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## HB 393 – Commerce and Trade: Selling and Other Trade Practices

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## COMMERCE AND TRADE

***Selling and Other Trade Practices: Amend Part 5 of Article 22 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated, Relating to Motor Vehicle Fair Practices, so as to Provide for Definitions; Provide for an Exception to Restrictions on the Ownership, Operation, or Control of Dealerships by Manufacturers and Franchisors; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 10-1-622, -664.1 (amended)
BILL NUMBER:	HB 393
ACT NUMBER:	159
GEORGIA LAWS:	2015 Ga. Laws 951
SUMMARY:	The Act allows manufacturers of zero emissions motor vehicles to sell an unlimited number of electric vehicles directly to consumers from not more than five new motor vehicle dealership locations. The Act also revises the definition of “new motor vehicle” to remove the specification that such cars must have been sold to a dealer.
EFFECTIVE DATE:	July 1, 2015

### *History*

Franchise car dealerships buy vehicles from manufacturers in hopes of quickly turning their product out to the market.<sup>1</sup> Starting a franchise requires a steep investment in labor and inventory, along with a commitment to, and an understanding of, the local community.<sup>2</sup> Franchise laws vary by state and typically prohibit or

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1. See E. M. Rawes, *What is the Difference Between a Franchise Dealership and an Independent Dealership?*, HOUS. CHRON., <http://smallbusiness.chron.com/difference-between-franchise-dealership-independent-dealership-10015.html> (last visited Sept. 30, 2015).

2. Ronald Kimmons, *The Average Start-Up Costs of a New Car Dealership*, HOUS. CHRON., <http://smallbusiness.chron.com/average-startup-costs-new-car-dealership-12923.html> (last visited Sept.

severely restrict direct sales from manufacturers.<sup>3</sup> The automobile-dealer franchise law in Georgia mandates that a manufacturer can own no more than 45% of a dealership.<sup>4</sup>

In 2013, Tesla Motors, Inc. (Tesla Motors or Tesla) opened its first store in Georgia, offering electric vehicles to drivers living in an area known for its nightmarish traffic.<sup>5</sup> Tesla is best known for its Model S, a sedan with a starting price around \$70,000.<sup>6</sup> The California-based manufacturer took a different approach to reaching consumers; bypassing the traditional franchise-dealership model and selling directly to customers.<sup>7</sup> Tesla was able to sell its vehicles directly to customers in Georgia under an exemption in the state Code because Tesla did not use dealers.<sup>8</sup> Tesla lauded this setup as a way to cut out the middleman and better serve the customer, while other vehicle manufacturers considered it unfair competition.<sup>9</sup> The tension over the way Tesla sold its cars led to litigation and eventually was a catalyst for House Bill (HB) 393.<sup>10</sup>

The Georgia Automobile Dealers Association (GADA or Association), in August 2014, filed a petition arguing that Tesla's business model violated Georgia law.<sup>11</sup> GADA is a trade association

30, 2015). Active auto dealers have invested more than \$230 billion in their industries. *Id.*

3. Roger M. Quinland, *Has the Traditional Automobile Franchise System Run Out of Gas?*, 16 THE FRANCHISE LAWYER 3 (2013), available at [http://www.americanbar.org/publications/franchise\\_lawyer/2013/summer\\_2013/has\\_traditional\\_automobile\\_franchise\\_system\\_run\\_out\\_gas.html](http://www.americanbar.org/publications/franchise_lawyer/2013/summer_2013/has_traditional_automobile_franchise_system_run_out_gas.html); see, e.g., MASS. GEN. LAWS ANN. ch. 93B, § 4(c)(10) (West, Westlaw through 2015); N.Y. VEH. & TRAF. L. § 461 (McKinney, Westlaw through 2015); N.C. GEN. STAT. ANN. § 20-305.2 (West, Westlaw through 2015); see also Cynthia Barmore, *Tesla Unplugged: Automobile Franchise Laws and the Threat to the Electric Vehicle Market*, 18 VA. J.L. & TECH. 185, 190-91 (2013).

4. O.C.G.A. § 10-1-664.1(a) (2009 & Supp. 2015).

5. Chris Isidore, *Tesla's Latest Battleground State: Georgia*, CNN MONEY (Sept. 2, 2014), <http://money.cnn.com/2014/09/02/news/companies/tesla-georgia/>.

