 be allowed fair and reasonable compensation by the
39 manufacturer for the all of the following:
- 40 I. New ~~Each new~~ motor vehicle within the new motor
41 vehicle dealer's inventory that is of a line-make
42 manufactured or distributed by the manufacturer or
43 distributor, has been acquired from the manufacturer
44 within 18 months, at a price not to exceed the original
45 manufacturer's price to the dealer, and which has not
46 been substantially altered or damaged to the prejudice
47 of the manufacturer or distributor while in the new
48 motor vehicle dealer's possession, and which has not
49 been driven more than 200 miles, and for which no
50 certificate of title has been ~~issued~~; issued. New motor
51 vehicles shall be purchased by the manufacturer or

- 1 distributor from the new motor vehicle dealer at the
2 dealer's net cost. For purposes of this sub-subdivision,
3 "net cost" is defined as the dealer's cost plus any
4 charges by the manufacturer or distributor for
5 distribution, delivery, advertising, and taxes less all
6 allowances paid to the dealer by the manufacturer or
7 distributor. In addition, the manufacturer or distributor
8 shall be entitled to discount the net cost paid by the
9 new motor vehicle dealer based on the odometer
10 mileage of each new motor vehicle at the time of its
11 purchase from the dealer by the manufacturer or
12 distributor, to be determined as follows:
- 13 (i) Vehicles with 0-1,000 miles shall be compensated at
14 the new motor vehicle dealer's net cost without any
15 discount on the basis of odometer mileage.
- 16 (ii) Vehicles with 1,001-6,000 miles shall be compensated
17 at the new motor vehicle dealer's net cost, reduced by
18 the net discount value of each mile in excess of 1,000
19 miles, where "net discount value" is determined
20 according to the following formula: net cost to the
21 dealer multiplied by total mileage in excess of 1,000
22 miles divided by 100,000.
- 23 (iii) Vehicles with more than 6,000 miles – no obligation
24 on the part of the manufacturer or distributor to
25 purchase.
- 26 (iv) Any mileage on a motor vehicle recorded by a
27 manufacturer or distributor or agent of a manufacturer
28 or distributor prior to its physical delivery to a motor
29 vehicle dealer shall not be included in the discount
30 calculation.
- 31 II. Unused, undamaged and unsold supplies and parts
32 purchased from the manufacturer or distributor or
33 sources approved by the manufacturer or distributor,
34 at a price not to exceed the original manufacturer's
35 price to the dealer the current catalogue price, less any
36 applicable discounts, provided such supplies and parts
37 are currently offered for sale by the manufacturer or
38 distributor in its current parts catalogs and are in
39 salable condition;
- 40 III. Equipment, signs, and furnishings that have not been
41 substantially altered or damaged and that have been
42 required by the manufacturer or distributor to be
43 purchased by the new motor vehicle dealer from the
44 manufacturer or distributor, or their approved sources.
- 45 IV. Special tools that have not been substantially altered
46 or damaged and that have been required by the
47 manufacturer or distributor to be purchased by the
48 new motor vehicle dealer from the manufacturer or
49 distributor, or their approved sources within five years
50 immediately preceding the termination, nonrenewal or
51 cancellation of the franchise. The amount of

1 distributor has received notice in writing from, or on behalf
2 of, the new motor vehicle dealer specifying the elements of
3 compensation requested by the dealer. If the termination,
4 cancellation, or nonrenewal is due to a manufacturer's change
5 in distributors, the manufacturer may avoid paying fair
6 market value to the dealer if the new distributor or the
7 manufacturer offers the dealer a franchise agreement with
8 terms acceptable to the dealer.

- 9 e. Dealership Facilities Assistance upon Termination, Cancellation or
10 Nonrenewal.

11 In the event of the occurrence of any of the events specified in
12 G.S. 20-305(6)d.1. above: ~~termination, cancellation or nonrenewal by~~
13 ~~the manufacturer or distributor under this section, except termination,~~
14 ~~cancellation or nonrenewal for insolvency, license revocation,~~
15 ~~conviction of a crime involving moral turpitude, or fraud by a~~
16 ~~dealer-owner:~~

- 17 1. Subject to paragraph 3, if the new motor vehicle dealer is
18 leasing the dealership facilities from a lessor other than the
19 manufacturer or distributor, the manufacturer or distributor
20 shall pay the new motor vehicle dealer a sum equivalent to
21 the rent for the unexpired term of the lease or three year's
22 rent, whichever is less, or such longer term as is provided in
23 the franchise agreement between the dealer and manufacturer;
24 except that, in the case of motorcycle dealerships, the
25 manufacturer shall pay the new motor vehicle dealer the sum
26 equivalent to the rent for the unexpired term of the lease or
27 one year's rent, whichever is less, or such longer term as
28 provided in the franchise agreement between the dealer and
29 manufacturer; or
- 30 2. Subject to paragraph 3, if the new motor vehicle dealer owns
31 the dealership facilities, the manufacturer or distributor shall
32 pay the new motor vehicle dealer a sum equivalent to the
33 reasonable rental value of the dealership facilities for three
34 years, or for one year in the case of motorcycle dealerships.
- 35 3. In order to be entitled to facilities assistance from the
36 manufacturer or distributor, as provided in this paragraph e.,
37 the dealer, owner, or lessee, as the case may be, shall have the
38 obligation to mitigate damages by listing the demised
39 premises for lease or sublease with a licensed real estate agent
40 within 30 days after the effective date of the termination of
41 the franchise and thereafter by reasonably cooperating with
42 said real estate agent in the performance of the agent's duties
43 and responsibilities. In the event that the dealer, owner, or
44 lessee is able to lease or sublease the demised premises, the
45 dealer shall be obligated to pay the manufacturer the net
46 revenue received from such mitigation up to the total amount
47 of facilities assistance which the dealer has received from the
48 manufacturer pursuant to sub-subdivisions 1. and 2. To the
49 extent and for such uses and purposes as may be consistent
50 with the terms of the lease, a manufacturer who pays facilities
51 assistance to a dealer under this paragraph e. shall be entitled

