

9-1-1999

COMMERCE AND TRADE Selling and Other Trade Practices: Provide for Standing, Damages, Burden of Proof, and Venue; Prohibit Franchisor from Requiring a Dealer to Acquire or Transfer a Line of Automobiles; Prohibit Franchisors from Operating, Owning or Controlling Certain Dealerships; Restrict Franchisor Activity in Relevant Market Area of Existing Dealerships; Provide for Injunctions Against Prohibited Franchisor Acts; Restrict Ownership, Operation and Control of Dealerships by Manufacturers and Franchisors; Prohibit Manufacturers and Franchisors from Unfairly Competing with Dealers

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Robert C. Townley
Part of the [Law Commons](#)

Recommended Citation

Robert C. Townley, *COMMERCE AND TRADE Selling and Other Trade Practices: Provide for Standing, Damages, Burden of Proof, and Venue; Prohibit Franchisor from Requiring a Dealer to Acquire or Transfer a Line of Automobiles; Prohibit Franchisors from Operating, Owning or Controlling Certain Dealerships; Restrict Franchisor Activity in Relevant Market Area of Existing Dealerships; Provide for Injunctions Against Prohibited Franchisor Acts; Restrict Ownership, Operation and Control of Dealerships by Manufacturers and Franchisors; Prohibit Manufacturers and Franchisors from Unfairly Competing with Dealers*, 16 GA. ST. U. L. REV. (1999).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol16/iss1/20>

COMMERCE AND TRADE

Selling and Other Trade Practices: Provide for Standing, Damages, Burden of Proof, and Venue; Prohibit Franchisor from Requiring a Dealer to Acquire or Transfer a Line of Automobiles; Prohibit Franchisors from Operating, Owning or Controlling Certain Dealerships; Restrict Franchisor Activity in Relevant Market Area of Existing Dealerships; Provide for Injunctions Against Prohibited Franchisor Acts; Restrict Ownership, Operation and Control of Dealerships by Manufacturers and Franchisors; Prohibit Manufacturers and Franchisors from Unfairly Competing with Dealers

CODE SECTIONS: O.C.G.A. §§ 10-1-622 to -623, -641, -653 to -654, -661 to -663 (amended), -664, -664.1, -670 (new)

BILL NUMBER: HB 356

ACT NUMBER: 435

GEORGIA LAWS: 1999 Ga. Laws 1194

SUMMARY: The Act changes the definitions of “dealer” and “franchise” and adds a definition for “relevant market area.” It provides for the filing of petitions with the Department of Revenue. It provides for standing, damages, burden of proof, and venue in actions under this Article. The Act provides for the change in management or sale or transfer of a dealership. It further allows a franchisor to limit such a change, sale, or transfer. The Act makes it unlawful for a franchisor to require a dealer to acquire or transfer a line of automobiles if the dealer does not agree. It prohibits a franchisor from denying payment of certain dealer claims. The Act limits the time during which franchisors may audit dealers. It requires franchisors to send invoices to dealers under certain circumstances. The Act prohibits a franchisor from operating, owning, or

controlling certain dealerships. The Act allows a franchisor to limit its dealers and franchisees from adding or acquiring a franchise for another make of automobile. It clarifies provisions regarding prohibited acts by manufacturers. It restricts a franchisor's ability to establish a new dealership or relocate a current dealership in the relevant market area of an existing dealership. This Act allows petitions to enjoin or prohibit such actions by a franchisor and establishes provisions for challenging the establishment or relocation of a dealership in an existing relevant market area. This Act sets forth criteria for determining when a new or current dealership may be established in an existing dealer's relevant market area. It places certain restrictions on the ownership, operation, or control of dealerships by manufacturers and franchisors. It prohibits a manufacturer from unfairly competing with dealers. It also provides for an automatic repeal of certain provisions.