6. See *Tesla Model S*, <http://www.teslamotors.com/models> (last visited Sept. 30, 2015).

7. Isidore, *supra* note 5.

8. See Telephone Interview with Rep. Chuck Martin (R-49th) (Apr. 9, 2015) [hereinafter Martin Interview]; see also O.C.G.A. § 10-1-664.1 (2009).

9. Justin Hyde, *How Tesla Plans to Short Circuit New-Car Dealers*, YAHOO NEWS (Sept. 4, 2012), <http://news.yahoo.com/blogs/motoramic/tesla-plans-short-circuit-car-dealers-194619627.html>; see, e.g., Letter from Wayne Weikel, Dir. of State Gov't Affairs, Auto Alliances to Sen. David Shafer (R-48th), President Pro Tempore, Ga. Senate (Mar. 24, 2015) (on file with the Georgia State Law Review).

10. Danny King, *Tesla Wants Court to Dismiss Georgia Dealer Lawsuit*, AUTOBLOG (Nov. 14, 2014), <http://www.autoblog.com/2014/11/15/tesla-wants-court-to-dismiss-georgia-dealer-lawsuit>; see also Martin Interview, *supra* note 8.

11. Amy Wilson, *Dealers in Georgia Petition to Shut Tesla Down*, AUTOMOTIVE NEWS (Aug. 29, 2014), <http://www.autonews.com/article/20140829/RETAIL07/140829846/dealers-in-georgia-petition->

comprised of more than 500 dealer members, representing more than 90% of new vehicle sales in Georgia.<sup>12</sup> GADA wanted regulators to revoke Tesla's dealer license and prohibit it from selling vehicles.<sup>13</sup> The Association also argued that Tesla improperly obtained its dealer license by claiming it qualified for a statutory exemption allowing the direct sale of up to 150 vehicles.<sup>14</sup> The exemption is for makers of custom vehicles, and the law is intended to keep manufacturers from competing directly with their own dealers.<sup>15</sup> Tesla backed a bill introduced in 2014 that would have allowed them to sell up to 1,500 cars per year.<sup>16</sup> That bill was introduced late in the session and never made it out of the House.<sup>17</sup>

Tesla's hurdles in Georgia are no anomaly. Automobile dealers across the nation have opposed Tesla's business model, and many states ban direct sales.<sup>18</sup> Lawsuits from automobile dealers have tried to push Tesla toward a franchise-dealership structure.<sup>19</sup> Tesla has, however, resisted adopting the traditional franchise model despite these lawsuits across the nation.<sup>20</sup> Representative Chuck Martin (R-49th) introduced HB 393 in the 2015-2016 legislative session, and the final version represents a compromise intended to appease representatives of Tesla and GADA.<sup>21</sup>

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to-shut-tesla-down.

12. See *History of GADA*, GA. AUTO. DEALERS ASS'N, <http://www.gada.com/index.php?module=About> (last visited Sept. 30, 2015).

13. Nikki Gordon-Bloomfield, *Georgia Becomes Latest Battleground in Tesla vs Autodealer Fight*, TRANSPORT EVOLVED (Sept. 1, 2014), <https://transportevolved.com/2014/09/01/latest-battleground-tesla-vs-autodealer-electric-car>.

14. *Id.*

15. O.C.G.A. § 10-1-664.1(a)(7) (2009 & Supp. 2015); see also Matt Kempner, *Car Dealers Flip: They Back Revised Tesla Bill*, ATLANTA J.-CONST., Mar. 9, 2015, available at 2015 WLNR 7072607.

16. Jay Cole, *Tesla Supports Bill to Raise 150/Year Vehicle Sales Cap in Georgia*, INSIDE EVS (Feb. 7, 2014), <http://insideevs.com/tesla-supports-bill-to-raise-150year-vehicle-sales-cap-in-Georgia>.

17. See Martin Interview, *supra* note 8. After the bill failed in 2014, lawmakers continued discussing different ways to approach the issue and eventually drafted HB 393. *Id.*; see also HB 925, as introduced, 2014 Ga. Gen. Assem.

18. Max Katsarelas, *Where Can Tesla Sell Cars?*, MOJOMOTORS BLOG (Mar. 19, 2015), <http://www.mojomotors.com/blog/where-can-tesla-sell-cars/>.

19. See Quinland, *supra* note 3.

20. See Adam Hartung, *Tesla is Smarter than Other Auto Companies*, FORBES (Apr. 8, 2014) <http://www.forbes.com/sites/adamhartung/2014/04/08/tesla-is-smarter-than-other-auto-companies/>.

