

**Senate Bill No. 630**

(By Senators Tucker and Plymale)

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[Introduced February 17, 2014; referred to the Committee on  
Transportation and Infrastructure; and then to the Committee on  
the Judiciary.]

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11 A BILL to amend and reenact §17A-6A-1, §17A-6A-3, §17A-6A-4,  
12 §17A-6A-5, §17A-6A-6, §17A-6A-7, §17A-6A-8, §17A-6A-8a,  
13 §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-18,  
14 §17A-6A-19, §17A-6A-20 and §17A-6A-21 of the Code of West  
15 Virginia, 1931, as amended; and to amend said code by adding  
16 thereto seven new sections, designated §17A-6A-12a,  
17 §17A-6A-12b, §17A-6A-12c, §17A-6A-14a, §17A-6A-15, §17A-6A-16  
18 and §17A-6A-17, all relating to motor vehicle dealers,  
19 distributors, wholesalers and manufacturers.

20 *Be it enacted by the Legislature of West Virginia:*

21 That §17A-6A-1, §17A-6A-3, §17A-6A-4, §17A-6A-5, §17A-6A-6,  
22 §17A-6A-7, §17A-6A-8, §17A-6A-8a, §17A-6A-10, §17A-6A-11,  
23 §17A-6A-12, §17A-6A-13, §17A-6A-18, §17A-6A-19, §17A-6A-20 and  
24 §17A-6A-21 of the Code of West Virginia, 1931, as amended, be

1 amended and reenacted; and that said code be amended by adding  
2 thereto seven new sections, designated §17A-6A-12a, §17A-6A-12b,  
3 §17A-6A-12c, §17A-6A-14a, §17A-6A-15, §17A-6A-16 and §17A-6A-17,  
4 all to read as follows:

5 **ARTICLE 6A. MOTOR VEHICLE DEALERS, DISTRIBUTORS, WHOLESALERS AND**  
6 **MANUFACTURERS.**

7 **§17A-6A-1. Legislative finding.**

8 The Legislature finds and declares that the distribution and  
9 sale of motor vehicles in this state vitally affects the general  
10 economy and the public interest and welfare and that in order to  
11 promote the public interest and welfare and in exercise of its  
12 police power, it is necessary to regulate motor vehicle dealers,  
13 manufacturers, distributors, and representatives of vehicle  
14 manufacturers and distributors doing business in this state in  
15 order to avoid inequitable conduct and undue control of the  
16 independent new motor vehicle dealer by the vehicle manufacturer or  
17 distributor and to insure that dealers fulfill their obligations  
18 under their franchises and provide adequate and sufficient service  
19 to consumers generally, and to protect and preserve the investments  
20 and properties of the citizens and motor vehicle dealers of this  
21 State.

22 **§17A-6A-3. Definitions.**

23 For the purposes of this article, the words and phrases

1 defined in this section have the meanings ascribed to them, except  
2 where the context clearly indicates a different meaning.

3       (1) "Dealer agreement" means the franchise, agreement or  
4 contract in writing between a manufacturer, distributor and a new  
5 motor vehicle dealer which purports to establish the legal rights  
6 and obligations of the parties to the agreement or contract with  
7 regard to the purchase, lease or sale of new motor vehicles,  
8 accessories, service and sale of parts for motor vehicles.

9       (2) "Designated family member" means the spouse, child,  
10 grandchild, parent, brother or sister of a deceased new motor  
11 vehicle dealer who is entitled to inherit the deceased dealer's  
12 ownership interest in the new motor vehicle dealership under the  
13 terms of the dealer's will, or who has otherwise been designated in  
14 writing by a deceased dealer to succeed the deceased dealer in the  
15 new motor vehicle dealership, or is entitled to inherit under the  
16 laws of intestate succession of this state. With respect to an  
17 incapacitated new motor vehicle dealer, the term means the person  
18 appointed by a court as the legal representative of the new motor  
19 vehicle dealer's property. The term also includes the appointed  
20 and qualified personal representative and the testamentary trustee  
21 of a deceased new motor vehicle dealer. However, the term means  
22 only that designated successor nominated by the new motor vehicle  
23 dealer in a written document filed by the dealer with the  
24 manufacturer or distributor, if such a document is filed.

1           (3) "Distributor" means any person, resident or nonresident,  
2 who, in whole or in part, offers for sale, sells or distributes any  
3 new motor vehicle to a new motor vehicle dealer or who maintains a  
4 factor representative, resident or nonresident, or who controls any  
5 person, resident or nonresident, who, in whole or in part, offers  
6 for sale, sells or distributes any new motor vehicle to a new motor  
7 vehicle dealer.

8           (4) "Established place of business" means a permanent,  
9 enclosed commercial building located within this state easily  
10 accessible and open to the public at all reasonable times and at  
11 which the business of a new motor vehicle dealer, including the  
12 display and repair of motor vehicles, may be lawfully carried on in  
13 accordance with the terms of all applicable building codes, zoning  
14 and other land-use regulatory ordinances and as licensed by the  
15 Division of Motor Vehicles.

16           (5) "Factory branch" means an office maintained by a  
17 manufacturer or distributor for the purpose of selling or offering  
18 for sale vehicles to a distributor, wholesaler or new motor vehicle  
19 dealer, or for directing or supervising, in whole or in part,  
20 factory or distributor representatives. The term includes any  
21 sales promotion organization maintained by a manufacturer or  
22 distributor which is engaged in promoting the sale of a particular  
23 make of new motor vehicles in this state to new motor vehicle  
24 dealers.

1           (6) "Factory representative" means an agent or employee of a  
2 manufacturer, distributor or factory branch retained or employed  
3 for the purpose of making or promoting the sale of new motor  
4 vehicles or for supervising or contracting with new motor vehicle  
5 dealers or proposed motor vehicle dealers.

6           (7) "Good faith" means honesty in fact and the observation of  
7 reasonable commercial standards of fair dealing in the trade.

8           (8) "Manufacturer" means any person who manufactures or  
9 assembles new motor vehicles, ~~or any distributor, factory branch or~~  
10 ~~factory representative.~~ and, in the case of a school bus, truck  
11 tractor, road tractor or truck as defined in Section 1, Article 1  
12 of Chapter 17A, also means a person engaged in the business of  
13 manufacturing a school bus, truck tractor, road tractor or truck,  
14 their engines, power trains or rear axles, including when such  
15 engines, power trains, or rear axles are not warranted by the final  
16 manufacturer or assembler, and any distributor, factory branch or  
17 representative. The term manufacturer also includes a captive  
18 finance source as herein defined in section 10(1)(k)(i) of this  
19 article.

20           (9) "Motor vehicle" means that term as defined in section one,  
21 article one of this chapter, including motorcycle, school bus,  
22 truck tractor, road tractor, truck, ~~and~~ recreational vehicle,  
23 all-terrain vehicle, and utility terrain vehicle as defined in  
24 subsections (c), (d), (ff), (h), (i), ~~and~~ (nn) and (vv)

1 respectively, of said section, but not including a farm tractor or  
2 farm equipment. The term "motor vehicle" shall also include, for  
3 a school bus, truck tractor, road tractor and truck,-its component  
4 parts, including, but not limited to, its engine, transmission, or  
5 real axle manufactured for installation in a school bus, truck  
6 tractor, road tractor or truck.

7 (10) "New motor vehicle" means a motor vehicle which is in the  
8 possession of the manufacturer, distributor or wholesaler, or has  
9 been sold only to a new motor vehicle dealer and on which the  
10 original title has not been issued from the new motor vehicle  
11 dealer.

12 (11) "New motor vehicle dealer" means a person who holds a  
13 dealer agreement granted by a manufacturer or distributor for the  
14 sale of its motor vehicles, who is engaged in the business of  
15 purchasing, selling, leasing, exchanging or dealing in new motor  
16 vehicles, service of said vehicles, warranty work and sale of parts  
17 who has an established place of business in this state and is  
18 licensed by the Division of Motor Vehicles.

19 (12) "Person" means a natural person, partnership,  
20 corporation, association, trust, estate or other legal entity.

21 (13) "Proposed new motor vehicle dealer" means a person who  
22 has an application pending for a new dealer agreement with a  
23 manufacturer or distributor. "Proposed motor vehicle dealer" does  
24 not include a person whose dealer agreement is being renewed or

1 continued.

2 (14) "Relevant market area" means the area located within a  
3 twenty air-mile radius around an existing same line-make new motor  
4 vehicle dealership.

5 **§17A-6A-4. Cancellation of dealer contract; notification.**

6 (1) Notwithstanding any agreement, a manufacturer or  
7 distributor shall not cancel, terminate, fail to renew or refuse to  
8 continue any dealer agreement with a new motor vehicle dealer  
9 unless the manufacturer or distributor has complied with all of the  
10 following:

11 (a) Satisfied the notice requirement of section seven of this  
12 article;

13 (b) Acted in good faith;

14 (c) Engaged in full and open communication with franchised  
15 dealer; and

16 (d) Has good cause for the cancellation, termination,  
17 nonrenewal or discontinuance.

18 (2) Notwithstanding any agreement, good cause exists when a  
19 manufacturer or distributor can demonstrate termination is  
20 necessary due to a material breach of a reasonable term or terms of  
21 the agreement by a dealer when weighed against the interests of the  
22 dealer and the public. The burden of proof is on the manufacturer  
23 to prove good cause by a preponderance of the evidence. The  
24 interests of the dealer and the public shall include consideration

1 of:

2 (a) The relationship of the dealer's sales to the sales in the  
3 relevant market;

4 (b) The investment and financial obligations of the dealer  
5 under the terms of the franchise agreement;

6 (c) The effect on the public cancellation of the franchise  
7 agreement would cause;

8 (d) The adequacy of the dealer's sales and service facilities,  
9 equipment, parts and personnel in relation to other dealers in the  
10 relevant market;

11 (e) Whether the dealer is honoring existing warranties;

12 (f) Whether the dealer is complying, or can comply within a  
13 reasonable time, with reasonable capitalization requirements; and

14 (g) The dealer's overall performance under the reasonable  
15 terms of the franchise agreement. This shall include the overall  
16 fairness of the agreement terms, the enforceability of the  
17 agreement and the relative bargaining power of the parties.

18 (h) Whether the manufacturer provided the requested  
19 appropriate volumes and type of motor vehicles to the dealer,  
20 training, tools, parts and support to the dealer.