EFFECTIVE DATE: May 3, 1999¹

History

The Act protects automobile buyers by significantly bolstering the retail end of the automobile distribution chain, the automobile dealers, against automobile manufacturers.² While a recent attempt by Ford Motor Company to gain controlling interests in several northern metro-Atlanta automobile dealerships prompted the Georgia General Assembly to act, others maintain that the Act is the result of a concerted nationwide effort by the automobile dealers' lobby to

1. See 1999 Ga. Laws 1194, § 13, at 1205. The Act took effect upon approval by the Governor. See *id.*

2. See Telephone Interview with Rep. Alan Powell, House District No. 23 (May 6, 1999) [hereinafter Powell Interview].

enhance automobile dealers' bargaining position with automobile manufacturers.³

HB 356

The Act amends the "Georgia Motor Vehicle Franchise Practices Act" by limiting automobile manufacturers' ability to sell automobiles on the retail market in Georgia.⁴ The Act reflects the Georgia General Assembly's 1993 legislative finding that "[t]he maintenance of strong and sound dealerships is essential to provide continuing and necessary reliable services to the consuming public in this state and to provide stable employment to the citizens of this state."⁵

Introduction

HB 356, as introduced, significantly altered the "Georgia Motor Vehicle Franchise Practices Act."⁶ The most notable of these changes included the following provisions: allowances for treble damages amounting to "three times the pecuniary loss" and attorneys fees;⁷ the creation of standing for automobile dealer associations and trade organizations;⁸ restriction of manufacturers' ability to limit or prohibit dealers from selling their dealerships or changing their management;⁹ restrictions on manufacturers' ability to establish new dealerships in the "relevant market areas" of existing dealerships;¹⁰ and prohibitions against manufacturers owning or operating dealerships in the state.¹¹

3. See Peter Mantius, *Lobbying Gets Heavy Over Bill On Car Sales*, ATLANTA J. & CONST., Apr. 15, 1999, at E2 (suggesting that the Georgia General Assembly was responding to Georgia automobile dealer concerns over Ford's attempted foray into the Atlanta retail market); Telephone Interview with Dwight Davis, Partner, King & Spalding (May 11, 1999) [hereinafter Davis Interview]. On behalf of an automobile manufacturer client, Mr. Davis vigorously opposed the bill. See *id.* Mr. Davis pointed out that while the concern over Ford's action was important, legislatures in 22 other states introduced similar legislation. See *id.*

4. See O.C.G.A. § 10-1-664.1 (Supp. 1999); see also Davis Interview, *supra* note 3; Powell Interview, *supra* note 2.

5. 1993 Ga. Laws 1585, § 2, at 1587 (formerly found at O.C.G.A. § 10-1-621(4) (1994)).

6. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., with 1993 Ga. Laws 1585, § 2, at 1586-1610 (formerly found at O.C.G.A. §§ 10-1-620 to -628, -630 to -631, -640 to -644, -650 to -654, -660 to -667 (1994)).

7. See HB 356, as introduced, 1999 Ga. Gen. Assem., § 2.

8. See *id.*

9. See *id.* § 4.

10. See *id.* § 10.

11. See *id.* § 11.

Code Section 10-1-622

The Act changed the definition of “dealer,” “franchise,” and “franchisor.”¹² Specifically, the Act expanded the definition of dealer to “also include any person who engages in the repair of motor vehicles if such repairs are performed pursuant to the terms of a franchise or other agreement with a franchisor or if such repairs are performed as part of a manufacturer’s or franchisor’s warranty.”¹³ Subsequently, the House excluded persons who repair motor homes from the definition of dealer.¹⁴ Finally, in the context of attaining dealer status through the repair of motor vehicles, the Senate added the requirement that such persons must be engaged “*exclusively* in the repair of motor vehicles” pursuant to the terms of a franchise agreement.¹⁵

Likewise, just as the sponsors of the bill broadened the meaning of “dealer” in their original version of the bill, they also attempted to expand the definition of franchise to “also mean any letter, memorandum, or other document which imposes a duty, responsibility, restriction, or limitation on a dealer or which fixes the legal rights or liabilities of a dealer.”¹⁶ The House Motor Vehicles Committee slightly altered the definition of franchise without affecting its scope.¹⁷ Finally, Senators Don Balfour of the 9th District and Peg Blitch of the 7th District offered a floor amendment that deleted the language added by the House Motor Vehicle Committee and the original version of the bill and replaced it instead with “[a] franchisor is prohibited from effectuating through any letter, memo, or other document or electronic communication any action or terms that this Article makes unlawful when included in a franchise

12. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 1, with 1993 Ga. Laws 1585, § 2, at 1587 (formerly found at O.C.G.A. § 10-1-622 (1994)).

13. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 1, with 1993 Ga. Laws 1585, § 2, at 1587-89 (formerly found at O.C.G.A. § 10-1-622 (1994)).

14. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 1, with HB 356 (HFS), 1999 Ga. Gen. Assem., § 1, and O.C.G.A. § 10-1-622(1) (Supp. 1999).

15. HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 1 (emphasis added).

16. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 1, with 1993 Ga. Laws 1585, § 2, at 1587-89 (formerly found at O.C.G.A. § 10-1-622 (1994)).

17. See HB 356 (HCS), 1999 Ga. Gen. Assem., § 1. The House Motor Vehicles Committee changed the language of the bill as follows: “Any letter, memorandum, or other document which imposes a duty, responsibility, restriction, or limitation on a dealer or which fixes the legal rights or liabilities of a dealer shall be subject to the provisions of this article relating to the franchise.” *Id.*

agreement.”¹⁸ The language of the floor amendment became law.¹⁹ Furthermore, the Act expanded the definition of “franchisor” to include “[a]ny person, other than a person who finances the purchase or lease of motor vehicles, who is controlled by a franchisor or more than 10 percent owned by a franchisor. . . .”²⁰

Finally, HB 356, as introduced, included a definition of “relevant market area.”²¹ The House, in a floor amendment, moved the definition from Code section 10-1-664 to Code section 10-1-622.²² The Senate Finance and Public Utilities Committee substantially simplified and somewhat narrowed the meaning of “relevant market area” by changing it to “the area located within an eight-mile radius of an existing dealership.”²³

Code Section 10-1-623

The Act adds remedies for dealers, makes venue proper wherever a dealer is located—regardless of where the franchisor or

18. HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 1.

19. See O.C.G.A. § 10-1-622(6) (Supp. 1999).

20. See *id.* § 10-1-622(7)(C). Except for the language “other than a person who finances the purchase or lease of motor vehicles,” which the Senate added in its floor substitute version of the bill, the language of this subsection did not deviate from the “as introduced” version of the bill. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 1, with HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 1, and O.C.G.A. § 10-1-622(7)(C) (Supp. 1999).

21. See HB 356, as introduced, 1999 Ga. Gen. Assem., § 10. HB 356, as introduced, defined “relevant market area” as:

(1) The area located within a ten mile radius of an existing dealership if such dealership is located in a county with a population of 100,000 or more according to the United States decennial census of 1990 or any such future census; or

(2) The area located within a 20 mile radius of an existing dealership if such dealership is located in a county with a population of less than 100,000 according to the United States decennial census of 1990 or any such future census.

Id.

22. See HB 356 (HFS), 1999 Ga. Gen. Assem., § 1. Though the House moved the definition of “relevant market area,” to Code section 10-1-622, it did not change the language of the definition. Compare *id.* with HB 356, as introduced, 1999 Ga. Gen. Assem., § 1. The Senate, however, changed the definition of “relevant market area.” See discussion *infra* note 23 and accompanying text.

23. HB 356 (SCS), 1999 Ga. Gen. Assem., § 1. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., with HB 356 (SCS), 1999 Ga. Gen. Assem., § 1, and O.C.G.A. § 10-1-622(13.1) (Supp. 1999).

manufacturer conducts business—and gives standing to dealer associations.²⁴

HB 356, as introduced, created powerful seller remedies. First, it would have allowed dealers to pursue remedies either through administrative proceedings with the Georgia Department of Revenue or through legal actions in “any court of competent jurisdiction.”²⁵ Second, HB 356, as introduced, would have allowed aggrieved dealers to seek treble damages in actions against franchisors, and, upon an aggrieved dealer’s prima facie showing that a violation of the Article had occurred, shifted to the franchisors the burden of proof that such a violation did not occur.²⁶ The House floor substitute, however, removed the treble damages, attorney’s fees, and burden of proof provisions.²⁷ The Senate, in a floor amendment to the Finance and Public Utilities Substitute version of the bill, restored the treble damages, attorney’s fees, and burden of proof provisions, but the Senate limited treble damages to a maximum of \$750,000.²⁸

