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SB 509

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CLERK WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
Regular Session, 2006



ENROLLED

Committee Substitute for

SENATE BILL NO. 509

(By Senator Kessler, et al)



PASSED March 8, 2006

In Effect 90 days from Passage

FILED

2006 MAR 23 P 4: 49

OFFICE WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 509

(SENATORS KESSLER, TOMBLIN, MR. PRESIDENT, HARRISON,
CARUTH, OLIVERIO, CHAFIN, DEMPSEY, FOSTER, HELMICK,
JENKINS, MINARD, LOVE, WHITE, PLYMALE, DEEM, FACEMYER,
WEEKS, MINEAR, GUILLS, YODER, BOWMAN, BAILEY, BOLEY,
UNGER AND SHARPE, *original sponsors*)

[Passed March 8, 2006; in effect ninety days from passage.]

AN ACT to amend and reenact §17A-6A-3, §17A-6A-4, §17A-6A-8, §17A-6A-8a, §17A-6A-10 and §17A-6A-15 of the Code of West Virginia, 1931, as amended, all relating generally to automobile franchise law; relationship of automobile dealers, distributors and manufacturers; providing clarification that material breach is required for good cause for cancellation of dealer contract; providing factors to be considered for dealer and public interest in cancellation of dealer contract; providing for compensation to a dealer from a manufacturer when a brand or line is phased out; expanding and clarifying prohibited practices; clarifying prohibited coercive acts when requiring a dealer enter into an agreement; adding requirement that manufacturers and distributors use fair and

reasonable performance standards that are statistically sound and verifiable; exception for volume purchases; prohibiting manufacturers and distributors from requiring facility upgrades as a condition of offering certain vehicle models; requiring manufacturer or distributor responsibility for all damage to vehicles prior to dealer taking possession; and providing for payment of reasonable expenses for professional services by the manufacturer or distributor prior to the exercise of a first right of refusal.

Be it enacted by the Legislature of West Virginia:

That §17A-6A-3, §17A-6A-4, §17A-6A-8, §17A-6A-8a, §17A-6A-10 and 17A-6A-15 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

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

§17A-6A-3. Definitions.

1 For the purposes of this article, the words and phrases
2 defined in this section have the meanings ascribed to them,
3 except where the context clearly indicates a different
4 meaning.

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

12 (2) "Designated family member" means the spouse,
13 child, grandchild, parent, brother or sister of a deceased
14 new motor vehicle dealer who is entitled to inherit the
15 deceased dealer's ownership interest in the new motor
16 vehicle dealership under the terms of the dealer's will, or
17 who has otherwise been designated in writing by a de-
18 ceased dealer to succeed the deceased dealer in the new

19 motor vehicle dealership, or is entitled to inherit under the
20 laws of intestate succession of this state. With respect to
21 an incapacitated new motor vehicle dealer, the term means
22 the person appointed by a court as the legal representative
23 of the new motor vehicle dealer's property. The term also
24 includes the appointed and qualified personal representa-
25 tive and the testamentary trustee of a deceased new motor
26 vehicle dealer. However, the term means only that design-
27 nated successor nominated by the new motor vehicle
28 dealer in a written document filed by the dealer with the
29 manufacturer or distributor, if such a document is filed.

30 (3) "Distributor" means any person, resident or nonresi-
31 dent, who, in whole or in part, offers for sale, sells or
32 distributes any new motor vehicle to a new motor vehicle
33 dealer or who maintains a factory representative, resident
34 or nonresident, or who controls any person, resident or
35 nonresident, who, in whole or in part, offers for sale, sells
36 or distributes any new motor vehicle to a new motor
37 vehicle dealer.

38 (4) "Established place of business" means a permanent,
39 enclosed commercial building located within this state
40 easily accessible and open to the public at all reasonable
41 times and at which the business of a new motor vehicle
42 dealer, including the display and repair of motor vehicles,
43 may be lawfully carried on in accordance with the terms
44 of all applicable building codes, zoning and other land-use
45 regulatory ordinances and as licensed by the Division of
46 Motor Vehicles.