21 (3) In addition to the requirements of subsection (2), if the  
22 failure by the new motor vehicle dealer to comply with a provision  
23 of the dealer agreement relates to the performance of the new motor  
24 vehicle dealer in sales or service, good cause exists for the



1 purposes of a termination, cancellation, nonrenewal or  
2 discontinuance under subsection (1) of this section when the new  
3 motor vehicle dealer failed to effectively carry out the  
4 performance provisions of the dealer agreement if all of the  
5 following have occurred:

6 (a) The new motor vehicle dealer was given written notice by  
7 the manufacturer or distributor of the failure;

8 (b) The notification stated that the notice of failure of  
9 performance was provided pursuant to this article;

10 (c) The new motor vehicle dealer was afforded a reasonable  
11 opportunity to exert good faith efforts to carry out the dealer  
12 agreement; and

13 (d) The failure continued for more than three hundred sixty  
14 days after the date notification was given pursuant to subdivision  
15 (a) of this subsection.

16 **§17A-6A-5. Circumstances not constituting good cause.**

17 Notwithstanding any agreement, the following alone shall not  
18 constitute good cause for the termination, cancellation, nonrenewal  
19 or discontinuance of a dealer agreement under subdivision (d),  
20 subsection (1), section four of this article:

21 (a) A change in ownership of the new motor vehicle dealer's  
22 dealership. The subdivision does not authorize any change in  
23 ownership which would have the effect of a sale or an assignment of  
24 the dealer agreement or a change in the principal management of the

1 dealership without the manufacturer's or distributor's prior  
2 written consent, which shall not be unreasonably or untimely  
3 withheld.

4 (b) The refusal of the new motor vehicle dealer to purchase or  
5 accept delivery of any new motor vehicle parts, accessories, or any  
6 other commodity or services not ordered by the new motor vehicle  
7 dealer.

8 (c) The fact that the new motor vehicle dealer owns, has an  
9 investment in, participates in the management of, or holds a dealer  
10 agreement for the sale of another make or line of new motor  
11 vehicles, or that the new motor vehicle dealer has established  
12 another make or line of new motor vehicles in the same dealership  
13 facilities as those of the manufacturer or distributor: *Provided,*  
14 That the new motor vehicle dealer maintains a reasonable line of  
15 credit for each make or line of new motor vehicles, and that the  
16 new motor vehicle dealer remains in substantial compliance with the  
17 terms and conditions of the dealer agreement and with any  
18 reasonable facilities' requirements of the manufacturer or  
19 distributor.

20 (d) The fact that the new motor vehicle dealer sells or  
21 transfers ownership of the dealership or sells or transfers capital  
22 stock in the dealership to the new motor vehicle dealer's spouse,  
23 son or daughter: *Provided,* That the sale or transfer shall not  
24 have the effect of a sale or an assignment of the dealer agreement

1 or a change in the principal management of the dealership without  
2 the manufacturer's or distributor's prior written consent.

3 **§17A-6A-6. Burden of proof.**

4 For each termination, cancellation, nonrenewal or  
5 discontinuance, the manufacturer or distributor shall have the  
6 burden of proof by a preponderance of the evidence for showing that  
7 he or she has acted in good faith, that the notice requirement has  
8 been complied with, and that there was good cause by a  
9 preponderance of the evidence for the termination, cancellation,  
10 nonrenewal or discontinuance.

11 **§17A-6A-7. Notice provisions.**

12 Notwithstanding any agreement, prior to the termination,  
13 cancellation, nonrenewal or discontinuance of any dealer agreement,  
14 the manufacturer or distributor shall furnish notice of the  
15 termination, cancellation, nonrenewal or discontinuance to the new  
16 motor vehicle dealer as follows:

17 (a) Except as otherwise provided in this section, notice shall  
18 be made not less than one hundred twenty days prior to the  
19 effective date of the termination, cancellation, nonrenewal or  
20 discontinuance.

21 (b) Notice shall be by certified mail with restrictive  
22 delivery to the new motor vehicle dealer principal and shall  
23 contain the following:

24 (1) A statement of intention to terminate, cancel, not renew

1 or discontinue the dealer agreement;

2       (2) A detailed written statement of all reasons for the  
3 termination, cancellation, nonrenewal or discontinuance. The  
4 statement shall include, at a minimum, a complete explanation of  
5 each reason upon which the manufacturer or distributor relies to  
6 support its proposed action, along with all supporting  
7 documentation which is material to the proposed action and  
8 available to the manufacturer or distributor at the time of  
9 termination, cancellation, nonrenewal or discontinuance; and

10       (3) The date on which the termination, cancellation,  
11 nonrenewal or discontinuance takes effect.

12       (c) Notwithstanding subdivision (a) of this subsection, notice  
13 shall be made not less than thirty days prior to the effective date  
14 of the termination, cancellation, nonrenewal or discontinuance for  
15 any of the following reasons:

16       (1) Insolvency of the new motor vehicle dealer or the filing  
17 of any petition by or against the new motor vehicle dealer under  
18 any bankruptcy or receivership law;

19       (2) Failure of the new motor vehicle dealer to conduct his or  
20 her customary sales and service operations during his or her  
21 customary business hours for seven consecutive business days;

22       (3) Conviction of the new motor vehicle dealer or its  
23 principal owners of a crime, but only if the crime is punishable by  
24 imprisonment in excess of one year under the law under which the

1 dealer was convicted or the crime involved theft, dishonesty or  
2 false statement regardless of the punishment;

3 (4) Revocation of a motor vehicle dealership license in  
4 accordance with section eighteen, article six of this chapter; or

5 (5) A fraudulent misrepresentation by the new motor vehicle  
6 dealer to the manufacturer or distributor, which is material to the  
7 dealer agreement.

8 (d) Notwithstanding subdivision (a) of this subsection, notice  
9 shall be made not less than twelve months prior to the effective  
10 date of a termination, cancellation, nonrenewal or discontinuance  
11 if a manufacturer or distributor discontinues production of the new  
12 motor vehicle dealer's product line or discontinues distribution of  
13 the product line in this state.

14 (e) Except as provided in subdivision (c) of this subsection,  
15 any motor vehicle dealer who receives a notice of intent to  
16 discontinue, cancel or not renew a dealer agreement may, within a  
17 one hundred twenty-day notice period, file a petition or complaint  
18 for a determination of whether such action is an unfair or  
19 prohibited discontinuation, cancellation or nonrenewal. Dealer  
20 agreements and certificates of appointment shall continue in effect  
21 until a final determination of the issues raised in such petition  
22 or complaint by the motor vehicle dealer. A discontinuance,  
23 cancellation or nonrenewal is unfair if it is:

24 (1) Not clearly permitted by the dealer agreement;

1 (2) Not undertaken for good cause; or

2 (3) Is based on an alleged breach of the franchise agreement  
3 which is not in fact a material and substantial breach.

4 (f) No replacement dealer shall be named for this point or  
5 location to engage in business and the dealer's agreement shall  
6 remain in effect until a final judgement is entered after all  
7 appeals are exhausted: ~~Provided, That when a motor vehicle dealer  
8 appeals a decision upholding a discontinuation, cancellation or  
9 nonrenewal under subdivisions (f) and (g) of this section, the  
10 dealer agreement shall remain in effect pending exhaustion of all  
11 appeals only if the motor vehicle dealer establishes a likelihood  
12 of success on appeal and that the public interest will not be  
13 harmed by keeping the dealer agreement in effect pending entry of  
14 final judgement after such appeal. Provided, that when a motor  
15 vehicle dealer appeals a decision upholding a discontinuation,  
16 cancellation or nonrenewal under sub-section (c) of this section,  
17 the dealer agreement shall remain in effect pending exhaustion of  
18 all appeals only if the motor vehicle dealer establishes a  
19 likelihood of success on appeal and the public interest will not be  
20 harmed by keeping the dealer agreement in effect pending entry of  
21 final judgment after appeal.~~

22 (g) If a transfer of ownership is proposed after a notice to  
23 discontinue, cancel or not renew a dealer agreement is received  
24 but, prior to the final determination, including exhaustion of all

1 appellate remedies of a motor vehicle dealer's complaint or  
2 petition contesting such action, the termination proceedings shall  
3 be stayed, without bond, during the period the transfer is being  
4 reviewed by the manufacturer or distributor. During the period  
5 that the transfer is being reviewed by the manufacturer or  
6 distributor, the dealer agreement shall remain in full force and  
7 effect, and the motor vehicle dealer shall retain all rights and  
8 remedies pursuant to the terms and conditions of the dealer  
9 agreement and applicable law. This shall include, but is not  
10 limited to, all rights of transfer under subdivision (2), section  
11 ten, article six-a, chapter seventeen of this code until such time  
12 as the manufacturer or distributor has accepted or rejected the  
13 proposed transfer. If the proposed transfer is rejected, the motor  
14 vehicle dealer shall retain all of its rights pursuant to section  
15 sixteen of said article to a judicial determination as to whether  
16 the manufacturer or distributor's rejection is in compliance with  
17 the provisions of subdivision (2), section ten of said article and  
18 during the pendency of such judicial proceeding, and any related  
19 appellate proceedings, the termination proceedings shall remain  
20 stayed without bond, the dealer agreement shall remain in full  
21 force and effect and the motor vehicle dealer shall retain all  
22 rights and remedies pursuant to the terms and conditions of the  
23 dealer agreement and applicable law including all rights of  
24 transfer. If a transfer is approved by the manufacturer or

1 distributor or mandated by law, the termination proceedings shall  
2 be dismissed with prejudice as moot.

3 **§17A-6A-8. Reasonable compensation to dealer.**

4 (1) Upon the termination, cancellation, nonrenewal or  
5 discontinuance of any dealer agreement, the new motor vehicle  
6 dealer shall be allowed fair and reasonable compensation by the  
7 manufacturer or distributor for the following:

8 (a) Any new motor vehicle inventory, manufactured for sale in  
9 the United States, purchased from the manufacturer, distributor or  
10 other dealers, which has not been materially altered, substantially  
11 damaged or driven for more than ~~seven hundred fifty miles~~ one  
12 thousand miles, except that for any new motorcycle, all terrain  
13 vehicle and utility terrain vehicle inventory purchased from the  
14 manufacturer or distributor, that inventory must not have been  
15 materially altered, substantially damaged or driven for more than  
16 fifty miles. For purposes of a school bus, truck tractor, road  
17 tractor or truck, materially altered does not include dealer  
18 add-ons, such as, but not limited to, racks, mud flaps, fifth wheel  
19 assemblies, dump or tank bodies.

20 (b) Supplies, special tools, equipment and parts inventory at  
21 the published list price of, purchased from or at the direction of  
22 the manufacturer or distributor. Parts shall be restricted to those  
23 and listed in the manufacturer's or distributor's current parts  
24 catalog;



1 (c) Equipment, current and prior model year marketing  
2 brochures and materials, furnishings and signs purchased or leased  
3 from, or at the direction of, the manufacturer or distributor at  
4 purchase price; and

5 (d) Special computer software, hardware, license fees and  
6 other programs mandated by the manufacturer to provide training or  
7 communication with the manufacturer.