In Code section 10-1-623(e), HB 356, as introduced, would have made venue proper “in the county in which the dealer engages in the business of selling the products or services” and “the manufacturer, franchisor, or distributor shall be deemed to reside in such county for venue purposes.”²⁹ The House Motor Vehicle Committee limited application of the Act to “such manufacturer, franchisor, or distributor . . . which is a corporation.”³⁰ Later, in the floor substitute version of HB 356, the House removed the entire section that addressed venue.³¹ In its floor substitute version, the Senate re-inserted the section on venue that the House Motor Vehicle Committee had approved.³²

24. Compare 1993 Ga. Laws 1585, § 2 at 1589-90 (formerly found at O.C.G.A. § 10-1-623 (1994)), with O.C.G.A. § 10-1-623 (Supp. 1999).

25. HB 356, as introduced, 1999 Ga. Gen. Assem., § 2.

26. See *id.* Specifically, the bill allowed an aggrieved dealer to “recover damages therefore in any amount equal to three times the pecuniary loss, together with costs and reasonable attorney’s fees.” *Id.*

27. See HB 356 (HFS), 1999 Ga. Gen. Assem., § 2.

28. See O.C.G.A. § 10-1-623 (Supp. 1999); HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 2.

29. HB 356, as introduced, 1999 Ga. Gen. Assem., § 2.

30. HB 356 (HCS), 1999 Ga. Gen. Assem., § 2. The actual language is confusing because it is difficult to determine whether the clause “which is a corporation” modifies only “distributor” or whether it modifies “manufacturer, franchisor, or distributor.” In any event, the distinction is academic because it is doubtful that an automobile manufacturer or franchisor exists, which is not a corporation.

31. See HB 356 (HFS), 1999 Ga. Gen. Assem., § 2.

32. Compare HB 356 (HCS), 1999 Ga. Gen. Assem., § 2, with HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 2, and O.C.G.A. § 10-1-623(f) (Supp. 1999).

Finally, and perhaps most significantly, Code section 10-1-623 empowers dealer associations to file petitions with the Georgia Department of Revenue or bring a cause of action in a court of competent jurisdiction for violations of the Article or for violations of rights the Article creates.³³ Under the old Code section, dealers, owners, or other parties could only obtain equitable relief if they could show that a violation of the Article by a franchisor might cause the dealers, owners, or other parties a “loss of money, property, employment rights, or business opportunity.”³⁴ The Act, however, makes it possible for “other parties” (*e.g.*, dealer associations) to have a cause of action against a franchisor who violates the Article without first having to show how the association would be damaged by the alleged violation.³⁵ In other words, dealer associations now have standing to bring action against franchisors regardless of whether the association itself was ever actually injured or even involved in the controversy between a franchisor and a dealer.³⁶

Code Section 10-1-641

The Act eliminates the provision in the Code that gave manufacturers up to two years following the payment of a dealer claim to audit the claim.³⁷ Both the House and the Senate approved this change to the Code as proposed in the original version of the bill.³⁸

Code Section 10-1-653

The Act changes Code section 10-1-653 by prohibiting a franchisor from disapproving of a dealer’s sale of his or her dealership or change in the dealer’s management or withholding approval for such a sale or change unless the franchisor can show by a preponderance of evidence the following: its decision is not arbitrary, and the new management, owner, or transferee is unfit or unqualified to be a

33. See O.C.G.A. § 10-1-623(e) (Supp. 1999).

34. 1993 Ga. Laws 1585, § 2, at 1590 (formerly found at O.C.G.A. § 10-1-623(c) (1994)).

35. See O.C.G.A. § 10-1-623(e) (Supp. 1999).

36. See Davis Interview, *supra* note 3 (noting the unprecedented grant of standing to an association regardless of whether the association is actually injured or is even a participant in the event giving rise to the litigation).

37. Compare 1993 Ga. Laws 1585, § 2, at 1593 (formerly found at O.C.G.A. § 10-1-641(c) (1994)), with O.C.G.A. § 10-1-641(c) (Supp. 1999).

38. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 3, with HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 3.

dealer.³⁹ Additionally, the Act prohibits the disapproval or withholding of approval of a change or a sale if the prospective new management, owner, or transferee is a manager or owner of any automobile dealership in the State of Georgia unless the prospective new management, owner, or transferee is not in substantial compliance with an existing franchise agreement in areas related to sales and customer satisfaction.⁴⁰ Finally, the Act eliminates the previous Code provision that allowed franchisors to purchase dealerships from dealers.⁴¹

In HB 356, as introduced, the House prohibited franchisors from disapproving sales or transfers of dealerships unless the franchisor's decision was not arbitrary and the franchisor could prove that the proposed new management, owner, or transferee was unqualified to be a dealer.⁴² In the floor substitute version of the bill, the House made it tougher in some respects for franchisors to disapprove of dealership sales, but it also relaxed some of the provisions against franchisors.⁴³ The House required that franchisors establish "written, reasonable, objective, and uniformly applied standards or qualifications" and apply these standards in evaluating the qualifications of a prospective new manager, owner, or transferee of a dealership.⁴⁴ On the other hand, the House eliminated the clause that declared that owners or managers of dealerships anywhere in the United States are presumptively qualified to be owners or managers and replaced it with a clause that declares that owners or managers of dealerships in the State of Georgia are presumptively qualified to be owners or managers.⁴⁵ Likewise, the House removed the provision that allowed prospective new managers, owners, or transferees to bring actions for violation of this section of the Code.⁴⁶

The Senate Finance and Public Utilities Committee also made changes that have mixed effects on a franchisor's ability to control the

39. See O.C.G.A. § 10-1-653 (Supp. 1999).

40. See *id.*

41. Compare *id.* with 1993 Ga. Laws 1585, § 2, at 1604 (formerly found at O.C.G.A. § 10-1-653(b) (1994)).

42. See HB 356, as introduced, 1999 Ga. Gen. Assem., § 4.

43. See HB 356 (HFS), 1999 Ga. Gen. Assem., § 4.

44. *Id.*

45. See *id.*

46. See *id.* HB 356, as introduced, gave both the prospective transferee, manager, or owner, as well as the existing dealer, the right to bring an action against a franchisor for violations of this section of the Code. See HB 356, as introduced, 1999 Ga. Gen. Assem., § 4.

sale of dealerships.⁴⁷ The Committee limited a franchisor's ability to reject dealership transfers by mandating that the franchisor's standards of qualification be "within reasonable classifications," but it allowed franchisors to reject transfers based upon the prospective transferee's "moral character."⁴⁸ Likewise, the Senate Finance and Public Utilities Committee allowed a franchisor to reject the transfer to another dealer operating in Georgia: if that dealer is not in substantial compliance with his or her existing franchise agreement in terms of customer satisfaction or sales or if that dealer has not met the franchisor's financial qualifications or moral standards.⁴⁹

Finally, the Senate made only one change to this Code section in its floor substitute version of HB 356. The Senate removed the "preponderance of the evidence" burden from franchisors who must show that their disapproval or withholding of approval of dealers wishing to change the executive management or ownership of their dealerships is not arbitrary.⁵⁰

Code Section 10-1-654

Under the Act, the applicability section, Code section 10-1-654, of the Motor Vehicle Franchise Continuation and Succession Act (Code sections 10-1-650 through -654), which made the Code applicable to all franchise agreements made or renewed after June 30, 1983, is removed in its entirety.⁵¹ This change passed as introduced.⁵²

Code Section 10-1-661

The Act amends the Code by adding a subsection that prohibits a franchisor from coercing a dealer into acquiring, giving up, selling, or transferring a line of automobiles once the dealer has notified the franchisor that the dealer does not want to acquire, give up, sell, or transfer that particular line of automobiles.⁵³ The added subsection

47. See HB 356 (SCS), 1999 Ga. Gen. Assem., § 4.

48. See *id.*

49. See *id.*

50. See HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 4.

51. Compare 1993 Ga. Laws 1585, § 2, at 1604 (formerly found at O.C.G.A. § 10-1-654 (1994)), with O.C.G.A. § 10-1-654 (Supp. 1999).