- 1 to occupy and use the dealership facilities during the years for
2 which the manufacturer shall have paid rent under
3 sub-subdivisions 1. and 2.
- 4 4. In the event the termination relates to fewer than all of the
5 franchises operated by the dealer at a single location, the
6 amount of facilities assistance which the manufacturer or
7 distributor is required to pay the dealer under this
8 sub-subdivision shall be based on the proportion of gross
9 revenue received from the sale and lease of new vehicles by
10 the dealer and from the dealer's parts and service operations
11 during the three years immediately preceding the effective
12 date of the termination (or any shorter period that the dealer
13 may have held these franchises) of the line-makes being
14 terminated, in relation to the gross revenue received from the
15 sale and lease of all line-makes of new vehicles by the dealer
16 and from the total of the dealer's and parts and service
17 operations from this location during the same three-year
18 period.
- 19 5. The compensation required for facilities assistance under this
20 paragraph e. shall be paid by the manufacturer or distributor
21 within 90 days of the effective date of termination,
22 cancellation, or nonrenewal. after the manufacturer or
23 distributor has received notice in writing from, or on behalf
24 of, a new motor vehicle dealer specifying the elements of
25 compensation requested by the dealer.
- 26 f. ~~The provisions of sub-subdivisions d. and e. above shall not be~~
27 ~~applicable when the termination, nonrenewal or cancellation of the~~
28 ~~franchise agreement is the result of the voluntary act of the dealer.~~
29 ~~Notwithstanding the terms of any contract or agreement, any dealer's~~
30 ~~termination or resignation shall not be deemed to be voluntary if that~~
31 ~~termination or resignation occurred under the manufacturer's threat of~~
32 ~~nonrenewal, cancellation, or termination of the franchise.~~
33 The provisions of sub-subdivisions d. and e. of this subdivision shall
34 also apply when a manufacturer or distributor provides public notice
35 or notifies one of its franchised dealers located in this State that it
36 intends to either phase out the dealer's franchise or terminate the
37 dealer's franchise at a later date, or when a manufacturer or
38 distributor provides public notice or notice to any of its franchised or
39 licensed dealers located in this State that any of the occurrences set
40 forth in G.S. 20-305(6)c.1.IV. has occurred or may reasonably be
41 expected to occur in the future, so as to either render a dealer's
42 franchised business substantially unmarketable, or saleable only at
43 prices significantly below its fair market value prior to the date any
44 of the occurrences set forth in G.S. 20-305(6)c.1.IV., either having
45 occurred in the past or to occur in the future, became public
46 knowledge.
- 47 g. A franchise shall continue in full force and operation notwithstanding
48 a change, in whole or in part, of an established plan or system of
49 distribution of the motor vehicles offered for sale under the franchise.
50 The appointment of a new manufacturer, factory branch, distributor,
51 or distributor branch for motor vehicles offered for sale under the

1 franchise agreement shall be deemed to be a change of an established
 2 plan or system of distribution.
 3 Upon the occurrence of the change, the Division shall deny an
 4 application of a manufacturer, factory branch, distributor, or
 5 distributor branch for a license or license renewal unless the
 6 applicant for a license as a manufacturer, factory branch, distributor,
 7 or distributor branch offers to each motor vehicle dealer who is a
 8 party to a franchise for that line-make a new franchise agreement
 9 containing substantially the same provisions which were contained in
 10 the previous franchise agreement or files an affidavit with the
 11 Division acknowledging its undertaking to assume and fulfill the
 12 rights, duties, and obligations of its predecessor under the previous
 13 franchise agreement.

14 h. The rights provided to new motor vehicle dealers in sub-subdivisions
 15 d. and e. of this subdivision shall be in addition to any other rights
 16 afforded dealers under any franchise or agreement. It shall be
 17 unlawful for a manufacturer or distributor to condition making any of
 18 the payments required in sub-subdivisions d. and e. of this
 19 subdivision on the willingness of a new motor vehicle dealer to
 20 waive any of the dealer's rights provided by this or any other law. It
 21 shall be unlawful for a manufacturer or distributor to offer any
 22 renewal or subsequent franchise or other agreement relating to the
 23 sale of motor vehicles or motor vehicle parts or accessories, or
 24 relating to the service of motor vehicles, which is conditioned on the
 25 willingness of a new motor vehicle dealer to waive any of the dealer's
 26 rights provided by this or any other law. Any waiver of rights
 27 executed by any new motor vehicle dealer in favor of a manufacturer
 28 or distributor which violates or is inconsistent with any of the terms
 29 or provisions of this Chapter shall be void.

30"

31 **SECTION 2.** This act is effective when it becomes law.

32 **SECTION 3.** If any provision of this act or its application is held invalid, the
 33 invalidity does not affect other provisions or applications of this act that can be given effect
 34 without the invalid provisions or application, and to this end the provisions of this act are
 35 severable.