47 (5) "Factory branch" means an office maintained by a
48 manufacturer or distributor for the purpose of selling or
49 offering for sale vehicles to a distributor, wholesaler or
50 new motor vehicle dealer, or for directing or supervising,
51 in whole or in part, factory or distributor representatives.
52 The term includes any sales promotion organization
53 maintained by a manufacturer or distributor which is
54 engaged in promoting the sale of a particular make of new
55 motor vehicles in this state to new motor vehicle dealers.

56 (6) "Factory representative" means an agent or employee
57 of a manufacturer, distributor or factory branch retained
58 or employed for the purpose of making or promoting the
59 sale of new motor vehicles or for supervising or contract-
60 ing with new motor vehicle dealers or proposed motor
61 vehicle dealers.

62 (7) "Good faith" means honesty in fact and the observa-
63 tion of reasonable commercial standards of fair dealing in
64 the trade.

65 (8) "Manufacturer" means any person who manufactures
66 or assembles new motor vehicles; or any distributor,
67 factory branch or factory representative.

68 (9) "Motor vehicle" means that term as defined in section
69 one, article one of this chapter, including motorcycle and
70 recreational vehicle as defined in subsections (c) and (nn),
71 respectively, of said section, but not including a tractor or
72 farm equipment.

73 (10) "New motor vehicle" means a motor vehicle which
74 is in the possession of the manufacturer, distributor or
75 wholesaler, or has been sold only to a new motor vehicle
76 dealer and on which the original title has not been issued
77 from the new motor vehicle dealer.

78 (11) "New motor vehicle dealer" means a person who
79 holds a dealer agreement granted by a manufacturer or
80 distributor for the sale of its motor vehicles, who is
81 engaged in the business of purchasing, selling, leasing,
82 exchanging or dealing in new motor vehicles, service of
83 said vehicles, warranty work and sale of parts who has an
84 established place of business in this state and is licensed
85 by the Division of Motor Vehicles.

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

88 (13) "Proposed new motor vehicle dealer" means a
89 person who has an application pending for a new dealer

90 agreement with a manufacturer or distributor. Proposed
91 motor vehicle dealer does not include a person whose
92 dealer agreement is being renewed or continued.

93 (14) "Relevant market area" means the area located
94 within a fifteen air-mile radius around an existing same
95 line-make new motor vehicle dealership.

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

1 (1) Notwithstanding any agreement, a manufacturer or
2 distributor shall not cancel, terminate, fail to renew or
3 refuse to continue any dealer agreement with a new motor
4 vehicle dealer unless the manufacturer or distributor has
5 complied with all of the following:

6 (a) Satisfied the notice requirement of section seven of
7 this article;

8 (b) Acted in good faith;

9 (c) Engaged in full and open communication with
10 franchised dealer; and

11 (d) Has good cause for the cancellation, termination,
12 nonrenewal or discontinuance.

13 (2) Notwithstanding any agreement, good cause exists
14 when a manufacturer or distributor can demonstrate
15 termination is necessary due to a material breach of a
16 reasonable term or terms of the agreement by a dealer
17 when weighed against the interests of the dealer and the
18 public. The interests of the dealer and the public shall
19 include consideration of:

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

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

24 (c) The effect on the public cancellation of the franchise
25 agreement would cause;

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

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

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

33 (g) The dealer's overall performance under the reason-
34 able terms of the franchise agreement. This shall include
35 the overall fairness of the agreement terms, the
36 enforceability of the agreement and the relative bargain-
37 ing power of the parties.

38 (3) If the failure by the new motor vehicle dealer to
39 comply with a provision of the dealer agreement relates to
40 the performance of the new motor vehicle dealer in sales
41 or service, good cause exists for the purposes of a termina-
42 tion, cancellation, nonrenewal or discontinuance under
43 subsection (1) of this section when the new motor vehicle
44 dealer failed to effectively carry out the performance
45 provisions of the dealer agreement if all of the following
46 have occurred:

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

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

51 (c) The new motor vehicle dealer was afforded a reason-
52 able opportunity to exert good faith efforts to carry out
53 the dealer agreement; and

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

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

1 (1) Upon the termination, cancellation, nonrenewal or
2 discontinuance of any dealer agreement, the new motor

3 vehicle dealer shall be allowed fair and reasonable com-
4 pensation by the manufacturer or distributor for the
5 following:

