WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2007

ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 601

(Senators Jenkins, Plymale, Kessler, Chafin, Unger, Oliverio, Bailey, Minard, Green, Caruth, Stollings, Deem, Bowman, Hall, Love, Yoder, Barnes, Helmick, Fanning, Foster, Hunter, Prezioso, Edgell, McKenzie, Guills and White, original sponsors)

[Passed March 10, 2007; in effect from passage.]
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[Passed March 10, 2007; in effect from passage.]

AN ACT to amend and reenact §17A-6A-3, 17A-6A-10 and §17A-6A-12 of the Code of West Virginia, 1931, as amended, all relating to the establishment or relocation of additional motor vehicle dealers within a relevant market area; redefining "relevant market area"; creating exceptions for certain relocations and transfers;
exceptions for purposes of adding dealerships to an area; and providing notice requirements to existing dealers.

Be it enacted by the Legislature of West Virginia:

That §17A-6A-3, 17A-6A-10 and §17A-6A-12 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.


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

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

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

(3) "Distributor" means any person, resident or nonresident, who, in whole or in part, offers for sale, sells or distributes any new motor vehicle to a new motor vehicle dealer or who maintains a factory representative, resident or nonresident, or who controls any person, resident or nonresident, who, in whole or in part, offers for sale, sells or distributes any new motor vehicle to a new motor vehicle dealer.

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

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

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

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

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

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

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

(11) "New motor vehicle dealer" means a person who
holds a dealer agreement granted by a manufacturer or
distributor for the sale of its motor vehicles, who is
engaged in the business of purchasing, selling, leasing,
(12) "Person" means a natural person, partnership, corporation, association, trust, estate or other legal entity.

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

(14) "Relevant market area" means the area located within a twenty air-mile radius around an existing same line-make new motor vehicle dealership: Provided, That a fifteen mile relevant market area as it existed prior to the effective date of this statute shall apply to any proposed new motor vehicle dealership as to which a manufacturer or distributor and the proposed new motor vehicle dealer have executed on or before the effective date of this statute a written agreement, including a letter of intent, performance agreement or commitment letter, concerning the establishment of the proposed new motor vehicle dealership.


(1) A manufacturer or distributor may not require any new motor vehicle dealer in this state to do any of the following:
(a) Order or accept delivery of any new motor vehicle, part or accessory of the vehicle, equipment or any other commodity not required by law which was not voluntarily ordered by the new motor vehicle dealer. This section does not prevent the manufacturer or distributor from requiring that new motor vehicle dealers carry a reasonable inventory of models offered for sale by the manufacturer or distributor;

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

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

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

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

(f) Refrain from participation in the management of, investment in or the acquisition of any other line of new motor vehicle or related products, provided that the dealer maintains a reasonable line of credit for each make or line of vehicle, remains in compliance with reasonable facilities requirements and makes no change in the principal management of the dealer. Notwithstanding the terms of any franchise agreement, a manufacturer or distributor may not enforce any requirements, including facility requirements, that a new motor vehicle dealer establish or maintain exclusive facilities, personnel or display space, when the requirements are unreasonable considering current economic conditions and are not otherwise justified by reasonable business considerations. The burden of proving that current economic conditions or reasonable business considerations justify exclusive facilities is on the manufacturer or distributor and must be proven by a preponderance of the evidence;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(l) For the purpose of broadening the diversity of its dealer body and enhancing opportunities for qualified persons who are part of a group who have historically
189 been under represented in its dealer body, or other
190 qualified persons who lack the resources to purchase a
191 dealership outright, but for no other purpose, a
192 manufacturer or distributor may temporarily own an
193 interest in a dealership if the manufacturer's or
194 distributor's participation in the dealership is in a bona
195 fide relationship with a franchised dealer who:

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

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

199 (iii) Operates the dealership under a plan to acquire
200 full ownership of the dealership within a reasonable
201 time and under reasonable terms and conditions;