52. See O.C.G.A. § 10-1-654 (Supp. 1999); HB 356 (HCS), 1999 Ga. Gen. Assem., § 5; HB 356 (HFS), 1999 Ga. Gen. Assem., § 5; HB 356 (SCS), 1999 Ga. Gen. Assem., § 5; HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 5.

53. Compare 1993 Ga. Laws 1585, § 2, at 1604-05 (formerly found at O.C.G.A. § 10-1-661(a) (1994)), with O.C.G.A. § 10-1-661(a) (Supp. 1999).

also prohibits franchisors from taking adverse or retaliatory actions against dealers who make such notifications.⁵⁴ The Senate Finance and Public Utilities Committee made the only change to the original version of the HB 356 amendment to this Code section when the Senate stipulated that the scope of the subsection was limited to makes of automobiles that have “been acquired in accordance with this article.”⁵⁵

Code Section 10-1-662

HB 356, as introduced, would have changed Code section 10-1-662 by prohibiting the following franchisor actions: auditing dealer activities that had occurred more than six months prior to the audit; charging back, deducting from, or reducing any account of a dealer or any money owed to a dealer because the franchisor alleges that the dealer owes the franchisor such money; denying, delaying, restricting, or billing back a claim by a dealer unless the dealer’s claim has a substantial defect; engaging in business as a dealer or managing a dealership if the primary business of the dealership is performing repair services on vehicles pursuant to a manufacturer’s or franchisor’s warranty; auditing, investigating, making inquiries on, or billing back any claims relating to activities that had concluded more than six months earlier; limiting or prohibiting dealers from selling foreign-produced cars; refusing to allow, limiting, or restricting a dealer from acquiring a sales or service operation for another line make of motor vehicle; and requiring a dealer to submit to arbitration.⁵⁶

The House Motor Vehicles Committee changed the franchisor audit window from occurrences within a six-month time frame to occurrences within a one-year time frame, and it changed the time limit of occurrences upon which franchisors can base adverse decisions against dealers from six months to one year.⁵⁷ Additionally, the House Motor Vehicles Committee shortened the number of days a dealer has to contest the claims of a franchisor audit from ninety to

54. See O.C.G.A. § 10-1-661(a)(7) (Supp. 1999).

55. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., § 6, with HB 356 (SCS), 1999 Ga. Gen. Assem., § 6.

56. See HB 356, as introduced, 1999 Ga. Gen. Assem., § 7.

57. See HB 356 (HCS), 1999 Ga. Gen. Assem., § 7. The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-662(a)(13) (Supp. 1999).

thirty days.⁵⁸ Furthermore, the Committee heightened the basis upon which a franchisor can deny a dealer claim for payment from “a substantial defect in such claim which materially affects the validity of the claim” to “a material defect in the claim which affects the validity of the claim.”⁵⁹ Finally, the House Motor Vehicles Committee removed the provision making it unlawful for franchisors to audit dealer promotional activities that had concluded more than six months prior to the start of the audit.⁶⁰

In its floor substitute version of HB 356, the House eased some of its restrictions on franchisor activity.⁶¹ First, the House modified the prohibition of franchisors and manufacturers from engaging in the management, operation, or control of dealerships except motor home dealerships.⁶² Next, the House removed the provision that makes it unlawful for franchisors to prohibit or limit dealers from selling new or used foreign automobiles.⁶³ Finally, the House also removed language that prohibited franchisors from requiring a dealer to submit to arbitration.⁶⁴

The Senate Finance and Public Utilities Committee made two alterations to Code section 10-1-662.⁶⁵ First, the Committee further limited a franchisor’s ability to audit a dealer by also prohibiting a franchisor from auditing “any promotion or special event which ends more than one year prior” to any such audit.⁶⁶ Next, with regard to the procedures a franchisor must use to inform a dealer of the results of an audit, the Senate Finance and Public Utilities Committee changed the franchisor’s mechanism from an “invoice to such dealer” to “notice to such dealer.”⁶⁷

58. See HB 356 (HCS), 1999 Ga. Gen. Assem. § 7. The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-662(a)(14) (Supp. 1999).