6 (a) Any new motor vehicle inventory, manufactured for
7 sale in the United States, purchased from the manufac-
8 turer, distributor or other dealers, which has not been
9 materially altered, substantially damaged or driven for
10 more than seven hundred fifty miles, except that for any
11 new motorcycle inventory purchased from the manufac-
12 turer or distributor, that inventory must not have been
13 materially altered, substantially damaged or driven for
14 more than fifty miles;

15 (b) Supplies and parts inventory purchased from the
16 manufacturer or distributor and listed in the manufac-
17 turer's or distributor's current parts catalog;

18 (c) Equipment, furnishings and signs purchased from the
19 manufacturer or distributor; and

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

23 (2) Upon the termination, cancellation, nonrenewal or
24 discontinuance of a dealer agreement by the manufacturer
25 or distributor, the manufacturer or distributor shall also
26 pay to the new motor vehicle dealer a sum equal to the
27 current, fair rental value of his or her established place of
28 business for a period of three years from the effective date
29 of termination, cancellation, nonrenewal or discontinu-
30 ance, or the remainder of the lease, whichever is less. If
31 the dealer, directly or indirectly, owns the dealership
32 facility, the manufacturer shall pay the dealer a sum equal
33 to the reasonable rental value of the dealership premises
34 for three years. However, the dealer shall have the obliga-
35 tion to mitigate his or her damages, including, but not
36 limited to, listing the facility with a commercial real estate
37 agent and other reasonable steps to sell or lease the
38 property. During this three-year period the manufacturer

39 shall have the right to occupy and use the facilities until
40 such time as the dealer is able to otherwise sell or lease the
41 property to another party. The payment required by this
42 subsection does not apply to any termination, cancellation,
43 nonrenewal or discontinuance made pursuant to subsec-
44 tion (c), section five of this article.

45 (3) Upon the termination, cancellation or nonrenewal
46 where the manufacturer or distributor is discontinuing the
47 sale of a product line, the manufacturer or distributor
48 shall pay or provide to the motor vehicle dealer:

49 (a) Compensation consistent with the length of time the
50 dealer carried the line and the investment and timing
51 thereof required by the manufacturer or distributor of the
52 dealer; and

53 (b) Support of the manufacturer's or distributor's
54 warranty obligations by making parts available and
55 compensating dealers for warranty parts and labor for five
56 years: *Provided*, That the motor vehicle dealer has ade-
57 quate facilities, trained personnel and equipment to
58 perform warranty repairs.

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

1 (1) Every motor vehicle manufacturer, distributor or
2 wholesaler, factory branch or distributor branch, or
3 officer, agent or representative thereof, shall:

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

7 (b) Compensate the motor vehicle dealer for warranty
8 and factory recall service required of the dealer by the
9 manufacturer, distributor or wholesaler, factory branch or
10 distributor branch or officer, agent or representative
11 thereof; and

12 (c) Provide the dealer the schedule of compensation to be
13 paid the dealer for parts, work and service in connection

14 with warranty and recall services and the time allowance
15 for the performance of the work and service.

16 (2) In no event may:

17 (a) The schedule of compensation fail to compensate the
18 dealers for the work and services they are required to
19 perform in connection with the dealer's delivery and
20 preparation obligations, or fail to adequately and fairly
21 compensate the dealers for labor, parts and other expenses
22 incurred by the dealer to perform under and comply with
23 manufacturer's warranty agreements and factory recalls;

24 (b) Any manufacturer, distributor or wholesaler, or
25 representative thereof, pay its dealers an amount of money
26 for warranty or recall work that is less than that charged
27 by the dealer to the retail customers of the dealer for
28 nonwarranty and nonrecall work of the like kind; and

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

33 (3) It is a violation of this section for any manufacturer,
34 distributor, wholesaler or representative to require any
35 dealer to pay in any manner, surcharges, limited alloca-
36 tion, audits, charge backs or other retaliation, if the dealer
37 seeks to recover its nonwarranty retail rate for warranty
38 and recall work.

