SENATE DOCKET, NO. 920 FILED ON: 1/20/2011

SENATE . . . . . No. 123

The Commonwealth of Massachusetts

PRESENTED BY:

Marc R. Pacheco

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act further regulating business practices between motor vehicle dealers, manufacturers, and distributors.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Marc R. Pacheco	☐ *[District]* ☐
Patricia A. Haddad	*5th Bristol*
Theodore C. Speliotis	*13th Essex*

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SENATE . . . . . No. 123

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 123) of Marc R. Pacheco, Patricia A. Haddad and Theodore C. Speliotis for legislation to further regulate business practices between motor vehicle dealers, manufacturers and distributors. Consumer Protection and Professional Licensure.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE
SENATE
, NO. *2581* OF 2009-2010.]

The Commonwealth of Massachusetts

An Act further regulating business practices between motor vehicle dealers, manufacturers, and distributors.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 93B of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by inserting after the definition of "Dual" the following definition:--

"Former Franchisee", a dealer that has either: (i) entered into a termination agreement or a deferred termination agreement with a predecessor or successor manufacturer related to the franchise; or (ii) had the franchise canceled, terminated, nonrenewed, noncontinued, rejected, nonassumed or otherwise ended by the predecessor or successor manufacturer.

SECTION 2. Said section 1 of said chapter 93B, as so appearing, is hereby further amended by inserting after the definition of "Franchisor representative" the following definition:--

"Line make", a collection of models, series or groups of motor vehicles manufactured by or for a particular manufacturer, distributor or importer that is offered for sale, lease, or distribution pursuant to a common brand name or mark; provided, however, that: (i) multiple brand names or marks may constitute a single line make but only when included in a common dealer agreement and the manufacturer, distributor or importer offers vehicles bearing the

16 multiple names or marks together only, and not separately, to its authorized dealers; and (ii)
17 motor vehicles bearing a common brand name or mark may constitute separate line makes when
18 pertaining to motor vehicles subject to separate dealer agreements or when such vehicle are
19 intended for different types of uses.

20 SECTION 3. Subsection (c) of section 4 of said chapter 93B, as so appearing, is hereby
21 amended by striking out paragraph (8) and inserting in place thereof the following paragraph:--

22 (8) to impose upon a motor vehicle dealer or a director, officer, partner or stockholder
23 thereof or any other person holding or otherwise owning an interest therein, by or through the
24 terms and provisions of a franchise agreement or otherwise, unreasonable restrictions upon the
25 financial arrangement or structure of a dealership, upon the method and manner by which the
26 dealership finances or intends to finance its operation, equipment and facilities or upon the
27 ability of an individual, proprietor or stockholder to use, sell or transfer any interest in the
28 dealership or to enter into and implement a testamentary arrangement with respect thereto;
29 provided, however, that:

30 (i) a manufacturer or distributor may require a director, officer, partner or stockholder of
31 a motor vehicle dealer, or any other person holding or otherwise owning an interest therein, to be
32 identified as such and may establish reasonable standards concerning the capital and facilities
33 needed for dealership operations and concerning continuity of dealership management subject to
34 the provisions of paragraph (13);

35 (ii) there shall be no assignment, delegation or transfer of the franchise or management or
36 control thereunder without the written consent of the manufacturer or distributor, which consent
37 shall not unreasonably be withheld;

38 (iii) the manufacturer or distributor shall not deny to the surviving spouse or heirs of an
39 individual franchised motor vehicle dealer the right to submit a proposal as provided in this
40 section to succeed to the interest of the decedent in a franchised motor vehicle dealership
41 enterprise or directly or indirectly to interfere with, hinder or prevent the continuance of the
42 business of the franchised motor vehicle dealer by reason of such succession to the interest of the
43 decedent during the pendency of any such proposal, provided that the surviving spouse or heirs
44 submit that proposal within 90 days after the decedent's death and provides all information
45 requested by the manufacturer or distributor in a timely manner, including the familial and
46 business relationship of the parties, which shall take into account the familial relationship of the
47 parties; and the continuation of the business of the franchised motor vehicle dealer shall be
48 conducted under competent management acceptable to the franchisor, whose acceptance shall
49 not be unreasonably withheld; but, in the event that the franchised motor vehicle dealer and
50 franchisor have executed an agreement concerning succession rights prior to the individual
51 dealer's, partner's or stockholder's death and if such agreement has not been revoked by the