8 (2) Upon the termination, cancellation, nonrenewal or  
9 discontinuance of a dealer agreement by the manufacturer or  
10 distributor, the manufacturer or distributor shall also pay to the  
11 new motor vehicle dealer a sum equal to the current, fair rental  
12 value of his or her established place of business for a period of  
13 three years from the effective date of termination, cancellation,  
14 nonrenewal or discontinuance, or the remainder of the lease,  
15 whichever is less. If the dealer, directly or indirectly, owns the  
16 dealership facility, the manufacturer shall pay the dealer a sum  
17 equal to the reasonable rental value of the dealership premises for  
18 three years. However, the dealer shall have the obligation to  
19 mitigate his or her damages, including, but not limited to, listing  
20 the facility with a commercial real estate agent and other  
21 reasonable steps to sell or lease the property. During this  
22 three-year period the manufacturer shall have the right to occupy  
23 and use the facilities until such time as the dealer is able to  
24 otherwise sell or lease the property to another party. The payment

1 required by this subsection does not apply to any termination,  
2 cancellation, nonrenewal or discontinuance made pursuant to  
3 subsection (c), section five of this article.

4 (3) In addition to the items listed in subsection (1) and (2),  
5 upon the termination, cancellation or nonrenewal where the  
6 manufacturer or distributor is discontinuing the sale of a product  
7 line, the manufacturer or distributor shall pay or provide to the  
8 motor vehicle dealer:

9 (a) Compensation consistent with the length of time the dealer  
10 carried the line and the investment and timing thereof required by  
11 the manufacturer or distributor of the dealer; and

12 (b) Support of the manufacturer's or distributor's warranty  
13 obligations by making parts available and compensating dealers for  
14 warranty parts and labor for five years: *Provided*, That the motor  
15 vehicle dealer has adequate facilities, trained personnel and  
16 equipment to perform warranty repairs; and

17 (c) Any actual damages that can be proven by the dealer by a  
18 preponderance of the evidence; and

19 (d) Any costs the dealer incurred for facility upgrades or  
20 alternations required by the manufacturer, distributor, or factory  
21 branch within the previous twelve years. This subdivision shall not  
22 apply if the manufacturer has provided the motor vehicle dealer  
23 with lump sum payments to assist dealer in making facility  
24 improvements or to pay for signs or manufacturer image elements

1 when such payments are not dependent on the dealer selling or  
2 purchasing specific numbers of new motor vehicles, and such  
3 payments are equal to the entire cost of the facility improvements,  
4 signs or image elements.

5 (e) Payment by the manufacturer to the dealer shall be made  
6 within ninety days. Thereafter, interest shall accumulate at the  
7 rate of twelve percent per annum.

8 **§17A-6A-8a. Compensation to dealers for service rendered.**

9 (1) Every motor vehicle manufacturer, distributor or  
10 wholesaler, factory branch or distributor branch, or officer, agent  
11 or representative thereof, shall:

12 (a) Specify in writing to each of its motor vehicle dealers,  
13 the dealer's obligation for delivery, preparation, warranty and  
14 factory recall services on its products;

15 (b) Compensate the motor vehicle dealer for warranty and  
16 factory recall service required of the dealer by the manufacturer,  
17 distributor or wholesaler, factory branch or distributor branch or  
18 officer, agent or representative thereof; and

19 (c) Provide the dealer the schedule of compensation to be paid  
20 the dealer for parts, work and service in connection with warranty  
21 and recall services and the time allowance for the performance of  
22 the work and service.

23 (2) In no event may:

24 (a) The schedule of compensation fail to compensate the

1 dealers for the work and services they are required to perform in  
2 connection with the dealer's delivery and preparation obligations,  
3 or fail to adequately and fairly compensate the dealers for labor,  
4 parts and other expenses incurred by the dealer to perform under  
5 and comply with manufacturer's warranty agreements and factory  
6 recalls;

7 (b) Any manufacturer, distributor or wholesaler, or  
8 representative thereof, pay its dealers an amount of money for  
9 warranty or recall work that is less than that charged by the  
10 dealer to the retail customers of the dealer for nonwarranty and  
11 nonrecall work of the like kind; and

12 (c) Any manufacturer, distributor or wholesaler, or  
13 representative thereof, compensate for warranty and recall work  
14 based on a flat-rate figure that is less than what the dealer  
15 charges for retail work.

16 (3) It is a violation of this section for any manufacturer,  
17 distributor, wholesaler or representative to require any dealer to  
18 pay in any manner, surcharges, limited allocation, audits, charge  
19 backs or other retaliation, if the dealer seeks to recover its  
20 nonwarranty retail rate for warranty and recall work.

21 (4) The retail rate charged by the dealer for parts is  
22 established by the dealer submitting to the manufacturer or  
23 distributor one hundred sequential nonwarranty customer-paid  
24 service repair orders that contain warranty-like parts or ninety

1 consecutive days of nonwarranty customer-paid service repair orders  
2 that contain warranty-like parts, whichever is less, covering  
3 repairs made no more than one hundred eighty days before the  
4 submission and declaring the average percentage markup.

5 (5) The retail rate customarily charged by the dealer for  
6 labor must be established using the same process as provided under  
7 subsection (4) and declaring the average labor rate. The average  
8 labor rate must be determined by dividing the amount of the  
9 dealer's total labor sales by the number of total hours that  
10 generated those sales. If a labor rate and parts markup rate  
11 simultaneously declared by the dealer, the dealer may use the same  
12 repair orders to complete each calculation as provided under  
13 subsection (4).

14 (6) In calculating the retail rate customarily charged by the  
15 dealer for parts and labor, the following work may not be included  
16 in the calculation:

17 (a) repairs for manufacturer or distributor special events,  
18 specials, or promotional discounts for retail customer repairs:

19 (b) parts sold at wholesale;

20 (c) routine maintenance not covered under any retail customer  
21 warranty, including fluids, filters, and belts not provided in the  
22 course of repairs;

23 (d) nuts, bolts, fasteners, and similar items that do not have  
24 an individual part number;

1       (e) tires; and

2       (f) vehicle reconditioning.

3       (7) The average of the parts markup rates and labor rate is  
4 presumed to be fair and reasonable and must go into effect thirty  
5 days following the manufacturer's approval. A manufacturer or  
6 distributor may rebut the presumption by a preponderance of the  
7 evidence that a rate is unreasonable in light of the practices of  
8 all other franchised motor vehicle dealers in an economically  
9 similar area of the state offering the dealer's declaration of the  
10 same line-make vehicles, not later than thirty days after  
11 submission. If the average parts markup rate or average labor rate  
12 is rebutted, or both, the manufacturer or distributor shall propose  
13 an adjustment of the average percentage markup based on that  
14 rebuttal not later than thirty days after submission.

15       (8) Each manufacturer, in establishing a schedule of  
16 compensation for warranty work, shall rely on the vehicle dealer's  
17 written schedule of hourly labor rates and parts and may not  
18 obligate any vehicle dealer to engage in unduly burdensome or  
19 time-consuming documentation of rates or parts, including  
20 obligating vehicle dealers to engage in transaction-by-transaction  
21 or part-by-part calculations.

22       (9) A dealer or manufacturer may demand that the average parts  
23 markup or average labor rate be calculated using the process  
24 provided under subsections 4 and 5; however, the demand for the

1 average parts markup may not be made within twelve months of the  
2 last parts markup declaration and the demand for the average labor  
3 rate may not be amide within twelve months of the last labor rate  
4 declaration. If a parts markup or labor rate is demanded by the  
5 dealer or manufacturer, the dealer shall determine the repair  
6 orders to be included in the calculation under subsection 4 and 5.

7 (10) As it applies to a school bus, truck tractor, road  
8 tractor and truck as defined in Section 1, Article 1 of Chapter  
9 17A, the manufacturer, distributor and/or O.E.M. supplier shall  
10 paid the dealer its incurred actual time at the retail labor rate  
11 for retrieving a motor vehicle and returning a motor vehicle to  
12 dealer's designated parking area. Dealer will be paid \$50.00  
13 minimum for each operation that requires the use of each electronic  
14 tool, i.e. laptop computer. The manufacturer or distributor cannot  
15 reduce what is paid to dealer for this retrieval or return time, or  
16 for the electronic tool charge. Dealer will be allowed to add to  
17 a completed warranty repair order three hours for every twenty-  
18 four hours the manufacturer, distributor and/or O.E.M. supplier  
19 makes the dealer stop working on a vehicle while the manufacturer,-  
20 distributor and/or O.E.M. supplier decides how it wants the dealer  
21 to proceed with the repairs.

22 ~~(4)~~(11) All claims made by motor vehicle dealers pursuant to  
23 this section for compensation for delivery, preparation, warranty  
24 and recall work, including labor, parts and other expenses, shall

1 be paid by the manufacturer within thirty days after approval and  
2 shall be approved or disapproved by the manufacturer within thirty  
3 days after receipt. When any claim is disapproved, the dealer  
4 shall be notified in writing of the grounds for disapproval. No  
5 claim which has been approved and paid may be charged back to the  
6 dealer unless it can be shown that the claim was false or  
7 fraudulent, that the repairs were not properly made or were  
8 unnecessary to correct the defective condition or the dealer failed  
9 to reasonably substantiate the claim in accordance with the written  
10 requirements of the manufacturer or distributor in effect at the  
11 time the claim arose. No charge back may be made until the dealer  
12 has had notice and an opportunity to support the claim in question.  
13 No otherwise valid reimbursement claims may be denied once properly  
14 submitted within manufacturers' submission guidelines due to a  
15 clerical error or omission or based on a different level of  
16 technician technical certification or the dealer's failure to  
17 subscribe to any manufacturer's computerized training programs.

18 ~~(5)~~ (12) Notwithstanding the terms of a franchise agreement or  
19 provision of law in conflict with this section, the dealer's  
20 delivery, preparation, warranty and recall obligations constitutes  
21 the dealer's sole responsibility for product liability as between  
22 the dealer and manufacturer, and, except for a loss caused by the  
23 dealer's failure to adhere to these obligations, a loss caused by  
24 the dealer's negligence or intentional misconduct or a loss caused



1 by the dealer's modification of a product without manufacturer  
2 authorization, the manufacturer shall reimburse the dealer for all  
3 loss incurred by the dealer, including legal fees, court costs and  
4 damages, as a result of the dealer having been named a party in a  
5 product liability action.