59. Compare HB 356, as introduced, 1999 Ga. Gen. Assem., with HB 356 (HCS), 1999 Ga. Gen. Assem. § 7. The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-662(a)(15) (Supp. 1999).

60. See HB 356 (HCS), 1999 Ga. Gen. Assem. § 7.

61. See HB 356 (HFS), 1999 Ga. Gen. Assem., § 7.

62. See *id.*

63. See *id.*

64. See *id.*

65. See HB 356 (SCS), 1999 Ga. Gen. Assem., § 7.

66. *Id.* The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-662(a)(13) (Supp. 1999).

67. HB 356 (SCS), 1999 Ga. Gen. Assem., § 7. The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-662(a)(14) (Supp. 1999).

Code Section 10-1-663

Code section 10-1-663 further defines what provisions a franchisor may impose on the dealer in the franchise agreement.⁶⁸ The Act does not add any new provisions; it merely restates and clarifies the existing section of the Code, and it removes the subsection that exempted application of the Code to franchise agreements entered into before July 1, 1983.⁶⁹

The House floor substitute changed the prohibition against franchisors from “[i]mpos[ing] on the dealer” to “[e]stablish[ing] or creat[ing];” likewise, the House added the modification “[b]y agreement or otherwise” to each of the prohibited activities.⁷⁰ Next, the Senate Finance and Public Utilities Committee relaxed one franchisor restriction by allowing franchise agreements to include a right of first refusal to purchase in favor of the franchisor if the exercise of such a purchase results in the dealer receiving the same or greater consideration.⁷¹ Finally the Senate, in its floor substitute version of the bill, reversed the work of the Senate Finance and Public Utilities Committee and returned the bill to its House form.⁷²

Code Section 10-1-664

The Act creates Code section 10-1-664.⁷³ This Code section establishes notice requirements that a franchisor must meet before establishing a new dealership or relocating an established dealership in the relevant market area of an existing dealership.⁷⁴ It also establishes the mechanism by which a dealer can enjoin a franchisor from establishing a new dealership or relocating an established dealership into the dealer’s relevant market area.⁷⁵

68. See O.C.G.A. § 10-1-663 (Supp. 1999).

69. Compare 1993 Ga. Laws 1585, § 2, at 1608 (formerly found at O.C.G.A. § 10-1-663 (1994)), with HB 356, as introduced, 1999 Ga. Gen. Assem., §§ 8-9, and O.C.G.A. § 10-1-663(b), (c) (Supp. 1999).

70. HB 356 (HFS), 1999 Ga. Gen. Assem., § 8.

71. HB 356 (SCS), 1999 Ga. Gen. Assem., § 8. Furthermore the right of first refusal would not apply in situations where a dealer wanted to sell his dealership to a family member or to a qualified manager or partnership or corporation controlled by a family member. See *id.*

72. See HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 8.

73. See O.C.G.A. § 10-1-664 (Supp. 1999).

74. See *id.*

75. See *id.*

The Senate Finance and Public Utilities Committee specified that superior courts are the tribunals or courts of competent jurisdiction with the power to enjoin a franchisor's establishment of a new dealership in an existing dealer's relevant market area.⁷⁶ The Senate Committee also added a subsection to the Code that defined the circumstances under which a franchisor may establish new dealerships in a relevant market.⁷⁷

Code Section 10-1-664.1

HB 356, as introduced, created Code section 10-1-664.1, which made the following franchisor or dealer activities unlawful: ownership, operation, or control of any new vehicle dealership in the state; unfair competition with new motor vehicle dealers; and the selling of new motor vehicles, except through dealers, anywhere in the state.⁷⁸

The House Motor Vehicles Committee changed the bill by excluding motor home or motorcycle sales by a manufacturer or franchisor, and the House, in its floor substitution, made several other changes to the bill.⁷⁹ The House extended the prohibitions against unfair trade practices to include trade practices by parents, wholly or partially owned subsidiaries, officers, or representatives of manufacturers or franchisors.⁸⁰ The House also expanded the exceptions to the clause forbidding franchisor ownership.⁸¹ With regard to the exception in the Code section that allows franchisors to lawfully operate dealerships,

76. See HB 356 (SCS), 1999 Ga. Gen. Assem., § 10. The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-664(b) (Supp. 1999).