39 (4) All claims made by motor vehicle dealers pursuant to
40 this section for compensation for delivery, preparation,
41 warranty and recall work, including labor, parts and other
42 expenses, shall be paid by the manufacturer within thirty
43 days after approval and shall be approved or disapproved
44 by the manufacturer within thirty days after receipt.
45 When any claim is disapproved, the dealer shall be notified
46 in writing of the grounds for disapproval. No claim which
47 has been approved and paid may be charged back to the
48 dealer unless it can be shown that the claim was false or

49 fraudulent, that the repairs were not properly made or
50 were unnecessary to correct the defective condition or the
51 dealer failed to reasonably substantiate the claim in
52 accordance with the written requirements of the manufac-
53 turer or distributor in effect at the time the claim arose.
54 No charge back may be made until the dealer has had
55 notice and an opportunity to support the claim in question.
56 No otherwise valid reimbursement claims may be denied
57 once properly submitted within manufacturers' submission
58 guidelines due to a clerical error or omission or based on
59 a different level of technician technical certification or the
60 dealer's failure to subscribe to any manufacturer's com-
61 puterized training programs.

62 (5) Notwithstanding the terms of a franchise agreement
63 or provision of law in conflict with this section, the
64 dealer's delivery, preparation, warranty and recall obliga-
65 tions constitutes the dealer's sole responsibility for prod-
66 uct liability as between the dealer and manufacturer, and,
67 except for a loss caused by the dealer's failure to adhere to
68 these obligations, a loss caused by the dealer's negligence
69 or intentional misconduct or a loss caused by the dealer's
70 modification of a product without manufacturer authori-
71 zation, the manufacturer shall reimburse the dealer for all
72 loss incurred by the dealer, including legal fees, court costs
73 and damages, as a result of the dealer having been named
74 a party in a product liability action.

§17A-6A-10. Prohibited practices.

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

4 (a) Order or accept delivery of any new motor vehicle,
5 part or accessory of the vehicle, equipment or any other
6 commodity not required by law which was not voluntarily
7 ordered by the new motor vehicle dealer. This section does
8 not prevent the manufacturer or distributor from requiring
9 that new motor vehicle dealers carry a reasonable inven-

10 tory of models offered for sale by the manufacturer or
11 distributor;

12 (b) Order or accept delivery of any new motor vehicle
13 with special features, accessories or equipment not in-
14 cluded in the list price of the new motor vehicle as publicly
15 advertised by the manufacturer or distributor;

16 (c) Unreasonably participate monetarily in any advertis-
17 ing campaign or contest, or purchase any promotional
18 materials, display devices, display decorations, brand signs
19 and dealer identification, nondiagnostic computer equip-
20 ment and displays, or other materials at the expense of the
21 new motor vehicle dealer;

22 (d) Enter into any agreement with the manufacturer or
23 distributor or do any other act prejudicial to the new
24 motor vehicle dealer by threatening to terminate a dealer
25 agreement, limit inventory, invoke sales and service
26 warranty or other types of audits or any contractual
27 agreement or understanding existing between the dealer
28 and the manufacturer or distributor. Notice in good faith
29 to any dealer of the dealer's violation of any terms or
30 provisions of the dealer agreement is not a violation of this
31 article;

32 (e) Change the capital structure of the new motor vehicle
33 dealership or the means by or through which the dealer
34 finances the operation of the dealership if the dealership
35 at all times meets any reasonable capital standards
36 determined by the manufacturer in accordance with
37 uniformly applied criteria;

38 (f) Refrain from participation in the management of,
39 investment in or the acquisition of any other line of new
40 motor vehicle or related products, provided that the dealer
41 maintains a reasonable line of credit for each make or line
42 of vehicle, remains in compliance with reasonable facilities
43 requirements and makes no change in the principal
44 management of the dealer. Notwithstanding the terms of

45 any franchise agreement, a manufacturer or distributor
46 may not enforce any requirements, including facility
47 requirements, that a new motor vehicle dealer establish or
48 maintain exclusive facilities, personnel or display space,
49 when the requirements are unreasonable considering
50 current economic conditions and are not otherwise justi-
51 fied by reasonable business considerations. The burden of
52 proving that current economic conditions or reasonable
53 business considerations justify exclusive facilities is on the
54 manufacturer or distributor and must be proven by a
55 preponderance of the evidence;

56 (g) Change the location of the new motor vehicle dealer-
57 ship or make any substantial alterations to the dealership
58 premises, where to do so would be unreasonable; and

59 (h) Prospectively assent to a release, assignment, nova-
60 tion, waiver or estoppel which would relieve any person
61 from liability imposed by this article or require any
62 controversy between a new motor vehicle dealer and a
63 manufacturer or distributor to be referred to a person
64 other than the duly constituted courts of the state or the
65 United States, if the referral would be binding upon the
66 new motor vehicle dealer.