6 **§17A-6A-10. Prohibited practices.**

7 (1) A manufacturer or distributor may not require any new  
8 motor vehicle dealer in this state to do any of the following:

9 (a) Order or accept delivery of any new motor vehicle, part or  
10 accessory of the vehicle, equipment or any other commodity not  
11 required by law which was not voluntarily ordered by the new motor  
12 vehicle dealer. This section does not prevent the manufacturer or  
13 distributor from requiring that new motor vehicle dealers carry a  
14 reasonable inventory of models offered for sale by the manufacturer  
15 or distributor;

16 (b) Order or accept delivery of any new motor vehicle with  
17 special features, accessories or equipment not included in the list  
18 price of the new motor vehicle as publicly advertised by the  
19 manufacturer or distributor;

20 (c) Unreasonably participate monetarily in any advertising  
21 campaign or contest, or purchase any promotional materials, display  
22 devices, display decorations, brand signs and dealer  
23 identification, nondiagnostic computer equipment and displays or  
24 other materials at the expense of the new motor vehicle dealer;

1 (d) Enter into any agreement with the manufacturer or  
2 distributor or do any other act prejudicial to the new motor  
3 vehicle dealer by threatening to terminate a dealer agreement,  
4 limit inventory, invoke sales and service warranty or other types  
5 of audits or any contractual agreement or understanding existing  
6 between the dealer and the manufacturer or distributor. Notice in  
7 good faith to any dealer of the dealer's violation of any terms or  
8 provisions of the dealer agreement is not a violation of this  
9 article;

10 (e) Change the capital structure or financial requirements of  
11 the new motor vehicle dealership without reasonable business  
12 justification in light of the dealer's market, historical  
13 performance and compliance with prior capital structure or  
14 financial requirements and business necessity, or the means by or  
15 through which the dealer finances the operation of the dealership  
16 if the dealership at all times meets any reasonable capital  
17 standards determined by the manufacturer in accordance with  
18 uniformly applied criteria. The burden of proof shall be on the  
19 manufacturer to prove business justification by a preponderance of  
20 the evidence;

21 (f) Refrain from participation in the management of,  
22 investment in or the acquisition of any other line of new motor  
23 vehicle or related products, provided that the dealer maintains a  
24 reasonable line of credit for each make or line of vehicle, remains

1 in compliance with reasonable facilities requirements and makes no  
2 change in the principal management of the dealer. Notwithstanding  
3 the terms of any franchise agreement, a manufacturer or distributor  
4 may not enforce any requirements, including facility requirements,  
5 that a new motor vehicle dealer establish or maintain exclusive  
6 facilities, personnel or display space, when the requirements are  
7 unreasonable considering current economic conditions and are not  
8 otherwise justified by reasonable business considerations. The  
9 burden of proving that current economic conditions or reasonable  
10 business considerations justify exclusive facilities is on the  
11 manufacturer or distributor and must be proven by a preponderance  
12 of the evidence;

13 (g) Change the location of the new motor vehicle dealership or  
14 make any substantial alterations to the dealership premises, where  
15 to do so would be unreasonable. The burden of proof is on the  
16 manufacturer or distributor to prove the reasonableness by a  
17 preponderance of the evidence; and

18 (h) Prospectively assent to a waiver of a trial by jury,  
19 release, arbitration, assignment, novation, waiver or estoppel  
20 which would relieve any person from liability imposed by this  
21 article or require any controversy between a new motor vehicle  
22 dealer and a manufacturer or distributor to be referred to a person  
23 other than the duly constituted courts of ~~the~~ this state or ~~the~~  
24 ~~United States, if the referral would be binding upon the new motor~~

1 ~~vehicle dealer~~ the United States District Courts for the Southern  
2 and Northern Districts of West Virginia. Nothing contained herein  
3 shall prevent a motor vehicle dealer, after a civil action is  
4 filed, to enter into any agreement of settlement, arbitration,  
5 assignment or waiver of a trial by jury.

6 (i) To coerce or require any dealer, whether by agreement,  
7 program, incentive provision, or otherwise, to construct  
8 improvements to its facilities or to install new signs or other  
9 franchisor image elements that replace or substantially alter those  
10 improvements, signs, or franchisor image elements completed within  
11 the preceding ten years that were required or approved by the  
12 manufacturer, factory branch, distributor, or distributor branch or  
13 one of its affiliates. If a manufacturer, factory branch,  
14 distributor, or distributor branch offers incentives, or other  
15 payments under a program offered after the effective date of this  
16 subdivision and available to more than one dealer in the state that  
17 are premised wholly or in part on dealer facility improvements or  
18 installation of franchisor signs or other franchisor image  
19 elements, a dealer that constructed improvements or installed signs  
20 or other franchisor image elements required by or approved by the  
21 manufacturer, factory branch, distributor, or distributor branch  
22 and completed within the ten years preceding the program shall be  
23 deemed to be in compliance with the program requirements pertaining  
24 to construction of facilities or installation of signs or other

1 franchisor image elements that would replace or substantially alter  
2 those previously constructed or installed within that ten-year  
3 period. This subdivision shall not apply to a program that provides  
4 lump sum payments to assist dealers in making facility improvements  
5 or to pay for signs or franchisor image elements when such payments  
6 are not dependent on the dealer selling or purchasing specific  
7 numbers of new vehicles, and such payments are equal to the entire  
8 cost of the facility improvements, signs or image elements.

9 (j) To condition the award, sale, transfer, relocation, or  
10 renewal of a franchise or dealer agreement or to condition sales,  
11 service, parts, or finance incentives upon site control or an  
12 agreement to renovate or make substantial improvements to a  
13 facility; provided, however, that voluntary and non-coerced  
14 acceptance of such conditions by the dealer in writing, including,  
15 but not limited to, a written agreement for which the dealer has  
16 accepted separate and valuable consideration, shall not constitute  
17 a violation.

18 (k) To enter into a contractual requirement imposed by the  
19 manufacturer, distributor or a captive finance source as follows:

20 (i) In this section, "captive finance source" means any  
21 financial source that provides automotive-related loans or  
22 purchases retail installment contracts or lease contracts for motor  
23 vehicles in this state, and is, directly or indirectly, owned,  
24 operated, or controlled by such manufacturer, factory branch,

1 distributor, or distributor branch.

2 (ii) It shall be unlawful for any manufacturer, factory  
3 branch, captive finance source, distributor, or distributor branch,  
4 or any field representative, officer, agent, or any representative  
5 of them, notwithstanding the terms, provisions, or conditions of  
6 any agreement or franchise, to require any of its franchised  
7 dealers located in this state to agree to any terms, conditions, or  
8 requirements in subparagraphs (a)-(h) in order for any dealer to  
9 sell to any captive finance source any retail installment contract,  
10 loan, or lease of any motor vehicles purchased or leased by any of  
11 the dealer's customers, or to be able to participate in, or  
12 otherwise, directly or indirectly, obtain the benefits of any  
13 consumer transaction incentive program payable to the consumer or  
14 the dealer and offered by or through any captive finance source:

15 (a) Require a dealer to grant such captive finance source a  
16 power of attorney to do anything on behalf of the dealer other than  
17 sign the dealer's name on any check, draft, or other instrument  
18 received in payment or proceeds under any contract for the sale or  
19 lease of a motor vehicle that is made payable to the dealer but  
20 which is properly payable to the captive finance source, is for the  
21 purpose of correcting an error in a customer's finance application  
22 or title processing document, or is for the purpose of processing  
23 regular titling of the vehicle.

24 (b) Require a dealer to warrant or guarantee the accuracy and

1 completeness of any personal, financial, or credit information  
2 provided by the customer on the credit application and/or in the  
3 course of applying for credit other than to require that the dealer  
4 make reasonable inquiry regarding the accuracy and completeness of  
5 such information and represent that such information is true and  
6 correct to the best of the dealer's knowledge.

7       (c) Require a dealer to repurchase, pay off, or guaranty any  
8 contract for the sale or lease of a motor vehicle or to require a  
9 dealer to indemnify, defend, or hold harmless the captive finance  
10 source for settlements, judgments, damages, litigation expenses, or  
11 other costs or expenses incurred by such captive finance source  
12 unless the obligation to repurchase, pay off, guaranty, indemnify,  
13 or hold harmless resulted directly from (i) the subject dealer's  
14 material breach of the terms of a written agreement with the  
15 captive finance source or the terms for the purchase of an  
16 individual contract for sale or lease that the captive finance  
17 source communicates to the dealer before each such purchase, except  
18 to the extent the breached terms are otherwise prohibited under  
19 subparagraphs (a)-(h), or (ii) the subject dealer's violation of  
20 applicable law. However, for purposes of this section, the dealer  
21 may contractually obligate itself to warrant the accuracy of the  
22 information provided in the finance contract, but such warranty may  
23 only be enforced if the captive finance source gives the dealer a  
24 reasonable opportunity to cure or correct any errors in the finance

1 contract where cure or correction is possible. For purposes of this  
2 section, any allegation by a third party that would constitute a  
3 breach of the terms of a written agreement between the dealer and  
4 a captive finance source shall be considered a material breach.

5 (d) Notwithstanding the terms of any contract or agreement,  
6 treat a dealer's breach of an agreement between the dealer and a  
7 captive finance source with respect to the captive finance source's  
8 purchase of individual contracts for the sale or lease of a motor  
9 vehicle as a breach of such agreement with respect to purchase of  
10 other such contracts, nor shall such a breach in and of itself,  
11 constitute a breach of any other agreement between the dealer and  
12 the captive finance source, or between the dealer and any affiliate  
13 of such captive finance source.

14 (e) Require a dealer to waive any defenses that may be  
15 available to it under its agreements with the captive finance  
16 source or under any applicable laws.

17 (f) Require a dealer to settle or contribute any of its own  
18 funds or financial resources toward the settlement of any  
19 multiparty or class action litigation without obtaining the  
20 dealer's voluntary and written consent subsequent to the filing of  
21 such litigation.

22 (g) Require a dealer to contribute to any reserve or  
23 contingency account established or maintained by the captive  
24 finance source, for the financing of the sale or lease of any motor



1 vehicles purchased or leased by any of the dealer's customers, in  
2 any amount or on any basis other than the reasonable expected  
3 amount of future finance reserve chargebacks to the dealer's  
4 account. This section shall not apply to or limit:

5 (1) Reasonable amounts reserved and maintained related to the  
6 sale or financing of any products ancillary to the sale, lease, or  
7 financing of the motor vehicle itself;

8 (2) A delay or reduction in the payment of dealer's portion of  
9 the finance income pursuant to an agreement between the dealer and  
10 a captive finance source under which the dealer agrees to such  
11 delay or reduction in exchange for the limitation, reduction, or  
12 elimination of the dealer's responsibility for finance reserve  
13 chargebacks; or

14 (3) A chargeback to a dealer, or offset of any amounts  
15 otherwise payable to a dealer by the captive finance source, for  
16 any indebtedness properly owing from a dealer to the captive  
17 finance source as part of a specific program covered by this  
18 section, the terms of which have been agreed to by the dealer in  
19 advance, except to the extent such chargeback would otherwise be  
20 prohibited by this section.