52 franchised motor vehicle dealer, the agreement shall control even if it designates an individual
53 other than the surviving spouse or heirs of the decedent;

54 (iv) the manufacturer or distributor shall promptly mail a dealership application to a
55 proposed assignee, delegatee or transferee following a request therefor submitted by the
56 proposed assigning, delegating or transferring motor vehicle dealer and the proposed assignee,
57 delegatee or transferee shall submit the application to the manufacturer or distributor with all
58 supporting documentation as specified therein by the manufacturer or distributor; and the
59 manufacturer or distributor shall, within 30 days of receipt of the application and all supporting
60 documentation as specified therein, review it and notify the assignee, delegatee or transferee
61 what additional information, data or documents, if any, is needed by the manufacturer or
62 distributor to complete its review and, upon the submission of all specified additional
63 information, data or documents by the assignee, delegatee or transferee, the manufacturer or
64 distributor shall, within 30 days after receipt thereof, make its decision to approve or reject the
65 proposed sale, assignment, or transfer; provided, that if the manufacturer or distributor does not
66 reject such application within 30 days after the submission of all of the requested additional
67 information, data or documents, the application shall be considered approved for all purposes,
68 unless the 30-day deadline is extended by mutual agreement of the manufacturer or distributor
69 and the proposed assigning, delegating or transferring dealer; provided further, that if the
70 manufacturer or distributor did not request any additional information, data, or documents, the
71 manufacturer or distributor shall, within 60 days of the receipt of the application and all
72 supporting documentation, review the application and approve or reject it but, if the
73 manufacturer or distributor does not reject the application within that 60-day period and the 60-
74 day period is not otherwise extended by mutual agreement of the manufacturer or distributor and
75 the proposed assigning, delegating or transferring dealer, the application shall be considered
76 approved for all purposes; and

77 (v) if a franchise agreement specifies that the consent of the manufacturer or distributor
78 shall be obtained before a dealer engages in dualing, the consent shall not be unreasonably
79 withheld, but nothing in this clause shall modify or supersede any term of a franchise agreement
80 requiring a dealer to maintain an exclusive facility for its operations.

81 SECTION 4. Paragraph (10) of said subsection (c) of said section 4 of said chapter 93B,
82 as so appearing, is hereby amended by adding the following words:- ; provided further, that
83 upon written request to a manufacturer or distributor by a dealer of the same line make as a
84 dealership established pursuant to clause (ii), the manufacturer or distributor shall send the
85 requesting dealer a written statement verifying that the relationship with the independent person
86 is in compliance with the this paragraph; and provided further, that the manufacturer or
87 distributor shall not disclose any personal or financial information of the independent person or
88 dealership.

89 SECTION 5. Section 5 of said chapter 93B, as so appearing, is hereby amended by
90 striking subsection (k) and inserting in place thereof the following subsection:-

91 (k) In the event of a termination or cessation of a line make, regardless of cause, the
92 manufacturer or distributor shall:

93 (1) within 90 days from the effective date of the termination, repurchase all new, unused,
94 undamaged and unaltered motor vehicles of the current model year that it sold to the dealer and
95 any other such vehicles that it sold to the dealer within 180 days before the notice of termination,
96 at a price equal to the amount paid therefor by the motor vehicle dealer including, but not limited
97 to, transportation charges, less all incentives and allowances received by the dealer; provided,
98 however, that the motor vehicles which are recreational vehicles of the current model year and
99 any other recreational vehicles sold to the dealer within 180 days before the notice of termination
100 shall be repurchased; provided further, this clause shall not apply to a recreational vehicle
101 manufacturer if the termination was initiated by the dealer for reasons other than the
102 manufacturer's material breach of contract; and provided further, that the dealer shall have
103 transferred to the manufacturer or distributor full right and legal title to the vehicles before their
104 repurchase;