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

69 (a) Fail to deliver new motor vehicles or new motor
70 vehicle parts or accessories within a reasonable time and
71 in reasonable quantities relative to the new motor vehicle
72 dealer's market area and facilities, unless the failure is
73 caused by acts or occurrences beyond the control of the
74 manufacturer or distributor, or unless the failure results
75 from an order by the new motor vehicle dealer in excess of
76 quantities reasonably and fairly allocated by the manufac-
77 turer or distributor. No manufacturer or distributor may
78 penalize a new motor vehicle dealer for an alleged failure
79 to meet sales quotas where the alleged failure is due to
80 actions of the manufacturer or distributor;

81 (b) Refuse to disclose to a new motor vehicle dealer the
82 method and manner of distribution of new motor vehicles
83 by the manufacturer or distributor, including any numeri-
84 cal calculation or formula used, nationally or within the
85 dealers market, to make the allocations;

86 (c) Refuse to disclose to a new motor vehicle dealer the
87 total number of new motor vehicles of a given model,
88 which the manufacturer or distributor has sold during the
89 current model year within the dealer's marketing district,
90 zone or region, whichever geographical area is the small-
91 est;

92 (d) Increase prices of new motor vehicles which the new
93 motor vehicle dealer had ordered and then eventually
94 delivered to the same retail consumer for whom the vehicle
95 was ordered, if the order was made prior to the dealer's
96 receipt of the written official price increase notification.
97 A sales contract signed by a private retail consumer and
98 binding on the dealer is evidence of each order. In the
99 event of manufacturer or distributor price reductions or
100 cash rebates, the amount of any reduction or rebate
101 received by a dealer shall be passed on to the private retail
102 consumer by the dealer. Any price reduction in excess of
103 five dollars shall apply to all vehicles in the dealer's
104 inventory which were subject to the price reduction. A
105 price difference applicable to new model or series motor
106 vehicles at the time of the introduction of the new models
107 or the series is not a price increase or price decrease. This
108 subdivision does not apply to price changes caused by the
109 following:

110 (i) The addition to a motor vehicle of required or op-
111 tional equipment pursuant to state or federal law;

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

114 (iii) Any increase in transportation charges due to an
115 increase in rates charged by a common carrier and trans-
116 porters;

117 (e) Offer any refunds or other types of inducements to
118 any dealer for the purchase of new motor vehicles of a
119 certain line-make to be sold to this state or any political
120 subdivision of this state without making the same offer
121 available upon request to all other new motor vehicle
122 dealers of the same line-make;

123 (f) Release to an outside party, except under subpoena or
124 in an administrative or judicial proceeding to which the
125 new motor vehicle dealer or the manufacturer or distribu-
126 tor are parties, any business, financial or personal infor-
127 mation which has been provided by the dealer to the
128 manufacturer or distributor, unless the new motor vehicle
129 dealer gives his or her written consent;

130 (g) Deny a new motor vehicle dealer the right to associ-
131 ate with another new motor vehicle dealer for any lawful
132 purpose;

133 (h) Establish a new motor vehicle dealership which
134 would unfairly compete with a new motor vehicle dealer
135 of the same line-make operating under a dealer agreement
136 with the manufacturer or distributor in the relevant
137 market area. A manufacturer or distributor shall not be
138 considered to be unfairly competing if the manufacturer or
139 distributor is:

140 (i) Operating a dealership temporarily for a reasonable
141 period.

142 (ii) Operating a dealership which is for sale at a reason-
143 able price.

144 (iii) Operating a dealership with another person who has
145 made a significant investment in the dealership and who
146 will acquire full ownership of the dealership under
147 reasonable terms and conditions.

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

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

151 (ii) Operate a dealership; or

152 (iii) Act in the capacity of a new motor vehicle dealer:
153 *Provided*, That a manufacturer may own an interest, other
154 than stock in a publicly held company, solely for invest-
155 ment purposes.