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

206 (n) Fail to respond in writing to a request for consent
207 to a sale, transfer or exchange of a dealership within
208 sixty days after receipt of a written application from the
209 new motor vehicle dealer on the forms generally utilized
210 by the manufacturer or distributor for such purpose and
211 containing the information required therein. Failure to
212 respond to the request within the sixty days is consent;

213 (o) Unfairly prevent a new motor vehicle dealer from
214 receiving reasonable compensation for the value of the
215 new motor vehicle dealership;

216 (p) Audit any motor vehicle dealer in this state for
217 warranty parts or warranty service compensation,
service compensation, service incentives, rebates or other forms of sales incentive compensation more than twelve months after the claim for payment or reimbursement has been made by the automobile dealer: 

Provided, That the provisions of this subsection does not apply where a claim is fraudulent. In addition, the manufacturer or distributor is responsible for reimbursing the audited dealer for all copying, postage and administrative costs incurred by the dealer during the audit. Any charges to a dealer as a result of the audit must be separately billed to the dealer;

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

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

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

(A) A designated family member of one or more of the dealer owners;
(B) A manager employed by the dealer in the dealership during the previous five years and who is otherwise qualified as a dealer operator;

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

(D) A trust established or to be established:

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

(ii) To provide for the succession of the franchise agreement to designated family members or qualified management in the event of death or incapacity of the dealer or its principle owner or owners.

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

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

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

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

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

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

(v) Discriminate directly or indirectly between dealers on vehicles of like grade or quantity where the effect of
(w) Use or employ any performance standard that is not fair and reasonable and based upon accurate and verifiable data made available to the dealer.

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

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

(5) Except when prevented by an act of God, labor strike, transportation disruption outside the control of the manufacturer or time of war, a manufacturer or distributor may not refuse or fail to deliver, in reasonable quantities and within a reasonable time, to a dealer having a franchise agreement for the retail sale of any motor vehicle sold or distributed by the manufacturer, any new motor vehicle or parts or accessories to new motor vehicles as are covered by the franchise if the vehicles, parts and accessories are publicly advertised as being available for delivery or are actually being delivered. All models offered for sale by the manufacturer, without any enrollment, surcharge,
unreasonable facility or building or any other unreasonable type of upgrade requirement or acquisition fee, shall be available to the franchised dealer at no additional cost for that particular model of vehicle.

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

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

(2) Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line-make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line-make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.

(3) Within sixty days after receiving the notice provided in subsection (2) of this section, or within sixty days after the end of any appeal procedure provided by the manufacturer or distributor, a new motor vehicle
dealer of the same line-make within the affected relevant market area may bring a declaratory judgment action in the circuit court for the county in which the new motor vehicle dealer is located to determine whether good cause exists for the establishing or relocating of the proposed new motor vehicle dealer:

Provided, That a new motor vehicle dealer of the same line-make within the affected relevant market area shall not be permitted to bring such an action if the proposed relocation site would be further from the location of the new motor vehicle dealer of the same line-make than the location from which the dealership is being moved. Once an action has been filed, the manufacturer or distributor may not establish or relocate the proposed new motor vehicle dealer until the circuit court has rendered a decision on the matter. An action brought pursuant to this section shall be given precedence over all other civil matters on the court's docket. The manufacturer has the burden of proving that good cause exists for establishing or relocating a proposed new motor vehicle dealer.

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

(5) In determining whether good cause exists for establishing or relocating an additional new motor vehicle dealer for the same line-make, the court shall take into consideration the existing circumstances, including, but not limited to, the following:
(a) Permanency and amount of the investment, including any obligations incurred by the dealer in making the investment;

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

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

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

(e) Whether the establishment or relocation of the new motor vehicle dealer would promote competition;

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

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

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

[Signatures]
Chairman Senate Committee
Chairman House Committee

Originated in the Senate.

In effect from passage.

[Signatures]
Clerk of the Senate

[Signatures]
Clerk of the House of Delegates

[Signatures]
President of the Senate
Speaker House of Delegates

The within is approved this the Day of , 2007.

[Signatures]
Governor