

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

SENATE BILL NO. 2236
(Senators Klein, G. Lee, O'Connell)
(Representatives Ruby, Kaldor, Vigesaa)

AN ACT to create and enact section 51-07-00.1 and 51-07-02.4 of the North Dakota Century Code, relating to definitions and warranty or incentive audits for new motor vehicle dealers; to amend and reenact section 51-07-02.3 of the North Dakota Century Code, relating to prohibited acts for manufacturers, wholesalers, or distributors of new automobiles and automobile parts; to provide for application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Section 51-07-00.1 of the North Dakota Century Code is created and enacted as follows:

51-07-00.1. Definitions.

As used in sections 51-07-01, 51-07-02.1, 51-07-02.2, 51-07-02.3, 51-07-02.4, and 51-07-03 unless context or subject matter otherwise requires:

1. "Contract" means any written franchise agreement, sales agreement, dealer agreement, or security agreement, or other form of agreement or arrangement of like effect.
2. "Dealer" means a person that engages in the business of selling, at retail, new motor vehicles or trucks or new and used motor vehicles or trucks and possesses a current new motor vehicle dealer license as defined in section 39-22-16.
3. "Distributor" means any person who in whole or in part offers for sale, sells, or distributes any new motor vehicle to a new motor vehicle dealer, and any person that in whole or in part offers for sale, sells, or distributes any farm implement, machinery, or attachment or part for the same; or lawn and garden equipment, or part for the same; or semitrailer, or part for the same, to any person that retails all or any of these items.
4. "Franchise" or "franchise agreement" means any contract or addendum to a contract between a dealer and a manufacturer or distributor that authorizes the dealer to engage in the business of selling or purchasing any particular make of new motor vehicles or motor vehicle parts manufactured or distributed by the manufacturer or distributor.
5. "Franchisor" means a person that manufactures, imports, or distributes new motor vehicles and which may enter a franchise agreement.
6. "Good cause" means failure by a new motor vehicle dealer to substantially comply with material and reasonable requirements imposed upon the new motor vehicle dealer by the franchise agreement if the requirements are not unreasonable when compared to those requirements imposed on other similarly situated new motor vehicle dealers.
7. "Good faith" means honesty in fact and the observance of commercially reasonable, nondiscriminatory standards of fair dealing.
8. "Manufacturer" means any person that is engaged in the business of manufacturing or assembling new motor vehicles or any person that in whole or in part offers for sale, sells, or distributes any new motor vehicle to a new motor vehicle dealer.

9. "Merchandise" means farm implements, machinery, attachments, and parts for the same; lawn and garden equipment and parts for the same; and automobiles, trucks, and semitrailers and parts for the same.
10. "New motor vehicle" means a motor vehicle that has not been subject to a retail sale, the registration provisions of chapter 39-04, the title registration provisions of chapter 39-05, or the motor vehicle excise tax provisions of chapter 57-40.3.
11. "Owner" means a person, other than a lienholder, having the property in or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security.
12. "Semitrailer" includes every vehicle of the trailer type so designed and used in conjunction with a truck that some part of its own weight and that of its own load rests upon or is carried by a truck, except that it does not include a mobile home.
13. "Successor" means the individual who, in the case of the owner's death, is entitled to inherit the ownership interest in the new motor vehicle dealership or who, in the case of an incapacitated owner of a new motor vehicle dealer, has been appointed by a court as the legal representative of the new motor vehicle dealer's property subject to sections 51-07-26 and 51-07-26.1.
14. "Truck" includes every motor vehicle designed, used, or maintained primarily for transportation of property or designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.
15. "Used motor vehicle" means a motor vehicle that has been subject to a retail sale, the registration provisions of chapter 39-04, the title registration provisions of chapter 39-05, or the motor vehicle excise tax provisions of chapter 57-40.3.

SECTION 2. AMENDMENT. Section 51-07-02.3 of the North Dakota Century Code is amended and reenacted as follows:

51-07-02.3. Prohibited acts.

A manufacturer, wholesaler, or distributor of automobiles or trucks, or parts of the automobiles or trucks, that enters a contract with any person engaged in the business of selling or retailing automobiles, trucks, or parts for the automobiles or trucks, may not:

1. Coerce or attempt to coerce the retailer into accepting delivery of automobiles, trucks, parts, or accessories that the retailer has not ordered voluntarily.
2. Condition or attempt to condition the sale of automobiles or trucks on a requirement that the automobile or truck retailer purchase other goods or services, except that the manufacturer, wholesaler, or distributor may require a retailer to purchase all parts reasonably necessary to maintain the quality of operation and telecommunications necessary to communicate with the manufacturer, wholesaler, or distributor.
3. Implement or establish a system of motor vehicle allocation or distribution to one or more of its dealers that is unfair, inequitable, or unreasonably discriminatory. As used in this subsection, "unfair" includes requiring a dealer to accept new vehicles not ordered by the dealer or the refusal or failure to offer to any dealer all models offered to any of its other same line-make dealers in this state. The failure to deliver any motor vehicle is not a violation of this section if failure is due to any cause over which the manufacturer does not have control.