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

160 (i) The person from whom the manufacturer or distribu-
161 tor acquired the dealership was a franchised dealer; and

162 (ii) The dealership is for sale by the manufacturer or
163 distributor at a reasonable price and on reasonable terms
164 and conditions;

165 (k) The twelve-month period may be extended for an
166 additional twelve months. Notice of any such extension of
167 the original twelve-month period must be given to any
168 dealer of the same line-make whose dealership is located
169 in the same county, or within fifteen air miles of, the
170 dealership owned or controlled by the manufacturer or
171 distributor prior to the expiration of the original twelve-
172 month period. Any dealer receiving the notice may protest
173 the proposed extension within thirty days of receiving
174 notice by bringing a declaratory judgment action in the
175 circuit court for the county in which the new motor vehicle
176 dealer is located to determine whether good cause exists
177 for the extension;

178 (l) For the purpose of broadening the diversity of its
179 dealer body and enhancing opportunities for qualified
180 persons who are part of a group who have historically been
181 under represented in its dealer body, or other qualified
182 persons who lack the resources to purchase a dealership
183 outright, but for no other purpose, a manufacturer or
184 distributor may temporarily own an interest in a dealer-
185 ship if the manufacturer's or distributor's participation in

186 the dealership is in a bona fide relationship with a fran-
187 chised dealer who:

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

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

191 (iii) Operates the dealership under a plan to acquire full
192 ownership of the dealership within a reasonable time and
193 under reasonable terms and conditions;

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

198 (n) Fail to respond in writing to a request for consent to
199 a sale, transfer or exchange of a dealership within sixty
200 days after receipt of a written application from the new
201 motor vehicle dealer on the forms generally utilized by the
202 manufacturer or distributor for such purpose and contain-
203 ing the information required therein. Failure to respond
204 to the request within the sixty days is consent;

205 (o) Unfairly prevent a new motor vehicle dealer from
206 receiving reasonable compensation for the value of the
207 new motor vehicle dealership;

208 (p) Audit any motor vehicle dealer in this state for
209 warranty parts or warranty service compensation, service
210 compensation, service incentives, rebates or other forms of
211 sales incentive compensation more than twelve months
212 after the claim for payment or reimbursement has been
213 made by the automobile dealer: *Provided*, That the
214 provisions of this subsection does not apply where a claim
215 is fraudulent. In addition, the manufacturer or distributor
216 is responsible for reimbursing the audited dealer for all
217 copying, postage and administrative costs incurred by the
218 dealer during the audit. Any charges to a dealer as a result
219 of the audit must be separately billed to the dealer;

220 (q) Unreasonably restrict a dealer's ownership of a
221 dealership through noncompetition covenants, site control,
222 sublease, collateral pledge of lease, right of first refusal,
223 option to purchase, or otherwise. A right of first refusal is
224 created when:

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

231 (ii) The proposed change of the dealership's ownership or
232 the transfer of the new vehicle dealer's assets does not
233 involve the transfer of assets or the transfer or issuance of
234 stock by the dealer or one of the dealer's owners to one of
235 the following:

236 (A) A designated family member of one or more of the
237 dealer owners;

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

241 (C) A partnership or corporation controlled by a desig-
242 nated family member of one of the dealers;

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

244 (1) For the purpose of allowing the new vehicle dealer to
245 continue to qualify as such under the manufacturer's or
246 distributor's standards; or

247 (2) To provide for the succession of the franchise agree-
248 ment to designated family members or qualified manage-
249 ment in the event of death or incapacity of the dealer or its
250 principle owner or owners.

251 (iii) Upon exercising the right of first refusal by a
252 manufacturer, it eliminates any requirement under its

253 dealer agreement or other applicable provision of this
254 statute that the manufacturer evaluate, process or respond
255 to the underlying proposed transfer by approving or
256 rejecting the proposal, is not subject to challenge as a
257 rejection or denial of the proposed transfer by any party.