21 (h) Require a dealer to repossess or otherwise gain possession  
22 of a motor vehicle at the request of or on behalf of the captive  
23 finance source. This section shall not apply to any requirements  
24 contained in any agreement between the dealer and the captive

1 finance source wherein the dealer agrees to receive and process  
2 vehicles that are voluntarily returned by the customer or returned  
3 to the lessor at the end of the lease term.

4 (i) Any clause or provision in any franchise or agreement  
5 between a dealer and a manufacturer, factory branch, distributor,  
6 or distributor branch, or between a dealer and any captive finance  
7 source, that is in violation of or that is inconsistent with any of  
8 the provisions of this section shall be deemed null and void and  
9 without force and effect to the extent it violates this section.

10 (iv) Any captive finance source who engages directly or  
11 indirectly in purposeful contacts within this state in connection  
12 with the offering or advertising the availability of financing for  
13 the sale or lease of motor vehicles within this state, or who has  
14 business dealings within this state, shall be subject to the  
15 provisions of this section and shall be subject to the jurisdiction  
16 of the courts of this state.

17 (v) The applicability of this section shall not be affected by  
18 a choice of law clause in any agreement, waiver, novation, or any  
19 other written instrument.

20 (vi) It shall be unlawful for a captive finance source to use  
21 any subsidiary corporation, affiliated corporation, or any other  
22 controlled corporation, partnership, association, or person to  
23 accomplish what would otherwise be illegal conduct under this  
24 section on the part of the captive finance source.

1           (2) A manufacturer or distributor may not do any of the  
2 following:

3           (a) Fail to deliver new motor vehicles or new motor vehicle  
4 parts or accessories within a reasonable time and in reasonable  
5 quantities relative to the new motor vehicle dealer's market area  
6 and facilities, unless the failure is caused by acts or occurrences  
7 beyond the control of the manufacturer or distributor, or unless  
8 the failure results from an order by the new motor vehicle dealer  
9 in excess of quantities reasonably and fairly allocated by the  
10 manufacturer or distributor. No manufacturer or distributor may  
11 penalize a new motor vehicle dealer for an alleged failure to meet  
12 sales quotas where the alleged failure is due to actions of the  
13 manufacturer or distributor;

14           (b) Refuse to disclose to a new motor vehicle dealer the  
15 method and manner of distribution of new motor vehicles by the  
16 manufacturer or distributor, including any numerical calculation or  
17 formula used, nationally or within the dealer's market, to make the  
18 allocations within thirty days of a request;

19           (c) Refuse to disclose to a new motor vehicle dealer the total  
20 number of new motor vehicles of a given model, which the  
21 manufacturer or distributor has sold during the current model year  
22 within the dealer's marketing district, zone or region, whichever  
23 geographical area is the smallest within thirty days of a request;

24           (d) Increase prices of new motor vehicles which the new motor

1 vehicle dealer had ordered and then eventually delivered to the  
2 same retail consumer for whom the vehicle was ordered, if the order  
3 was made prior to the dealer's receipt of the written official  
4 price increase notification. A sales contract signed by a private  
5 retail consumer and binding on the dealer is evidence of each  
6 order. In the event of manufacturer or distributor price reductions  
7 or cash rebates, the amount of any reduction or rebate received by  
8 a dealer shall be passed on to the private retail consumer by the  
9 dealer. Any price reduction in excess of \$5 shall apply to all  
10 vehicles in the dealer's inventory which were subject to the price  
11 reduction. A price difference applicable to new model or series  
12 motor vehicles at the time of the introduction of the new models or  
13 the series is not a price increase or price decrease. This  
14 subdivision does not apply to price changes caused by the  
15 following:

16 (i) The addition to a motor vehicle of required or optional  
17 equipment pursuant to state or federal law;

18 (ii) In the case of foreign made vehicles or components,  
19 revaluation of the United States dollar; or

20 (iii) Any increase in transportation charges due to an  
21 increase in rates charged by a common carrier and transporters;

22 (e) Offer any refunds or other types of inducements to any  
23 dealer for the purchase of new motor vehicles of a certain  
24 line-make to be sold to this state or any political subdivision of

1 this state without making the same offer available upon request to  
2 all other new motor vehicle dealers of the same line-make;

3 (f) Release to an outside party, except under subpoena or in  
4 an administrative or judicial proceeding to which the new motor  
5 vehicle dealer or the manufacturer or distributor are parties, any  
6 business, financial or personal information which has been provided  
7 by the dealer to the manufacturer or distributor, unless the new  
8 motor vehicle dealer gives his or her written consent;

9 (g) Deny a new motor vehicle dealer the right to associate  
10 with another new motor vehicle dealer for any lawful purpose;

11 (h) Establish a new motor vehicle dealership which would  
12 unfairly compete with a new motor vehicle dealer of the same  
13 line-make operating under a dealer agreement with the manufacturer  
14 or distributor in the relevant market area. A manufacturer or  
15 distributor shall not be considered to be unfairly competing if the  
16 manufacturer or distributor is:

17 (i) Operating a dealership temporarily for a reasonable  
18 period.

19 (ii) Operating a dealership which is for sale at a reasonable  
20 price.

21 (iii) Operating a dealership with another person who has made  
22 a significant investment in the dealership and who will acquire  
23 full ownership of the dealership under reasonable terms and  
24 conditions;

1 (i) A manufacturer may not, except as provided by this  
2 section, directly or indirectly:

3 (i) Own an interest in a dealer or dealership;

4 (ii) Operate a dealership; or

5 (iii) Act in the capacity of a new motor vehicle dealer:  
6 *Provided*, That a manufacturer may own an interest, other than stock  
7 in a publicly held company, solely for investment purposes;

8 (j) A manufacturer or distributor may own an interest in a  
9 franchised dealer, or otherwise control a dealership, for a period  
10 not to exceed twelve months from the date the manufacturer or  
11 distributor acquires the dealership if:

12 (i) The person from whom the manufacturer or distributor  
13 acquired the dealership was a franchised dealer; and

14 (ii) The dealership is for sale by the manufacturer or  
15 distributor at a reasonable price and on reasonable terms and  
16 conditions;

17 (k) The twelve-month period may be extended for an additional  
18 twelve months. Notice of any such extension of the original  
19 twelve-month period must be given to any dealer of the same  
20 line-make whose dealership is located in the same county, or within  
21 twenty air miles of, the dealership owned or controlled by the  
22 manufacturer or distributor prior to the expiration of the original  
23 twelve-month period. Any dealer receiving the notice may protest  
24 the proposed extension within thirty days of receiving notice by

1 bringing a declaratory judgment action in the circuit court for the  
2 county in which the new motor vehicle dealer is located to  
3 determine whether good cause exists for the extension;

4 (1) For the purpose of broadening the diversity of its dealer  
5 body and enhancing opportunities for qualified persons who are part  
6 of a group who have historically been under represented in its  
7 dealer body, or other qualified persons who lack the resources to  
8 purchase a dealership outright, but for no other purpose, a  
9 manufacturer or distributor may temporarily own an interest in a  
10 dealership if the manufacturer's or distributor's participation in  
11 the dealership is in a bona fide relationship with a franchised  
12 dealer who:

13 (i) Has made a significant investment in the dealership,  
14 subject to loss;

15 (ii) Has an ownership interest in the dealership; and

16 (iii) Operates the dealership under a plan to acquire full  
17 ownership of the dealership within a reasonable time and under  
18 reasonable terms and conditions;

19 (m) Unreasonably withhold consent to the sale, transfer or  
20 exchange of the dealership to a qualified buyer capable of being  
21 licensed as a new motor vehicle dealer in this state;

22 (n) Fail to respond in writing to a request for consent to a  
23 sale, transfer or exchange of a dealership within sixty days after  
24 receipt of a written application from the new motor vehicle dealer

1 on the forms generally utilized by the manufacturer or distributor  
2 for such purpose and containing the information required therein.  
3 Failure to respond to the request within the sixty days is consent;

4 (o) Unfairly prevent a new motor vehicle dealer from receiving  
5 reasonable compensation for the value of the new motor vehicle  
6 dealership;

7 (p) Audit any motor vehicle dealer in this state for warranty  
8 parts or warranty service compensation, service compensation,  
9 service incentives, manufacturer rebates or other forms of sales  
10 incentive compensation more than twelve months after the claim for  
11 payment or reimbursement has been made by the automobile dealer. No  
12 charge back may be made until the dealer has had notice and an  
13 opportunity to support the claim in question. No otherwise valid  
14 reimbursements claims may be denied once properly submitted with  
15 the manufacturer's submission guidelines due to clerical error or  
16 omission. ~~Provided, That~~ The provisions of this subsection do not  
17 apply where a claim is fraudulent. In addition, the manufacturer  
18 or distributor is responsible for reimbursing the audited dealer  
19 for all copying, postage and administrative costs incurred by the  
20 dealer during the audit. Any charges to a dealer as a result of  
21 the audit must be separately billed to the dealer;

22 (q) Unreasonably restrict a dealer's ownership of a dealership  
23 through noncompetition covenants, site control, sublease,  
24 collateral pledge of lease, right of first refusal, option to



1 purchase, or otherwise. A right of first refusal is created when:

2 (i) A manufacturer has a contractual right of first refusal to  
3 acquire the new motor vehicle dealer's assets where the dealer  
4 owner receives consideration, terms and conditions that are either  
5 the same as or better than those they have already contracted to  
6 receive under the proposed change of more than fifty percent of the  
7 dealer's ownership.

8 (ii) The proposed change of the dealership's ownership or the  
9 transfer of the new vehicle dealer's assets does not involve the  
10 transfer of assets or the transfer or issuance of stock by the  
11 dealer or one of the dealer's owners to one of the following:

12 (A) A designated family member of one or more of the dealer  
13 owners;

14 (B) A manager employed by the dealer in the dealership during  
15 the previous five years and who is otherwise qualified as a dealer  
16 operator;

17 (C) A partnership or corporation controlled by a designated  
18 family member of one of the dealers;

19 (D) A trust established or to be established:

20 (i) For the purpose of allowing the new vehicle dealer to  
21 continue to qualify as such under the manufacturer's or  
22 distributor's standards; or

23 (ii) To provide for the succession of the franchise agreement  
24 to designated family members or qualified management in the event

1 of death or incapacity of the dealer or its principle owner or  
2 owners.

3 (iii) Upon exercising the right of first refusal by a  
4 manufacturer, it eliminates any requirement under its dealer  
5 agreement or other applicable provision of this statute that the  
6 manufacturer evaluate, process or respond to the underlying  
7 proposed transfer by approving or rejecting the proposal, is not  
8 subject to challenge as a rejection or denial of the proposed  
9 transfer by any party.