21. See Martin Interview, *supra* note 8. One of the key changes that led to the support of the GADA was changing the definition of "new motor vehicle." *Id.* Even though GADA supported the final legislation, not every dealership was in favor of it. See *id.*

*Bill Tracking of HB 393**Consideration and Passage by the House*

Representatives Chuck Martin (R-49th), Howard Maxwell (R-17th), David Stover (R-71st), Mike Dudgeon (R-25th), Buzz Brockway (R-102nd), and Heath Clark (R-147th) sponsored HB 393.<sup>22</sup> The House read the bill for the first time on February 19, 2015.<sup>23</sup> The House read the bill for the second time the following day.<sup>24</sup> Speaker David Ralston (R-7th) assigned the bill to the House Committee on Motor Vehicles, which favorably reported the bill by substitute on March 9, 2015.<sup>25</sup>

The substitute bill incorporated language tweaks and, at the request of the affected parties, revised the definition of “new motor vehicle” by removing the specification that such vehicles must have been sold to a dealer.<sup>26</sup> The new definition reflected the general understanding of the term “new motor vehicle” and closed a loophole that led to litigation.<sup>27</sup> The substitute bill also extended its applicability to manufacturers of zero emissions motor vehicles and allowed such manufactures to operate at no more than five licensed locations.<sup>28</sup> These key changes represented a compromise between Tesla and GADA.<sup>29</sup> The House, on March 13, 2015, passed the Committee substitute by a vote of 170 to 3.<sup>30</sup>

*Consideration and Passage by the Senate*

Senator Ben Watson (R-1st) sponsored the bill in the Senate.<sup>31</sup> The Senate read the bill for the first time on March 18, 2015, and

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22. Georgia General Assembly, HB 393, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/393>.

23. State of Georgia Final Composite Status Sheet, HB 393, May 14, 2015.

24. *Id.*

25. *Id.*

26. HB 393 (HCS), § 1, p. 1, ln. 11, 2015 Ga. Gen. Assem.

27. See Martin Interview, *supra* note 8; see also Kempner, *supra* note 15.

28. HB 393 (HCS), § 2, p. 3, ln. 62–63, 68–70, 2015 Ga. Gen. Assem.

29. Video Recording of House Motor Vehicles Committee, Mar. 9, 2015 at 34 min., 44 sec. (remarks by Rep. Chuck Martin (R-49th)), [http://original.livestream.com/gahln606/video?clipId=pla\\_5b7fe470-62b7-4ba9-a4f7-4706b0f94b22](http://original.livestream.com/gahln606/video?clipId=pla_5b7fe470-62b7-4ba9-a4f7-4706b0f94b22) [hereinafter House Video].

30. Georgia House of Representatives Voting Record, HB 393 (Mar. 13, 2015).

31. Georgia General Assembly, HB 393, Bill Tracking, <http://www.legis.ga.gov/Legislation/en->

assigned it to the Senate Public Safety Committee.<sup>32</sup> The Committee favorably reported the bill on March 23, 2015, and the Senate read the bill for the second time on March 24, 2015.<sup>33</sup> The following day, the Senate read the bill for the third time.<sup>34</sup> Senator Charlie Bethel (R-54th) and others offered an amendment that would sunset the bill on June 30, 2018.<sup>35</sup> Senator Brandon Beach (R-21st), who later voted against the final bill, would not support the bill without a sunset provision because he wanted to make sure lawmakers would have the opportunity to assess the state of the rapidly changing electric car industry in the near future.<sup>36</sup> Another failed floor amendment, introduced by Senators Mike Crane (R-28th) and Bethel, proposed striking several lines, including many provisions added by the House substitute.<sup>37</sup> Ultimately, the Senate approved HB 393 on March 25, 2015,<sup>38</sup> by a vote of 48 to 4.<sup>39</sup> The House sent the bill to Governor Nathan Deal (R) on April 6, 2015, and he signed it into law on May 6, 2015.<sup>40</sup>

### *The Act*

The Act amends Part 5 of Article 22 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated, relating to motor vehicle fair practices, for the purpose of removing restrictions on the ownership and control of automobile dealerships by manufacturers of zero emissions motor vehicles.<sup>41</sup>

Section 1 of the Act amends the definition of “new motor vehicle” found in Code section 10-1-622(11).<sup>42</sup> The previous definition

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US/display/20152016/HB/393.

