SENATE . . . . . No. 2162

The Commonwealth of Massachusetts

In the Year Two Thousand Twelve

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 2010 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 under 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 such vehicles bearing the multiple names or marks together only, and not separately, to its authorized dealers; and (ii) motor vehicles that share a common brand name or mark may constitute separate line makes when such vehicles are of different vehicle types or are intended for different types of use, provided that either: (A) the manufacturer has expressly defined or covered the line makes of vehicles as separate and distinct line makes in the applicable dealer agreements; or (B) the manufacturer has consistently characterized the vehicles as constituting separate and distinct line makes to its dealer networks.

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

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

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

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

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

57 (iv) the manufacturer or distributor shall promptly mail a dealership application to
58 a proposed assignee, delegatee or transferee following a request submitted by the proposed
59 assigning, delegating or transferring motor vehicle dealer and the proposed assignee, delegatee or

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

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

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

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

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

94 (1) within 90 days from the effective date of the termination, repurchase all new,
95 unused, undamaged and unaltered motor vehicles of the current model year that it sold to the
96 dealer and any other such vehicles that it sold to the dealer within 180 days before the notice of

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

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

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

122 (4) in the event of a termination that is the result of the cessation of a line make, if
123 requested by the dealer within the same 90-day period, pay: (i) the fair market value of the
124 goodwill of the franchise as of the date immediately preceding the manufacturer or distributor's
125 announcement of a termination or announcement that a line make is being discontinued; and (ii)
126 if the dealer leases the facility from an unrelated and unaffiliated person or entity, the cost of the
127 lease for the facilities used for the franchise or line make for the unexpired term of the lease not
128 to exceed 1 year; provided, however, that if a facility is used for the operation of more than 1
129 franchise, the reasonable rent owed by the manufacturer shall be based on the portion of the
130 facility utilized by the terminated franchise; provided further, that the dealer shall attempt in
131 good faith to mitigate the expense by attempting to terminate its lease obligations or to sublease
132 or assign the lease, reimbursing or crediting the manufacturer or distributor for any money
133 received in connection with the termination, sublease or assignment of the lease; provided
134 further, that the dealer shall provide the manufacturer or distributor with documentation
135 indicating that it has made a good faith effort to terminate its lease obligations and to assign the

136 lease or sublease the space including, but not limited to, a copy of an agreement with a
137 commercial real estate broker to obtain such an assignment or sublease; and (iii) if requested by
138 the manufacturer or distributor, the dealer shall make the facility available to the manufacturer or
139 distributor for use by it or its nominee for a time period equivalent to the time period covered by
140 any such payment from the manufacturer or distributor to the dealer; provided further, that this
141 clause shall not apply to a termination of a recreational vehicle or a powersport vehicle franchise
142 or a termination of a recreational vehicle or powersport vehicle line make; provided further, that
143 this clause shall only apply to a manufacturer or distributor that made the decision to terminate or
144 discontinue the line make and shall not impose any obligations on a manufacturer or distributor
145 that was not the decision maker.

146 (5) This subsection shall not apply in the event of a sale of the assets or stock of a
147 motor vehicle dealership.

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

150 A motor vehicle dealer shall be limited to a relocation of an existing point under
151 paragraph (1) or to the appointment of a successor at a site under paragraph (2) once within a 2
152 year period.

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

155 (i) In the event a dealer is terminated, cancelled or not renewed as a result of the
156 discontinuation of a line make or insolvency of a franchisor, for a period of 2 years from the date
157 that the former franchisee ceased operations, it shall be unlawful for a successor manufacturer or
158 distributor to enter into a same line make franchise as that operated by the former franchisee of
159 the predecessor manufacturer with any person or to permit the relocation of any existing same
160 line make franchise for the same line make represented by the former franchisee that would be
161 located or relocated within the relevant market area of the former franchisee without first
162 receiving written permission to do so from the majority owner of the former franchisee, or the
163 majority owner's designated successor if the dealer principal of the former franchisee is deceased
164 or disabled. Written permission from the former franchisee shall not be required if: (i) the
165 manufacturer or distributor has offered to reinstate or appoint the former franchisee at no cost
166 and without any requirements or restrictions other than those imposed generally on the
167 manufacturer's other franchisees at that time and provided that the former franchisee meets the
168 manufacturer's reasonable requirements for appointment as a dealer; (ii) the manufacturer or
169 distributor has paid the former franchisee or designated successor all termination assistance as
170 required by section 5; (iii) as a result of the former franchisee's termination of the franchise, the
171 predecessor manufacturer had consolidated the line make with another of its line makes for
172 which the predecessor manufacturer had a franchisee with a then existing dealership facility

173 located within the relevant market area; or (iv) unless the former franchisee was eligible to seek
174 reinstatement of the franchise subject to such termination under section 747 of the Consolidated
175 Appropriations Act, 2010 and for any reason failed to secure such relief; provided, however that
176 this clause shall not apply to franchisors and franchisees of recreational or powersport vehicles.