105 (2) if requested by the dealer within the same 90-day period, repurchase all genuine new
106 and unused motor vehicle parts and accessories that it sold to the motor vehicle dealer so long as
107 the same are undamaged, in their original packaging and listed in the current parts and
108 accessories price list of the manufacturer or distributor, at a price equal to the wholesale price
109 stated in the current parts and accessories price list of the manufacturer or distributor including,
110 but not limited to, transportation charges, less all incentives and allowances received by the
111 dealer and without reduction for such repurchase or for processing or handling the repurchase;
112 provided, however, that the dealer shall have transferred to the manufacturer or distributor full
113 right and legal title to the equipment before their repurchase;

114 (3) if requested by the dealer within the same 90-day period, repurchase the new and used
115 equipment that it sold to the motor vehicle dealer within 3 years from the effective date of
116 termination at its then fair market value including, but not limited to, signs, special tools and
117 manuals, which the manufacturer or distributor required the motor vehicle dealer to purchase,
118 such repurchase amount to include transportation charges assessed on the dealer; provided,
119 however, that the dealer shall have transferred to the manufacturer or distributor full right and
120 legal title to the equipment before their repurchase; and

121 (4) in the event of a termination that is the result of the cessation of a line make, if
122 requested by the dealer within the same 90-day period, pay: (i) the fair market value of the
123 goodwill of the franchise as of the date immediately preceding the manufacturer or distributor's
124 announcement of a termination or announcement that a line make is being discontinued; and (ii)
125 if the dealer leases the facility from an unrelated and unaffiliated person or entity, the cost of the

126 lease for the facilities used for the franchise or line make for the unexpired term of the lease not
127 to exceed 1 year; provided, however, that if a facility is used for the operation of more than 1
128 franchise, the reasonable rent owed by the manufacturer shall be based on the portion of the
129 facility utilized by the terminated franchise; provided further that the dealer shall attempt in good
130 faith to mitigate the expense by attempting in good faith to terminate its lease obligations or to
131 sublease or assign the lease, reimbursing or crediting the manufacturer or distributor for any
132 money received in connection with same; provided further, that the dealer shall provide the
133 manufacturer or distributor with documentation indicating that it has made a good faith effort to
134 terminate its lease obligations and to assign the lease or sublease the space including, but not
135 limited to, a copy of an agreement with a commercial real estate broker to obtain such an
136 assignment or sublease; and (iii) if requested by the manufacturer or distributor, the dealer shall
137 make the facility available to the manufacturer or distributor for use by it or its nominee for a
138 time period equivalent to the time period covered by any such payment from the manufacturer or
139 distributor to the dealer; provided further, that this clause shall not apply to a termination of a
140 recreational vehicle or a power sport vehicle franchise or a termination of a recreational vehicle
141 or power sport vehicle line make; provided further, that this clause shall only apply to a
142 manufacturer or distributor that made the decision to terminate or discontinue the line make and
143 shall not impose any obligations on a manufacturer or distributor that was not the decision
144 maker; and provided further that this shall not apply in the event of a sale of the assets or stock of
145 a motor vehicle dealership.

146 SECTION 6. Subsection (b) of section 6 of said chapter 93B, as so appearing, is hereby
147 amended by adding the following paragraph:-

148 A motor vehicle dealer shall be limited to a relocation of an existing point pursuant to
149 clause (1) of subsection (a) or to the appointment of a successor at a site pursuant to clause (2)
150 once within a 2-year period.