4. Require a dealer to pay all or any part of the cost of an advertising campaign or contest or purchase any promotional material, showroom, or other display decoration or material at the expense of the dealer.
5. Coerce or attempt to coerce an automobile or truck retailer into not carrying dual lines or into maintaining separate facilities as long as the retailer's facilities otherwise satisfy the reasonable requirements of the manufacturer, wholesaler, or distributor.
6. Require a retailer to either establish or maintain exclusive facilities, personnel, or display space or to abandon an existing franchise relationship with another manufacturer in order to continue, renew, reinstate, or enter a franchise agreement or to participate in any program discount, credit, rebate, or sales incentive. This subsection does not apply to a program that is in effect with more than one dealer in this state on the effective date of this Act or to a renewal or modification of the program.
7. Unreasonably prevent or refuse to approve the relocation of a dealership to another site within the dealer's relevant market area. The dealer shall provide the manufacturer or distributor with notice of the proposed address and a reasonable site plan of the proposed location. The manufacturer or distributor shall approve or deny the request in writing within sixty days after receipt of the request, and failure to deny the request within sixty days is deemed approval.
8. Require the retailer to unreasonably remodel, renovate, or recondition the retailer's facilities, change the location of the facilities, or make unreasonable alterations to the dealership premises.
- 4-9. Discriminate in the prices charged for automobiles or trucks of like grade and quality sold by automobile or truck manufacturers to similarly situated automobile or truck retailers. This prohibition does not prevent the use of differentials that solely make due allowance for differences in the cost of manufacture, sale, or delivery or for differing methods or quantities in which the automobiles or trucks are sold or delivered by the manufacturer, wholesaler, or distributor.
10. Refuse or fail to offer any incentive program, bonus payment, holdback margin, or any other mechanism that effectively lowers the net cost of a vehicle to any franchised dealer in this state if the incentive, bonus, or holdback is available or made to one or more same line-make dealers in this state.
- 5-11. Attempt or threaten to terminate, cancel, or fail to renew, or substantially change the competitive circumstances of the dealership contracts for any reason other than the failure of the automobile or truck retailer to comply with the terms of the contract between the parties, if the attempt or threat is based on the results of a circumstance beyond the retailer's control, including a natural disaster in the dealership market area or a labor dispute.
12. Require a dealer in this state to enter any agreement to assent to a release, assignment, novation, waiver, or estoppel in which a dealer relinquishes any rights under this state's law, or which would relieve any person from liability imposed by this state's law unless done in connection with a settlement agreement to resolve a matter between a manufacturer and the dealer. The settlement agreement must be entered voluntarily for separate and valuable consideration, and the renewal, reinstatement, or continuation of a franchise agreement alone does not constitute separate and valuable consideration.
13. Require any dealer in this state to enter any agreement with the manufacturer or any other party which requires the law of another jurisdiction to apply to any dispute between the dealer and manufacturer, requires that the dealer bring an action against the manufacturer in a venue outside of this state, in any way purports to waive any dealer's right to have all of this state's statutory and common law apply, shortens or otherwise modifies or eliminates any dealer's right to resolve any dispute with a manufacturer in a state or federal court in this state, or requires the dealer to agree to arbitration or waive its rights to bring a cause of action against

the manufacturer, unless done in connection with a settlement agreement to resolve a matter or pending dispute between a manufacturer and the dealer. This settlement agreement must be entered voluntarily for separate and valuable consideration and renewal, reinstatement, or continuation of a franchise agreement alone is not separate and valuable consideration.

SECTION 3. Section 51-07-02.4 of the North Dakota Century Code is created and enacted as follows:

51-07-02.4. Warranty and incentive claims.

1. A manufacturer may not conduct a warranty or incentive audit or seek a chargeback on a warranty or incentive payment more than one year after the date of that warranty or incentive payment.
2. A manufacturer may not charge back a dealer for an incentive or warranty payment unless the manufacturer can satisfy its burden of proof that the dealer's claim was false, fraudulent, or the dealer did not substantially comply with the reasonable written procedures of the manufacturer.
3. The audit and chargeback provisions of this section apply to all other incentive and reimbursement programs that are subject to audit by the manufacturer. This section does not apply to fraudulent claims.

SECTION 4. APPLICATION. This Act applies to all dealership agreements in effect on the effective date of this Act which do not have an expiration date and which are continuing contracts and all other contracts entered, amended, or renewed on or after the effective date of this Act. A contract in effect on the effective date of this Act, which by its terms will terminate on a date after that date and which is not renewed, is governed by the law as it existed before the effective date of this Act.

SECTION 5. EMERGENCY. This Act is declared to be an emergency measure.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-second Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2236 and that two-thirds of the members-elect of the Senate voted in favor of said law.

Vote: Yeas 47 Nays 0 Absent 0

President of the Senate

Secretary of the Senate

This certifies that two-thirds of the members-elect of the House of Representatives voted in favor of said law.

Vote: Yeas 92 Nays 0 Absent 2

Speaker of the House

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2011.

Approved at _____ M. on _____, 2011.

Governor

Filed in this office this _____ day of _____, 2011,

at _____ o'clock _____ M.

Secretary of State