32. State of Georgia Final Composite Status Sheet, HB 393, May 14, 2015.

33. *Id.*

34. *Id.*

35. Failed Senate Floor Amendment to HB 393, introduced by Sen. Charlie Bethel (R-54th), Mar. 25, 2015.

36. *See* Telephone Interview with Sen. Brandon Beach (R-21st) (Apr. 9, 2015) [hereinafter Beach Interview].

37. Failed Senate Floor Amendment to HB 393, introduced by Sen. Mike Crane (R-28th), Mar. 25, 2015.

38. State of Georgia Final Composite Status Sheet, HB 393, May 14, 2015.

39. Georgia Senate Voting Record, HB 393 (Mar. 25, 2015).

40. State of Georgia Final Composite Status Sheet, HB 393, May 14, 2015.

41. 2015 Ga. Laws 951, at 951.

42. 2015 Ga. Laws 951, § 1, at 951.

applied only to a motor vehicle “which has been sold to a dealer and on which the original motor vehicle title has not been issued.”<sup>43</sup> The Act removes this restriction, defining a “new motor vehicle” as any “motor vehicle on which the original motor vehicle title has not been issued.”<sup>44</sup> The modified definition prevents potential conflicts with the language contained in Section 2 of the Act and aligns the definition with general usage of the term.<sup>45</sup>

Section 2 of the Act adds paragraph (8) to subsection (a) of Code section 10-1-664.1, creating a new exception to the general prohibition against manufacturers of new motor vehicles from operating or owning controlling interests in dealerships within the state.<sup>46</sup> The Act creates an exception allowing a motor vehicle manufacturer to own and operate a maximum of five new motor vehicle dealerships in Georgia, and an unlimited number of locations that “engage exclusively in the repair of such manufacturer’s line make of motor vehicles . . . .”<sup>47</sup>

Section 2 of the Act also includes four restrictions to the new exception for manufacturer ownership of dealerships.<sup>48</sup> First, the manufacturer must have sold new motor vehicles from an established place of business on or before January 1, 2015.<sup>49</sup> Second, the manufacturer can only produce zero emission vehicles.<sup>50</sup> Third, the manufacturer must never have sold its line of vehicles through a franchised new motor vehicle dealer in Georgia.<sup>51</sup> Finally, the manufacturer cannot have acquired, sold, or transferred a controlling interest in a franchisor or subsidiary thereof.<sup>52</sup>

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43. 1993 Ga. Laws 1585, § 2, at 1589 (formerly found at O.C.G.A. § 10-1-622(11) (2009 & Supp. 2014)).

44. O.C.G.A. § 10-1-622(11) (2009 & Supp. 2015).

45. See Martin Interview, *supra* note 8.

46. See O.C.G.A. § 10-1-664.1(a)(8) (Supp. 2015).

47. *Id.*

48. See *id.*

49. *Id.*

50. O.C.G.A. § 10-1-664.1(a)(8)(A) (Supp. 2015).

51. *Id.*

52. O.C.G.A. § 10-1-664.1(a)(8)(B) (Supp. 2015).

*Analysis**Intended Consequences and Public Policy*

The Act's purpose is to allow manufacturers of zero emissions vehicles to sell an unlimited number of vehicles directly to consumers in Georgia, without having to use a network of franchise dealers.<sup>53</sup> More specifically, it allows Tesla Motors to sell an unlimited number of vehicles from its existing showrooms in Georgia by removing the 150-vehicle-per-showroom cap.<sup>54</sup> Tesla Motors is the only electric vehicle manufacturer in the United States that has never sold conventional fossil fuel vehicles, which along with the fact that it sold motor vehicles before January 1, 2015, and never sold vehicles through or had a controlling interest in a Georgia franchisor, qualifies it for the Act's new exception.<sup>55</sup> Supporters of the Act touted it as a step forward for free market enterprise in the state.<sup>56</sup>

Yet some legislators expressed concerns about enacting legislation intended to help a single company as opposed to a broader industry.<sup>57</sup> Likewise, other automobile manufacturers claimed that the Act would give Tesla Motors a competitive advantage by avoiding restrictions placed on other manufacturers.<sup>58</sup> But the Act's sponsor, Representative Chuck Martin (R-49th), contends that the Act was intended to support consumers in Georgia, rather than provide a carve-out for a single manufacturer.<sup>59</sup>

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53. See Martin Interview, *supra* note 8.

54. See *id.*

55. *About Tesla*, <http://www.teslamotors.com/about> (last visited Sept. 30, 2015); see also O.C.G.A. § 10-1-664.1(a)(8) (Supp. 2015).