151 SECTION 7. Said section 6 of said chapter 93B, as so appearing, is hereby further
152 amended by adding the following subsection:-

153 (i) In the event a dealer is terminated, cancelled or not renewed as a result of the
154 discontinuation of a line make or insolvency of a franchisor, for a period of 2 years from the
155 date that the former franchisee ceased operations, it shall be unlawful for a successor
156 manufacturer or distributor to enter into a same line make franchise as that operated by the
157 former franchisee of the predecessor manufacturer with any person or to permit the relocation of
158 any existing same line make franchise for the same line make represented by the former
159 franchisee that would be located or relocated within the relevant market area of the former
160 franchisee without first receiving written permission to do so from the majority owner of the
161 former franchisee, or his designated successor if the dealer principal of the former franchisee is
162 deceased or disabled. Written permission from the former franchisee shall not be required if: (i)
163 the manufacturer or distributor has offered to reinstate or appoint the former franchisee at no cost

164 and without any requirements or restrictions other than those imposed generally on the
165 manufacturer's other franchisees at that time and provided that the former franchisee meets the
166 manufacturer's reasonable requirements for appointment as a dealer; (ii) the manufacturer or
167 distributor has paid the former franchisee or designated successor all termination assistance as
168 required by section 5; (iii) as a result of the former franchisee's termination of the franchise, the
169 predecessor manufacturer had consolidated the line make with another of its line makes for
170 which the predecessor manufacturer had a franchisee with a then existing dealership facility
171 located within the relevant market area; or (iv) unless the former franchisee was eligible to seek
172 reinstatement of the franchise subject to such termination pursuant to section 747 of the
173 Consolidated Appropriations Act, 2010 and for any reason failed to secure such relief; provided,
174 however, that this clause shall not apply to franchisees and manufacturers of recreational or
175 power sport vehicles.

176 SECTION 8. Section 9 of said chapter 93B, as so appearing, is hereby amended by
177 striking out subsection (b) and inserting in place thereof the following subsection:-

178 (b)(1) A manufacturer or distributor shall specify in writing to each of its dealers the
179 dealer's obligations for predelivery preparation and warranty service on its products and shall
180 compensate the dealer for such preparation and service. A manufacturer or distributor shall
181 within a reasonable time fulfill its obligations under all express warranty agreements made by it
182 with respect to a product manufactured, distributed or sold by it and shall adequately and fairly
183 compensate any motor vehicle dealer who, in accordance with its franchise obligations, furnishes
184 labor, parts and materials pursuant to the warranty or maintenance plan, extended warranty,
185 certified preowned warranty or a service contract, issued by the manufacturer or distributor or its
186 common entity, unless issued by a common entity that is not a manufacturer; to fulfill a
187 manufacturer or distributor's delivery or preparation procedures or to repair a motor vehicle as a
188 result of a manufacturer or distributor's or common entity's recall, campaign service, authorized
189 goodwill, directive or bulletin. For the purposes of motor vehicle dealers, fair and adequate
190 compensation shall be not less than the rate and price customarily charged for retail customer
191 repairs as defined herein and computed pursuant to paragraph (2); provided, however, that fair
192 and adequate compensation shall, for purposes of this section for powersport vehicles, be
193 computed at the rate normally charged by the motor vehicle dealer to the public for the labor and
194 materials and shall include a fair charge for diagnostic and test services; provided further, that
195 notwithstanding the foregoing, fair and adequate compensation shall, for purposes of this section
196 for recreational vehicles, be computed at the rate normally charged by the motor vehicle dealer to
197 the public for the labor and shall include a fair charge for diagnostic and test services and shall
198 be computed for the materials at the rate of not less than actual wholesale cost, plus a handling
199 charge of 30 per cent of the cost and the cost, if any, of freight to return the warranty materials to
200 the manufacturer. For the purposes of this section, "labor" shall include time spent by
201 employees for diagnosis and repair of a vehicle, "parts" shall include replacement parts and
202 accessories and "retail customer repair" shall mean work, including parts and labor, performed

203 by a dealer which does not come within the provisions of a manufacturer's or distributor's or its
204 common entity's warranty, extended warranty, certified preowned warranty, service contract or
205 maintenance plan and excludes parts and labor described in clause (iii) of paragraph (2).