258 (iv) Except as otherwise provided in this subsection, the
259 manufacturer or distributor agrees to pay the reasonable
260 expenses, including reasonable out-of-pocket professional
261 fees which shall include, but not be limited to, accounting,
262 legal or appraisal services fees that are incurred by the
263 proposed owner or transferee before the manufacturer's or
264 distributor's exercise of its right of first refusal. Payment
265 of the expenses and fees for professional services are not
266 required if the dealer fails to submit an accounting of
267 those expenses and fees within twenty days of the dealer's
268 receipt of the manufacturer's or distributor's written
269 request for such an accounting. Such a written account of
270 fees and expenses may be requested by a manufacturer or
271 distributor before exercising its right of first refusal;

272 (r) Except for experimental low-volume not-for-retail
273 sale vehicles, cause warranty and recall repair work to be
274 performed by any entity other than a new motor vehicle
275 dealer;

276 (s) Make any material change in any franchise agreement
277 without giving the new motor vehicle dealer written notice
278 by certified mail of the change at least sixty days prior to
279 the effective date of the change;

280 (t) Fail to reimburse a new motor vehicle dealer, at the
281 dealers regular rate, or the full and actual cost of provid-
282 ing a loaner vehicle to any customer who is having a
283 vehicle serviced at the dealership if the provision of the
284 loaner vehicle is required by the manufacturer;

285 (u) Compel a new motor vehicle dealer through its
286 finance subsidiaries to agree to unreasonable operating
287 requirements or to directly or indirectly terminate a

288 franchise through the actions of a finance subsidiary of the
289 franchisor. This subsection does not limit the right of a
290 finance subsidiary to engage in business practices in
291 accordance with the usage of trade in retail or wholesale
292 vehicle financing;

293 (v) Discriminate directly or indirectly between dealers on
294 vehicles of like grade or quantity where the effect of the
295 discrimination would substantially lessen competition; and

296 (w) Use or employ any performance standard that is not
297 fair and reasonable and based upon accurate and verifi-
298 able data made available to the dealer.

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

304 (4) Except as may otherwise be provided in this article,
305 no manufacturer or franchisor shall sell, directly or
306 indirectly, any new motor vehicle to a consumer in this
307 state, except through a new motor vehicle dealer holding
308 a franchise for the line-make covering such new motor
309 vehicle. This subsection shall not apply to manufacturer
310 or franchisor sales of new motor vehicles to charitable
311 organizations, qualified vendors or employees of the
312 manufacturer or franchisor.

313 (5) Except when prevented by an act of God, labor strike,
314 transportation disruption outside the control of the
315 manufacturer or time of war, a manufacturer or distribu-
316 tor may not refuse or fail to deliver, in reasonable quanti-
317 ties and within a reasonable time, to a dealer having a
318 franchise agreement for the retail sale of any motor vehicle
319 sold or distributed by the manufacturer, any new motor
320 vehicle or parts or accessories to new motor vehicles as are
321 covered by the franchise if the vehicles, parts and accesso-
322 ries are publicly advertised as being available for delivery

323 or are actually being delivered. All models offered for sale
324 by the manufacturer, without any enrollment, surcharge,
325 unreasonable facility or building or any other unreason-
326 able type of upgrade requirement or acquisition fee, shall
327 be available to the franchised dealer at no additional cost
328 for that particular model of vehicle.

§17A-6A-15. Indemnity.

1 Notwithstanding the terms of any dealer agreement, a
2 manufacturer or distributor shall indemnify and hold
3 harmless its dealers for any reasonable expenses incurred,
4 including damages, court costs and attorney's fees, arising
5 solely out of complaints, claims or actions which relate to
6 the manufacture, assembly, design of a new motor vehicle
7 or other functions by the manufacturer or distributor
8 beyond the control of the dealer, including, without
9 limitation, the selection by the manufacturer or distributor
10 of parts or components for the vehicle, and any damages to
11 merchandise occurring prior to acceptance of the vehicle
12 by the dealer to the dealer if the carrier is designated by
13 the manufacturer or distributor, if the new motor vehicle
14 dealer gives timely notice to the manufacturer or distribu-
15 tor of the complaint, claim or action.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chandy White
.....
Chairman Senate Committee

R. Berry
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Harrell Gibbs
.....
Clerk of the Senate

Gregg M. Boy
.....
Clerk of the House of Delegates

Carl Roy Tomblin
.....
President of the Senate

Robert H.
.....
Speaker House of Delegates

The within *is approved* this the *23rd*
Day of *March* 2006.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 17 2006

Time 11:15h