77. See HB 356 (SCS), 1999 Ga. Gen. Assem., § 10. The General Assembly incorporated this change into the Act. See O.C.G.A. § 10-1-664(c) (Supp. 1999). Specifically, the Senate Finance and Public Utilities Committee added the provision that the Code section shall not apply to the following:

- (1) To the addition of a new dealership at a location which is within a three-mile radius of a former dealership of the same line make which has been closed for less than two years;
- (2) To the relocation of an existing dealership to a new location which is further away from the protesting dealer's location than the relocated dealer's prior location; or,
- (3) To the relocation of an existing dealership to a new location which is within a three-mile radius of such dealership's current location and it has been at such a current location at least ten years.

Id.

78. See HB 356, as introduced, 1999 Ga. Gen. Assem., § 11.

79. Compare HB 356 (HCS), 1999 Ga. Gen. Assem., § 11, with HB 356 (HFS), 1999 Ga. Gen. Assem., § 11.

80. See HB 356 (HFS), 1999 Ga. Gen. Assem., § 11.

81. See *id.*

the House changed the continuous period requirement of owning, operating, or selling cars by franchisors from “two years prior to the effective date of this Act” to “two years prior to April 1, 1999.”⁸² The House also added the following two exceptions to the Code section that makes franchisor ownership unlawful: manufacturers who only manufacture motor homes or motorcycles can engage in the retail sales of motor homes or motorcycles; and manufacturers who were selling vehicles to the public at an established place of business as of January 1, 1999, and who had never sold their line of vehicles in Georgia can continue to lawfully operate.⁸³ Finally, and perhaps more importantly, the House changed the prohibition against franchisors or manufacturers “unfairly” competing against dealers to a strict prohibition against all franchisor or dealer competition.⁸⁴

The Senate Finance and Public Utilities Committee also made a number of changes to Code section 10-1-664.1.⁸⁵ First, the Senate committee added “affiliates” of franchisors or manufacturers to the entities that may not “own, operate, or control” a new motor vehicle dealership within the state.⁸⁶ Next, it added a “shareholder agreement” in which a new vehicle dealership is being sold as a type of transaction under which a franchisor or manufacturer may temporarily own, operate, or control a dealership.⁸⁷ Further, the Senate Committee broadened the exception allowing motor home and motor cycle manufacturers to sell their products at retail by deleting the requirement that these manufacturers or franchisors be “exclusively” engaged in retail sales.⁸⁸ The Committee also excluded, under certain circumstances, the prohibition against manufacturers owning, operating, or controlling dealerships of trucks weighing in excess of 12,500 pounds, and it permitted manufacturers, under certain circumstances, to sell custom-designed vehicles directly to customers.⁸⁹

Finally, the Senate, in its floor substitute, made some key changes to this Code section.⁹⁰ First, the Senate forbade franchisors from

82. *Id.*

83. *See id.*

84. *See id.*

85. *See* HB 356 (SCS), 1999 Ga. Gen. Assem., § 11.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See* HB 356 (SCSFA), 1999 Ga. Gen. Assem., § 11.

participating in the ownership, operation, or control of any dealership within a fifteen-mile radius of an existing dealership.⁹¹ Next, the Senate forbade the ownership, operation, and control of more than forty-five percent interest in a dealership anywhere in the state.⁹² The Senate also changed the provision prohibiting franchisors from “competing” to a provision prohibiting the franchisors from “unfairly competing.”⁹³ Finally, the Senate defined unfair competition.⁹⁴

Robert C. Townley

91. *See* HB 356 (SCS), 1999 Ga. Gen. Assem., § 11.

92. *See id.*

93. *See id.*

94. *See id.* A franchisor or manufacturer would be presumed to be engaged in unfair competition under the following circumstances:

[I]f it gives any preferential treatment . . . , expressly including, but not limited to, preferential treatment regarding the direct or indirect costs of vehicles or parts, the availability or allocation of vehicles or parts, the availability or allocation of special or program vehicles, the provision of service and service support, the availability of or participation in special programs, the administration of warranty policy, the availability and use of after warranty adjustments, advertising, floor planning, financing or financing programs, or factory rebates.

Id.