206 (2) (i) In determining the rate and price customarily charged by the motor vehicle dealer
207 to the public for parts, the compensation may be an agreed percentage markup over the dealer's
208 cost pursuant to a writing separate and distinct from the franchise agreement signed after the
209 dealer's request, but if an agreement is not reached within 30 days after a dealer's written request
210 to be compensated pursuant to this section, compensation for parts shall be calculated by
211 utilizing the method described in this paragraph.

212 The retail rate customarily charged by the dealer for parts shall be established by the
213 dealer submitting to the manufacturer or distributor 100 sequential nonwarranty or customer-paid
214 service repair orders, or 60 consecutive days of nonwarranty, customer-paid service repair
215 orders, whichever is less, each of which includes parts that would normally be used in warranty
216 repairs and covered by the manufacturer's warranty, covering repairs made not more than 180
217 days before the submission and declaring the average percentage markup. The average of the
218 markup rates shall be presumed to be fair and reasonable. The retail rate shall go into effect 30
219 days following the declaration, subject to audit of the submitted repair orders by the franchisor.
220 If the declared rate is rebutted, the manufacturer or distributor shall propose an adjustment of the
221 average percentage markup based on that rebuttal not later than 30 days after submission. If the
222 dealer does not agree with the proposed average percentage markup, the dealer may file an action
223 in a court of competent jurisdiction not later than 30 days after receipt of that proposal by the
224 manufacturer or distributor. In an action commenced pursuant to this paragraph, the
225 manufacturer or distributor shall have the burden of proving that the rate declared by the dealer
226 was inaccurate or unreasonable.

227 (ii) The retail rate customarily charged by the dealer for labor may be established by
228 submitting to the manufacturer or distributor 100 sequential nonwarranty, customer-paid service
229 repair orders, or 60 consecutive days of nonwarranty, customer-paid service repair orders,
230 whichever is less, covering repair orders made not more than 180 days before the submission and
231 dividing the amount of the dealer's total labor sales by the number of total labor hours that
232 generated those sales. The average labor rate shall be presumed to be fair and reasonable. The
233 average labor rate shall go into effect 30 days following the declaration, subject to audit of the
234 submitted repair orders by the franchisor and a rebuttal of such declared rate. If the declared rate
235 is rebutted, the manufacturer or distributor shall propose an adjustment of the average labor rate
236 based on such rebuttal not later than 30 days after submission. If the dealer does not agree with
237 the proposed average labor rate, the dealer may file an action in a court of competent jurisdiction
238 not later than thir30 days after receipt of that proposal by the manufacturer or distributor. In any
239 action commenced pursuant to this paragraph, the manufacturer or distributor shall have the
240 burden of proving that the rate declared by the dealer was inaccurate or unreasonable.

241 (iii) In calculating the retail rate customarily charged by the dealer for parts and labor, the
242 following work shall not be included in the calculation: (1) routine maintenance not covered
243 under any retail customer warranty, such as fluids, filters and belts not provided in the course of
244 repairs; (2) items that do not have an individual part number such as some nuts, bolts, fasteners,
245 and similar items; (3) tires; and (4) vehicle reconditioning.

246 (iv) If a manufacturer or distributor furnishes a part or component to a dealer, at no cost,
247 to use in performing repairs under a recall, campaign service action or warranty repair, the
248 manufacturer or distributor shall compensate the dealer for the part or component in the same
249 manner as warranty parts compensation under this section by compensating the dealer the
250 average markup on the cost for the part or component as listed in the manufacturer's or
251 distributor's price schedule less the cost for the part or component.