10 (iv) Except as otherwise provided in this subsection, the  
11 manufacturer or distributor agrees to pay the reasonable expenses,  
12 including reasonable out-of-pocket professional fees which shall  
13 include, but not be limited to, accounting, legal or appraisal  
14 services fees that are incurred by the proposed owner or transferee  
15 before the manufacturer's or distributor's exercise of its right of  
16 first refusal. Payment of the expenses and fees for professional  
17 services are not required if the dealer fails to submit an  
18 accounting of those expenses and fees within twenty days of the  
19 dealer's receipt of the manufacturer's or distributor's written  
20 request for such an accounting. Such a written account of fees and  
21 expenses may be requested by a manufacturer or distributor before  
22 exercising its right of first refusal;

23 (r) Except for experimental low-volume not-for-retail sale  
24 vehicles, cause warranty and recall repair work to be performed by

1 any entity other than a new motor vehicle dealer;

2 (s) Make any material or unreasonable change in any franchise  
3 agreement, including, but not limited to the dealer's area of  
4 responsibility, without giving the new motor vehicle dealer written  
5 notice by certified mail of the change at least sixty days prior to  
6 the effective date of the change, and shall include an explanation  
7 of the basis for the alteration. This explanation shall include,  
8 but not be limited to, a reasonable and commercially acceptable  
9 copy of all information, data, evaluations, and methodology  
10 considered, reviewed, or relied on or based its decision on, to  
11 propose the change to the dealer's area of responsibility. At any  
12 time prior to the effective date of an alteration of a new motor  
13 vehicle dealer's area of responsibility, and after the completion  
14 of any internal appeal process pursuant to the manufacturer's or  
15 distributor's policy manual, the motor vehicle dealer may petition  
16 the court to enjoin or prohibit the alteration. The court shall  
17 enjoin or prohibit the alteration of a motor vehicle dealer's area  
18 of responsibility unless the franchisor shows, by a preponderance  
19 of the evidence, that the alteration is reasonable and justifiable  
20 in light of market conditions. If a motor vehicle dealer petitions  
21 the court, no alteration to a motor vehicle dealer's area of  
22 responsibility shall become effective until a final determination  
23 by the court. If a new motor vehicle dealer's area of  
24 responsibility is altered, the manufacturer shall allow twenty-four

1 months for the motor vehicle dealer to become sales effective prior  
2 to taking any action claiming a breach or nonperformance of the  
3 motor vehicle dealer's sales performance responsibilities;

4 (t) Fail to reimburse a new motor vehicle dealer, at the  
5 dealer's regular rate, or the full and actual cost of providing a  
6 loaner vehicle to any customer who is having a vehicle serviced at  
7 the dealership if the provision of the loaner vehicle is required  
8 by the manufacturer;

9 (u) Compel a new motor vehicle dealer through its finance  
10 subsidiaries to agree to unreasonable operating requirements or to  
11 directly or indirectly terminate a franchise through the actions of  
12 a finance subsidiary of the franchisor. This subsection does not  
13 limit the right of a finance subsidiary to engage in business  
14 practices in accordance with the usage of trade in retail or  
15 wholesale vehicle financing;

16 (v) Discriminate directly or indirectly between dealers on  
17 vehicles of like grade or quantity where the effect of the  
18 discrimination would substantially lessen competition; ~~and~~

19 (w) Use or employ any performance standard that is not fair  
20 and reasonable and based upon accurate and verifiable data made  
21 available to the dealer; and

22 (X) Sell, offer to sell or sell exclusively an extended  
23 service contract, maintenance plan or similar product, including  
24 gap or other products, offered, endorsed or sponsored by the

1 manufacturer or distributor by the following means:

2 (i) By an act or statement that the manufacturer or  
3 distributor will in any manner impact the dealer, whether it is  
4 express or implied or made directly or indirectly.

5 (ii) By a contract, or an express or implied offer of  
6 contract, made to the dealer on the condition that the dealer shall  
7 sell, offer to sell or sell exclusively an extended service  
8 contract, extended maintenance plan or similar product offered,  
9 endorsed or sponsored by the manufacturer or distributor.

10 (iii) By measuring the dealer's performance under the  
11 franchise based on the sale of extended service contracts, extended  
12 maintenance plans or similar products offered, endorsed or  
13 sponsored by the manufacturer or distributor.

14 (iv) By requiring the dealer to actively promote the sale of  
15 extended service contracts, extended maintenance plans or similar  
16 products offered, endorsed or sponsored by the manufacturer or  
17 distributor.

18 (v) Nothing in this paragraph shall prohibit a manufacturer or  
19 distributor from providing incentive programs to a new vehicle  
20 dealer who makes the voluntary decision to offer to sell, sell or  
21 sell exclusively an extended service contract, extended maintenance  
22 plan or similar product offered, endorsed or sponsored by the  
23 manufacturer or distributor.

24 (y) (i) Require a dealer to purchase goods or services from a

1 vendor selected, identified, or designated by a manufacturer,  
2 factory branch, distributor, distributor branch, or one of its  
3 affiliates by agreement, program, incentive provision, or otherwise  
4 without making available to the dealer the option to obtain the  
5 goods or services of substantially similar quality and overall  
6 design from a vendor chosen by the dealer and approved by the  
7 manufacturer, factory branch, distributor, or distributor branch;  
8 provided that such approval shall not be unreasonably withheld, and  
9 further provided that the dealer's option to select a vendor shall  
10 not be available if the manufacturer or distributor provides  
11 substantial reimbursement for the goods or services offered.  
12 Substantial reimbursement is equal to or greater than sixty-five  
13 percent of the cost, which shall not be greater than the cost of  
14 reasonably available similar goods and services in close proximity  
15 to the dealer's market.

16 (ii) To fail to provide to a dealer, when the manufacturer,  
17 factory branch, distributor, or distributor branch claims that a  
18 vendor chosen by the dealer cannot supply goods and services of  
19 substantially similar quality, a disclosure concerning the vendor  
20 selected, identified, or designated by the franchisor stating: (I)  
21 Whether the manufacturer, factory branch, distributor, distributor  
22 branch, or one of its affiliates, or any officer, director, or  
23 supervisory employee of the same, has an ownership interest, actual  
24 or beneficial, in the vendor and, if so, the percentage of the

1 ownership interest; and (ii) whether the manufacturer, factory  
2 branch, distributor, distributor branch, or one of its affiliates  
3 has an agreement or arrangement by which the vendor pays to the  
4 manufacturer, factory branch, distributor, distributor branch, or  
5 one of its affiliates, or any officer, director, or supervisory  
6 employee of the same, any compensation and, if so, the basis and  
7 amount of the compensation to be paid as a result of any purchases  
8 by the dealer, whether it is to be paid by direct payment by the  
9 vendor or by credit from the vendor for the benefit of the  
10 recipient.

11 (3) A manufacturer or distributor, either directly or through  
12 any subsidiary, may not terminate, cancel, fail to renew or  
13 discontinue any lease of the new motor vehicle dealer's established  
14 place of business except for a material breach of the lease.

15 (4) Except as may otherwise be provided in this article, no  
16 manufacturer or franchisor shall sell, directly or indirectly, any  
17 new motor vehicle to a consumer in this state, except through a new  
18 motor vehicle dealer holding a franchise for the line-make covering  
19 such new motor vehicle. This subsection shall not apply to  
20 manufacturer or franchisor sales of new motor vehicles to  
21 charitable organizations, qualified vendors or employees of the  
22 manufacturer or franchisor.

23 (5) Except when prevented by an act of God, labor strike,  
24 transportation disruption outside the control of the manufacturer

1 or time of war, a manufacturer or distributor may not refuse or  
2 fail to deliver, in reasonable quantities and within a reasonable  
3 time, to a dealer having a franchise agreement for the retail sale  
4 of any motor vehicle sold or distributed by the manufacturer, any  
5 new motor vehicle or parts or accessories to new motor vehicles as  
6 are covered by the franchise if the vehicles, parts and accessories  
7 are publicly advertised as being available for delivery or are  
8 actually being delivered. All models offered for sale by the  
9 manufacturer, without any enrollment, surcharge, unreasonable  
10 facility or building or any other unreasonable type of upgrade  
11 requirement or acquisition fee, shall be available to the  
12 franchised dealer at no additional cost for that particular model  
13 of vehicle.

14 **§17A-6A-11. Where motor vehicle dealer deceased or incapacitated.**

15 (1) Any designated family member of a deceased or  
16 incapacitated new motor vehicle dealer may succeed the dealer in  
17 the ownership or operation of the dealership under the existing  
18 dealer agreement if the designated family member gives the  
19 manufacturer or distributor written notice of his or her intention  
20 to succeed to the dealership within one hundred twenty days after  
21 the dealer's death or incapacity, agrees to be bound by all of the  
22 terms and conditions of the dealer agreement, and the designated  
23 family member meets the current criteria generally applied by the  
24 manufacturer or distributor in qualifying new motor vehicle



1 dealers. A manufacturer or distributor may refuse to honor the  
2 existing dealer agreement with the designated family member only  
3 for good cause. In determining whether good cause exists for  
4 refusing to honor the agreement, the manufacturer or distributor  
5 has the burden of proving that the designated successor is a person  
6 who is not of good moral character or does not meet the  
7 manufacturer's existing written, reasonable and uniformly applied  
8 standards for business experience and financial qualifications. The  
9 designated family member will have a minimum of one year to satisfy  
10 the manufacturer's written and reasonable standards and financial  
11 qualifications for appointment as the dealer principal.

12 (2) The manufacturer or distributor may request from a  
13 designated family member such personal and financial data as is  
14 reasonably necessary to determine whether the existing dealer  
15 agreement should be honored. The designated family member shall  
16 supply the personal and financial data promptly upon the request.

17 (3) If a manufacturer or distributor believes that good cause  
18 exists for refusing to honor the succession, the manufacturer or  
19 distributor may, within forty-five days after receipt of the notice  
20 of the designated family member's intent to succeed the dealer in  
21 the ownership and operation of the dealership, or within forty-five  
22 days after the receipt of the requested personal and financial  
23 data, serve upon the designated family member notice of its refusal  
24 to approve the succession.

1           (4) The notice of the manufacturer or distributor provided in  
2 subsection (3) above shall state the specific grounds for the  
3 refusal to approve the succession and that discontinuance of the  
4 agreement shall take effect not less than ~~ninety days~~ one hundred  
5 and eighty days after the date the notice is served.

6           (5) If notice of refusal is not served within the sixty days  
7 provided for in subsection (3) of this section, the dealer  
8 agreement continues in effect and is subject to termination only as  
9 otherwise permitted by this article.

10          (6) This section does not preclude a new motor vehicle dealer  
11 from designating any person as his or her successor by will or any  
12 other written instrument filed with the manufacturer or  
13 distributor, and if such an instrument is filed, it alone  
14 determines the succession rights to the management and operation of  
15 the dealership.