56. Martin Interview, *supra* note 8 (“I would hope that we would look at this as a step toward the free market in Georgia, while being respectful of what the manufacturers bring to the state and also what the franchise dealers do.”).

57. See, e.g., Beach Interview, *supra* note 36 (“We do stuff for industries, but we don’t do things for one company.”).

58. Letter from Bryan R. Roosa, Exec. Dir. N. Am. Gov’t Relations, Gen. Motors, LLC to Casey Cagle (R), Lieutenant Governor, State of Ga. (Mar. 24, 2015) (on file with the Georgia State Law Review) (“The language [of the Act] would exempt Tesla from several legal requirements that exist for all other auto manufacturers doing business in Georgia. The exemption would allow Tesla to sell vehicles directly to customers without utilizing an independent dealer network, which is prohibited for other automakers.”); see also Weikel, *supra* note 9.

59. Martin Interview, *supra* note 8 (“[T]his was not intended to be to the benefit of Tesla and to the detriment of any future . . . new motor car line . . .”). The intent was to fix a situation where an “archaic regulation in Georgia law” was limiting the automobile market in the state. *Id.*



*Compromise to End Litigation*

Neither Tesla Motors nor GADA wanted to continue with a “time-consuming legal fight,” facing an uncertain outcome in their litigation, when legislation could provide a compromise.<sup>60</sup> Even during the legislative session, both parties awaited an administrative law judge’s decision.<sup>61</sup> The decision hinged on the interpretation of the term “new motor vehicle” in the prior Code.<sup>62</sup> The Act represents a compromise that renders this litigation moot, while effectively allowing only Tesla Motors to sell vehicles directly from the manufacturer in Georgia.<sup>63</sup>

*Unintended Consequences of the Act*

Legislators and other automobile manufacturers expressed concerns about the Act’s long-term impact on maintaining electric vehicle competition in Georgia.<sup>64</sup> The Act’s opponents advocated for a short-term sunset provision as demonstrated in Senator Charlie Bethel’s (R-54th) failed floor amendment.<sup>65</sup> The sunset provision was designed to allow the General Assembly to re-evaluate the electric vehicle market after a few years—the Act’s impact on that market—and then make any necessary revisions.<sup>66</sup> Long-term technological changes may lead other automobile manufacturers to shift more production to electric vehicles, where the Act may place them at a competitive disadvantage to Tesla Motors or other

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60. Dave Williams & Urvaksh Karkaria, *Tesla Motors Could Get Greenlight to Expand in Georgia*, ATLANTA BUS. CHRON., Mar. 12, 2015, available at 2015 WLNR 7103391. (“The resulting legislative solution is better for both sides than continuing an expensive, time-consuming legal fight, said Chip Lake, spokesman for [GADA]. . . . [The Act] takes the worst-case scenario for both parties off the table . . .”).

61. *See id.*

62. *Id.* (“A ruling in favor of Tesla would have nullified a dealership practices law Georgia car dealers want protected, Lake said. On the other hand, a ruling for the dealers would have shut Tesla down in Georgia he said.”); *see also* Martin Interview, *supra* note 8 (“[O]ne of the reasons . . . was an inconsistency in the law around what the definition of a new vehicle was that had actually led to the litigation that was in place.”).

63. *See* Martin Interview, *supra* note 8 (“So, by changing this definition, it removed that issue of litigation and that was, if you will, the win-win for the manufacturers and [GADA] for the most part.”).

64. *See* Beach Interview, *supra* note 36; Weikel, *supra* note 9.

65. Beach Interview, *supra* note 36; Weikel, *supra* note 9; *see also* Failed Senate Floor Amendment to HB 393, *supra* note 35.

66. Beach Interview, *supra* note 36.

exclusively electric car manufacturers.<sup>67</sup> The biggest challenge to the future of electric vehicles in Georgia may not be HB 393, but one of the 2015 legislative session's marquee pieces of legislation; the Transportation Funding Act of 2015, which repealed the generous state income tax credits for electric vehicles and levies an annual registration fee them.<sup>68</sup>

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67. *Id.* (“I think in the next three to five years, technology is going to change such that there are going to be other manufacturers [entering] the electric car business.”).

68. *See generally*, Megan Canning & Jack Winne, *Revenue and Taxation: Motor Fuel and Road Taxes*, 32 GA. ST. U. L. REV. 261 (2015).