252 (v) A manufacturer or distributor shall not require a dealer to establish the retail rate
253 customarily charged by the dealer for parts and labor by an unduly burdensome or time-
254 consuming method or by requiring information that is unduly burdensome or time consuming to
255 provide including, but not limited to, part-by-part or transaction-by-transaction calculations. A
256 dealer shall not declare an average percentage markup or average labor rate more than once in a
257 calendar year.

258 (vi) A manufacturer or distributor shall not establish or implement a special part or
259 component number for parts used in predelivery, dealer preparation, warranty, extended
260 warranty, certified preowned warranty, recall, campaign service, authorized goodwill or
261 maintenance-only applications if it results in lower compensation to the dealer than as calculated
262 in this subsection.

263 (vii) A manufacturer or distributor shall not require, influence or attempt to influence a
264 motor vehicle dealer to implement or change the prices for which it sells parts or labor in retail
265 customer repairs. A manufacturer or distributor shall not implement or continue a policy,
266 procedure or program to any of its dealers in the commonwealth for compensation under this
267 section which is inconsistent with this section.

268 (3) Time allowances for the diagnosis and performance of warranty work and service
269 shall be reasonable and adequate for the work to be performed.

270 (4) All claims by dealers under this section for such labor and parts and all claims for
271 compensation relative to any sales incentive programs shall be paid not later than 30 days after
272 approval by the manufacturer or distributor; provided, however, that manufacturers or
273 distributors shall retain the right to audit such claims and to chargeback the dealer for false or
274 unsubstantiated claims pursuant to this section. Dealers shall be required to maintain defective
275 parts for not longer than 90 days following submission of claims. All such claims shall be either
276 approved or disapproved not later than 30 days after their receipt on forms, and in the manner
277 specified by, the manufacturer or distributor. A claim not disapproved in writing or by means of

electronic transmission not later than 30 days after receipt shall be deemed approved and payment shall be made within 30 days.

SECTION 9. Subsection (e) of said section 9 of said chapter 93B, as so appearing, is hereby amended by adding the following paragraph:-

A manufacturer or distributor shall not charge a motor vehicle dealer back subsequent to the payment of a claim unless a representative of the manufacturer or distributor first meets in person or by video or teleconference with an officer or employee of the dealer or a dealer-designated representative. The unexcused failure or refusal of a dealer or dealer-designated representative to schedule, attend or participate in a meeting with the manufacturer or distributor to which the dealer or dealer-designated representative consented shall relieve the manufacturer or distributor of any further obligation under this section; provided, however, that for the purposes of this section, an excused failure or refusal of a dealer or a dealer-designated representative to schedule, attend or participate in a meeting with the manufacturer or distributor shall include, but not be limited to, the illness, hospitalization or death of the dealer or the dealer’s designee, the dealer or dealer’s designee attending to an emergency or the death of a family member, the dealer or the dealer’s designee attending to an emergency regarding the dealership; absence caused by military deployment, a weather emergency, an act of God and the dealer or the dealer’s designee attending another dealership-related meeting scheduled by the manufacturer or distributor away from the dealership. At such meeting the manufacturer or distributor shall provide a detailed explanation, with supporting documentation, as to the basis for each of the claims for which the manufacturer or distributor proposed a chargeback to the dealer and a written statement containing the basis upon which the motor vehicle dealer was selected for audit or review. Thereafter, the manufacturer or distributor shall provide the dealer or the dealer's representative with a reasonable period of time after the meeting within which to respond to the proposed chargebacks, with such period to be commensurate with the volume of claims under consideration, but in no case less than 30 days after the meeting. The manufacturer or distributor shall be prohibited from changing or altering the basis for each of the proposed chargebacks as presented to the dealer or the dealer's representative following the conclusion of the audit unless the manufacturer or distributor receives new information affecting the basis for any of the chargebacks. If the manufacturer or distributor claims the existence of new information, the dealer shall have the same right to a meeting and right to respond as when the chargeback was originally presented.