16          (7) If the manufacturer challenges the succession, it  
17 maintains the burden of proof to show good cause by a preponderance  
18 of the evidence. If the person seeking succession files a civil  
19 action within the one hundred eighty days set forth in subsection  
20 (4), no action may be taken by the manufacturer contrary to the  
21 dealer agreement until such time as the civil action and any appeal  
22 has been exhausted. Provided, that when a motor vehicle dealer  
23 appeals a decision upholding a manufacturer's decision to not allow  
24 succession based upon the designated person's insolvency,

1 conviction of a crime punishable by imprisonment in excess of one  
2 year under the law which the designated person was convicted or the  
3 crime involved theft, dishonesty, or false statement, regardless of  
4 the punishment, the dealer agreement shall remain in effect pending  
5 exhaustion of all appeals only if the motor vehicle dealer  
6 establishes a likelihood of success on appeal and the public  
7 interest will not be harmed by keeping the dealer agreement in  
8 effect pending entry of final judgment after such appeal.

9 **§17A-6A-12. Establishment and relocation or establishment of**  
10 **additional dealers.**

11 (1) As used in this section, "relocate" and "relocation" do  
12 not include the relocation of a new motor vehicle dealer within  
13 four air miles of its established place of business or an existing  
14 new motor vehicle dealer sells or transfers the dealership to a new  
15 owner and the successor new motor vehicle dealership owner  
16 relocates to a location within four miles of the seller's last open  
17 new motor vehicle dealership location. The relocation of a new  
18 motor vehicle dealer to a site within the area of sales  
19 responsibility assigned to that dealer by the manufacturing branch  
20 or distributor may not be within six air miles of another dealer of  
21 the same line-make.

22 (2) Before a manufacturer or distributor enters into a dealer  
23 agreement establishing or relocating a new motor vehicle dealer  
24 within a relevant market area where the same line-make is

1 represented, the manufacturer or distributor shall give written  
2 notice to each new motor vehicle dealer of the same line-make in  
3 the relevant market area of its intention to establish an  
4 additional dealer or to relocate an existing dealer within that  
5 relevant market area.

6 (3) Within sixty days after receiving the notice provided in  
7 subsection (2) of this section, or within sixty days after the end  
8 of any appeal procedure provided by the manufacturer or  
9 distributor, a new motor vehicle dealer of the same line-make  
10 within the affected relevant market area may bring a declaratory  
11 judgment action in the circuit court for the county in which the  
12 new motor vehicle dealer is located to determine whether good cause  
13 exists for the establishing or relocating of the proposed new motor  
14 vehicle dealer: *Provided*, That a new motor vehicle dealer of the  
15 same line-make within the affected relevant market area shall not  
16 be permitted to bring such an action if the proposed relocation  
17 site would be further from the location of the new motor vehicle  
18 dealer of the same line-make than the location from which the  
19 dealership is being moved. Once an action has been filed, the  
20 manufacturer or distributor may not establish or relocate the  
21 proposed new motor vehicle dealer until the circuit court has  
22 rendered a decision on the matter. An action brought pursuant to  
23 this section shall be given precedence over all other civil matters  
24 on the court's docket. The manufacturer has the burden of proving

1 that good cause exists for establishing or relocating a proposed  
2 new motor vehicle dealer.

3 (4) This section does not apply to the reopening in a relevant  
4 market area of a new motor vehicle dealer that has been closed or  
5 sold within the preceding two years if the established place of  
6 business of the new motor vehicle dealer is within four air miles  
7 of the established place of business of the closed or sold new  
8 motor vehicle dealer.

9 (5) In determining whether good cause exists for establishing  
10 or relocating an additional new motor vehicle dealer for the same  
11 line-make, the court shall take into consideration the existing  
12 circumstances, including, but not limited to, the following:

13 (a) Permanency and amount of the investment, including any  
14 obligations incurred by the dealer in making the investment;

15 (b) Effect on the retail new motor vehicle business and the  
16 consuming public in the relevant market area;

17 (c) Whether it is injurious or beneficial to the public  
18 welfare;

19 (d) Whether the new motor vehicle dealers of the same  
20 line-make in the relevant market area are providing adequate  
21 competition and convenient consumer care for the motor vehicles of  
22 that line-make in the market area, including the adequacy of motor  
23 vehicle sales and qualified service personnel;

24 (e) Whether the establishment or relocation of the new motor

1 vehicle dealer would promote competition;

2 (f) Growth or decline of the population and the number of new  
3 motor vehicle registrations in the relevant market area; and

4 (g) The effect on the relocating dealer of a denial of its  
5 relocation into the relevant market area.

6 **§17A-6A-12a. Restriction on Motor Vehicle Dealer's Use of**  
7 **Dealership Property.**

8 Notwithstanding the terms of any dealer agreement, a  
9 manufacturer, distributor, or representative may not:

10 (1) unreasonably limit or impair the ability of a franchised  
11 dealer to use the dealership property as the dealer considers  
12 appropriate;

13 (2) control the use of the dealership property after the  
14 franchise is terminated or discontinued; or

15 (3) at any time exercise exclusive control over the use of the  
16 dealership property.

17 **§17A-6A-12b. Property Use Agreement.**

18 (a) A manufacturer, distributor, or representative may not  
19 require that a dealer enter into a property use agreement as a  
20 condition of the manufacturer, distributor, or representative:

21 (1) entering into a franchise;

22 (2) approving a franchised dealer's application to add a  
23 line-make;

24 (3) approving a franchised dealer's application to relocate a

1 franchise; or

2 (4) approving a sale or transfer of a dealer, dealership, or  
3 franchise.

4 (b) The following provisions in a property use agreement are  
5 void and unenforceable:

6 (1) a limitation on the franchised dealer's ability to add a  
7 line-make; or

8 (2) a provision that binds a franchised dealer's successor.

9 (c) A property use agreement expires on the earlier of:

10 (1) the date provided by the property use agreement; or

11 (2) the termination of the franchise between the parties to  
12 the property use agreement.

13 (d) This section applies to a subsidiary of, or a person  
14 controlled by, a manufacturer, distributor, or representative.

15 **§17A-6A-12c. Certain Property Use Agreements.**

16 (a) Notwithstanding subsection (b)(1) of section twelve-b of  
17 this article, and subject to this section, a dealer may enter into  
18 a property use agreement for cash consideration that grants the  
19 manufacturer or distributor the exclusive rights to direct the use  
20 of the dealership.

21 (b) In the event the dealer breaches the terms of the property  
22 use agreement described by Subsection (a) by altering the use of  
23 the property during the term of the agreement in violation of the  
24 agreement, the property use agreement is terminated and the dealer

1 must reimburse the manufacturer or distributor in an amount  
2 determined by dividing the amount of the manufacturer's or  
3 distributor's cash consideration provided under subsection (a) by  
4 the market value of the property identified in the original  
5 property use agreement at the time any necessary real estate has  
6 been purchased and any necessary construction has been completed,  
7 and multiplying the resulting quotient by the market value of the  
8 property at the time of the breach.

9 (c) For purposes of this section, the market value of property  
10 is to be determined by three appraisers chosen as follows:

11 (1) one selected by the affected manufacturer or distributor;

12 (2) one selected by the affected dealer; and

13 (3) one selected by mutual agreement of the manufacturer or  
14 distributor and the dealer.

15 **§17A-6A-13. Obligations regarding warranties.**

16 (1) Each new motor vehicle manufacturer or distributor shall  
17 specify in writing to each of its new motor vehicle dealers  
18 licensed in this state the dealer's obligations for preparation,  
19 delivery and warranty service on its products. The manufacturer or  
20 distributor shall compensate the new motor vehicle dealer for  
21 warranty service required of the dealer by the manufacturer or  
22 distributor. The manufacturer or distributor shall provide the new  
23 motor vehicle dealer with the schedule of compensation to be paid  
24 to the dealer for parts, work and service, and the time allowance



1 for the performance of the work and service in a manner in  
2 compliance with section eight-a of this article.

3 (2) The schedule of compensation shall include reasonable  
4 compensation for diagnostic work, as well as repair service and  
5 labor. Time allowances for the diagnosis and performance of  
6 warranty work and service shall be reasonable and adequate for the  
7 work to be performed. In the determination of what constitutes  
8 reasonable compensation under this section, ~~the principal factor to~~  
9 ~~be given consideration shall be the prevailing wage rates being~~  
10 ~~paid by dealers in the community in which the dealer is doing~~  
11 ~~business, and in no event may the compensation of a dealer for~~  
12 ~~warranty labor and parts be less than the rates charged by the~~  
13 ~~dealer for like service to retail customers for nonwarranty service~~  
14 ~~and repairs, provided that the rates are reasonable. section~~  
15 eight-a of this article shall govern. However, in the case of a new  
16 motor vehicle dealer of motorcycles or recreational vehicles, in no  
17 event may the compensation of a dealer for warranty parts be less  
18 than the dealer's cost of acquiring the part plus twenty percent.

19 (3) A manufacturer or distributor may not do any of the  
20 following:

21 (a) Fail to perform any warranty obligation;

22 (b) Fail to include in written notices of factory recalls to  
23 new motor vehicle owners and dealers the expected date by which  
24 necessary parts and equipment will be available to dealers for the

1 correction of the defects; or

2 (c) Fail to compensate any of the new motor vehicle dealers  
3 licensed in this state for repairs effected by the recall.

4 (4) All claims made by a new motor vehicle dealer pursuant to  
5 this section for labor and parts shall be paid within thirty days  
6 after their approval. All claims shall be either approved or  
7 disapproved by the manufacturer or distributor within thirty days  
8 after their receipt on a proper form generally used by the  
9 manufacturer or distributor and containing the usually required  
10 information therein. Any claim not specifically disapproved in  
11 writing within thirty days after the receipt of the form is  
12 considered to be approved and payment shall be made within thirty  
13 days. The manufacturer has the right to initiate an audit of a  
14 claim within twelve months after payment and to charge back to the  
15 new motor vehicle dealer the amount of any false, fraudulent or  
16 unsubstantiated claim, subject to the requirements of section  
17 eight-a of this article.

18 (5) The manufacturer shall accept the return of any new and  
19 unused part, component or accessory that was ordered by the dealer,  
20 and shall reimburse the dealer for the full cost charged to the  
21 dealer for the part, component or accessory if the dealer returns  
22 the part and makes a claim for the return of the part within one  
23 year of the dealer's receipt of the part, component or accessory  
24 and provides reasonable documentation, to include any changed part

1 numbers to match new part numbers, provided that the part was  
2 ordered for a warranty repair.

3 **§17A-6A-14a Open Account Protection.**

4 If there is a dispute between the manufacturer, factory  
5 branch, distributor, or distributor branch and the dealer with  
6 respect to any matter referred to this article, either party may  
7 notify, in writing, the other party of its request to challenge,  
8 through the manufacturer's appeal process or the circuit courts of  
9 the State of West Virginia. A manufacturer, factory branch,  
10 distributor, or distributor branch may not collect chargebacks,  
11 fully or in part, either through direct payment or by charge to the  
12 dealer's account, for warranty parts or service compensation,  
13 including service incentives, sales incentives, other sales  
14 compensation, surcharges, fees, penalties, or any financial  
15 imposition of any type arising from an alleged failure of the  
16 dealer to comply with a policy of, directive from, or agreement  
17 with the manufacturer, factory branch, distributor, or distributor  
18 branch until thirty days following final notice of the amount  
19 charged to the dealer following all internal processes of the  
20 manufacturer, factory, factory branch, distributor, or distributor  
21 branch. Within thirty days following receipt of final notice, the  
22 dealer may, in writing, request a hearing or seek civil relief from  
23 the manufacturer's appeal process or the circuit courts of the  
24 State of West Virginia . If a dealer requests a hearing or files a

1 civil action, the manufacturer, factory branch, distributor, or  
2 distributor branch may not collect the chargeback, fully or in  
3 part, either through direct payment or by charge to the dealer's  
4 account, until the completion of the hearing or civil action, and  
5 all appeal, civil or otherwise, have been exhausted concerning the  
6 validity of the chargeback.

7 **§17A-6A-15 Dealer Data, Obligation of Manufacturer, Vendors,**  
8 **Suppliers, and Others; Indemnification of Dealer.**

9 Notwithstanding any of the terms or provisions contained in  
10 this section or in any consent, authorization, release, novation,  
11 franchise, or other contract or agreement, whenever any  
12 manufacturer, factory branch, distributor, distributor branch,  
13 dealer management computer system vendor, or any third party acting  
14 on behalf of or through or approved, referred, endorsed,  
15 authorized, certified, granted preferred status, or recommended by,  
16 any manufacturer, factory branch, distributor, distributor branch,  
17 dealer management computer system vendor requires that a new motor  
18 vehicle dealer provide any dealer, consumer, or customer data or  
19 information through direct access to a dealer's computer system,  
20 the dealer is not required to provide, and may not be required to  
21 consent to provide in any written agreement, such direct access to  
22 its computer system. The dealer may instead provide the same  
23 dealer, consumer, or customer data or information specified by the  
24 requesting party by timely obtaining and pushing or otherwise

1 furnishing the requested data to the requesting party in a widely  
2 accepted file format; provided that, when a dealer would otherwise  
3 be required to provide direct access to its computer system under  
4 the terms of a consent, authorization, release, novation,  
5 franchise, or other contract or agreement, a dealer that elects to  
6 provide data or information through other means may be charged a  
7 reasonable initial set-up fee and a reasonable processing fee based  
8 on the actual incremental costs incurred by the party requesting  
9 the data for establishing and implementing the process for the  
10 dealer. Any term or provision contained in any consent,  
11 authorization, release, novation, franchise, or other contract or  
12 agreement which is inconsistent with any term or provision  
13 contained in this subsection shall be voidable at the option of the  
14 dealer.

15 Notwithstanding the terms or conditions of any consent,  
16 authorization, release, novation, franchise or other contract or  
17 agreement, every manufacturer, factory branch, distributor,  
18 distributor branch, dealer management computer system vendor, or  
19 any third party acting on behalf of or through any manufacturer,  
20 factory branch, distributor, distributor branch, dealer management  
21 computer system vendor, having electronic access to consumer or  
22 customer data or other information in a computer system utilized by  
23 a new motor vehicle dealer, or who has otherwise been provided  
24 consumer or customer data or information by the dealer, shall fully

1 indemnify and hold harmless any dealer from all damages, costs, and  
2 expenses incurred by the dealer. Such indemnification by the  
3 manufacturer, factory branch, distributor, distributor branch,  
4 dealer management computer system vendor, or any third party,  
5 whether working for these entities or not, includes, but is not  
6 limited to, judgments, settlements, fines penalties, litigation  
7 costs, defense costs, court costs, costs related to the disclosure  
8 of security breaches, and attorney fees arising out of complaints,  
9 claims, civil and administrative actions, and, to the fullest  
10 extent allowable under the law, governmental investigations and  
11 prosecutions to the extent caused by a security breach or the  
12 access, storage, maintenance, use, sharing, disclosure, or  
13 retention of the dealer's consumer or customer data or other  
14 information or maintenance or services provided to any computer  
15 system utilized by a new motor vehicle dealer.

16 **§17A-6A-16. Exports; Rebuttable Presumption on Behalf of Dealer.**

17 It shall be unlawful for a manufacturer or distributor to take  
18 or threaten to take any adverse action against a dealer pursuant to  
19 an export or sale-for-resale prohibition because the dealer sold or  
20 leased a vehicle to a customer who either exported the vehicle to  
21 a foreign country or resold the vehicle in violation of the  
22 prohibition, unless the export or sale-for-resale prohibition  
23 policy was provided to the dealer in writing prior to the sale or  
24 lease, and the dealer knew or reasonably should have known of the

1 customer's intent to export or resell the vehicle in violation of  
2 the prohibition at the time of sale or lease. If the dealer causes  
3 the vehicle to be registered in this state or any other state, a  
4 rebuttable presumption is established that the dealer did not have  
5 reason to know of the customer's intent to export or resell the  
6 vehicle.

7 **§17A-6A-17. Manufacturer performance standards; uniform**  
8 **application, prohibited practices.**

9 A manufacturer may not require dealer adherence to a  
10 performance standard or standards which are not applied uniformly  
11 to other similarly situated dealers. In addition to any other  
12 requirements of the law, the following shall apply:

13 A performance standard, sales objective, or program for  
14 measuring dealer performance that may have a material effect on a  
15 dealer, including the dealer's right to payment under any incentive  
16 or reimbursement program, and the application of the standard,  
17 sales objective or program by a manufacturer, distributor or  
18 factory branch, shall be fair, reasonable, equitable and based on  
19 accurate information.

20 Prior to beginning any incentive or reimbursement program, the  
21 manufacturer shall provide in writing to each dealer of the same  
22 line-make that chooses to participate in the program the dealer's  
23 performance requirement or sales goal or objective, which shall  
24 include a reasonable and general explanation of the methodology,

1 criteria, and calculations used.

2 A manufacturer shall allocate an adequate supply of vehicles,  
3 appropriate to the market and season, to its dealers by series,  
4 product line, and model to assist the dealer in achieving any  
5 performance standards established by the manufacturer and  
6 distributor.

7 A dealer that claims that the application of a performance  
8 standard, sales objective, or program for measuring dealership  
9 performance does not meet the standards listed in subsection (a) of  
10 this section, may seek relief and damages in the circuit courts of  
11 the State of West Virginia.

12 The manufacturer or distributor has the burden of proving by  
13 a preponderance of the evidence that the performance standard,  
14 sales objective or program for measuring dealership performance  
15 complies with this Article.

16 **§17A-6A-18. Indemnity.**

17 Notwithstanding the terms of any dealer agreement, a  
18 manufacturer or distributor shall indemnify and hold harmless its  
19 dealers for any reasonable expenses incurred, including damages,  
20 court costs and attorney's fees, arising solely out of complaints,  
21 claims or actions which relate to the manufacture, assembly, design  
22 of a new motor vehicle or other functions by the manufacturer or  
23 distributor beyond the control of the dealer, including, without  
24 limitation, the selection by the manufacturer or distributor of



1 parts or components for the vehicle, and any damages to merchandise  
2 occurring prior to acceptance of the vehicle by the dealer to the  
3 dealer if the carrier is designated by the manufacturer or  
4 distributor, if the new motor vehicle dealer gives timely notice to  
5 the manufacturer or distributor of the complaint, claim or action.

6 **§17A-6A-19. Actions at law; damages.**

7 (1) If a manufacturer or distributor terminates, cancels,  
8 fails to renew or discontinues a dealer agreement for other than  
9 good cause as defined in this article, or commits any other  
10 violation of this article, the new motor vehicle dealer adversely  
11 affected by the actions may bring an action for damages and  
12 equitable relief against the manufacturer or distributor. If the  
13 new motor vehicle dealer prevails, the dealer may recover, in  
14 addition to actual damages, treble damages up to three times the  
15 amount of the actual damages awarded, plus reasonable attorney's  
16 fees, regardless of the amount in controversy. For the purposes of  
17 the award of attorney's fees and costs, whenever the new motor  
18 vehicle dealer is seeking injunctive or other relief, the dealer  
19 may be considered to have prevailed when a judgment or other final  
20 order providing equitable relief is entered in its favor.

21 (2) A manufacturer or distributor who violates this article is  
22 liable for all damages sustained by a new motor vehicle dealer as  
23 a result of the violation.

24 (3) A manufacturer or distributor or new motor vehicle dealer

1 may bring an action for declaratory judgment for determination of  
2 any controversy arising pursuant to this article.

3       (4) Any corporation or association which is primarily owned by  
4 or composed of dealers and which primarily represents the interests  
5 of dealers has standing to file a petition or cause of action with  
6 the court of competent jurisdiction for itself or by, for or on  
7 behalf of any, or a group of, new motor vehicle dealers for any  
8 violation of this article or for the determination of any rights  
9 created by this article.

10       (5) In addition to any county in which venue is proper in  
11 accordance with the Constitution and laws of this state, in any  
12 cause of action brought by a new motor vehicle dealer against a  
13 manufacturer or distributor for any violation of this article or  
14 for the determination of any rights created by the dealer's  
15 franchise agreement, venue is proper in the county in which the  
16 dealer is engaged in the business of selling the products or  
17 services of the manufacturer or distributor.

18 **§17A-6A-20. Injunctive relief.**

19       Upon proper application to the circuit court, a manufacturer  
20 or distributor or new motor vehicle dealer may obtain appropriate  
21 injunctive relief against termination, cancellation, nonrenewal or  
22 discontinuance of a dealer agreement or any other violation of this  
23 article. The court may grant injunctive relief or a temporary  
24 restraining order without bond.

1 **§17A-6A-21. West Virginia law to apply.**

2       Notwithstanding the terms, provisions or requirements of any  
3 franchise agreement, contract or other agreement of any kind  
4 between a new motor vehicle dealer and a manufacturer or  
5 distributor, captive finance source, or any subsidiary, affiliate  
6 or partner of a manufacturer or distributor, the provisions of the  
7 Code of West Virginia apply to all such agreements and contracts.  
8 Any provisions in the agreements and contracts which violate the  
9 terms of this section are null and void.

NOTE: The purpose of this bill is to update and clarify the article of the code relating to motor vehicle dealers, distributors, wholesalers and manufacturers.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

Sections §17A-6A-12a; 12b; 12c; 14a; 15; 16 and 17 are new, therefore underscoring has been omitted.

Sections §17A-6A-18; 19 and 20 and 21 have been renumbered.