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

179 (b) (1) A manufacturer or distributor shall specify in writing to each of its dealers the
180 dealer's obligations for predelivery preparation and warranty service on its products and shall
181 compensate the dealer for such preparation and service. A manufacturer or distributor shall
182 within a reasonable time fulfill its obligations under all express warranty agreements made by it
183 with respect to a product manufactured, distributed or sold by it and shall adequately and fairly
184 compensate any motor vehicle dealer who, under its franchise obligations, furnishes labor, parts
185 and materials under the warranty or maintenance plan, extended warranty, certified preowned
186 warranty or a service contract, issued by the manufacturer or distributor or its common entity,
187 unless issued by a common entity that is not a manufacturer; to fulfill a manufacturer or
188 distributor's delivery or preparation procedures or to repair a motor vehicle as a result of a
189 manufacturer or distributor's or common entity's recall, campaign service, authorized goodwill,
190 directive or bulletin. For the purposes of motor vehicle dealers, fair and adequate compensation
191 shall not be less than the rate and price customarily charged for retail customer repairs and
192 computed under paragraph (2); provided, however, that fair and adequate compensation shall,
193 for purposes of this section for powersport vehicles, be computed at the rate normally charged by
194 the motor vehicle dealer to the public for the labor and materials and shall include a fair charge
195 for diagnostic and test services; provided further, that fair and adequate compensation shall, for
196 purposes of this section for recreational vehicles, be computed at the rate normally charged by
197 the motor vehicle dealer to the public for the labor and shall include a fair charge for diagnostic
198 and test services and shall be computed for the materials at the rate of not less than actual
199 wholesale cost, plus a handling charge of 30 per cent of the cost and the cost, if any, of freight to
200 return the warranty materials to the manufacturer. For the purposes of this subsection, “labor”
201 shall include time spent by employees for diagnosis and repair of a vehicle, “parts” shall include
202 replacement parts and accessories and “retail customer repair” shall mean work, including parts
203 and labor, performed by a dealer which does not come within a manufacturer’s, distributor’s or
204 its common entity’s warranty, extended warranty, certified preowned warranty, service contract
205 or 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
207 vehicle dealer to the public for parts, the compensation may be an agreed percentage markup
208 over the dealer's cost under a writing separate and distinct from the franchise agreement signed
209 after the dealer’s request, but if an agreement is not reached within 30 days after a dealer's
210 written request to be compensated under this section, compensation for parts shall be calculated
211 by 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 orders,
215 whichever is less, each of which includes parts that would normally be used in warranty repairs
216 and covered by the manufacturer's warranty, covering repairs made not more than 180 days
217 before the submission and declaring the average percentage markup. The average of the markup
218 rates shall be presumed to be fair and reasonable. The retail rate shall go into effect 30 days
219 following the declaration, subject to audit of the submitted repair orders by the franchisor and a
220 rebuttal of the declared rate. If the declared rate is rebutted, the manufacturer or distributor shall
221 propose an adjustment of the average percentage markup based on the rebuttal not later than 30
222 days after submission. If the dealer does not agree with the proposed average percentage markup,
223 the dealer may file an action in a court of competent jurisdiction not later than 30 days after
224 receipt of the proposal by the manufacturer or distributor. In an action commenced under this
225 paragraph, the manufacturer or distributor shall have the burden of proving that the rate declared
226 by the dealer was inaccurate or unreasonable.

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

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

247 (iv) If a manufacturer or distributor furnishes a part or component to a
248 dealer, at no cost, to use in performing repairs under a recall, campaign service action or
249 warranty repair, the manufacturer or distributor shall compensate the dealer for the part or
250 component in the same manner as warranty parts compensation under this section by

251 compensating the dealer the average markup on the cost for the part or component as listed in the
252 manufacturer's or distributor's price schedule less the cost for the part or component.

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

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

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

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

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

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

283 A manufacturer or distributor shall not chargeback a motor vehicle dealer
284 subsequent to the payment of a claim unless a representative of the manufacturer or distributor
285 first meets in person or by video or teleconference with an officer or employee of the dealer or a
286 dealer-designated representative. The unexcused failure or refusal of a dealer or dealer-

287 designated representative to schedule, attend or participate in a meeting with the manufacturer or
288 distributor to which the dealer or dealer-designated representative consented shall relieve the
289 manufacturer or distributor of any further obligation under this subsection; provided, however,
290 that for the purposes of this subsection, an excused failure or refusal of a dealer or a dealer-
291 designated representative to schedule, attend or participate in a meeting with the manufacturer or
292 distributor shall include, but not be limited to, (i) the illness, hospitalization or death of the dealer
293 or the dealer’s designee; (ii) the dealer or dealer’s designee attending to an emergency or the
294 death of a family member; (iii) the dealer or the dealer’s designee attending to an emergency
295 regarding the dealership; (iv) absence caused by military deployment, a weather emergency, an
296 act of God; or (v) the dealer or the dealer’s designee attending another dealership-related meeting
297 scheduled by the manufacturer or distributor away from the dealership. At such meeting the
298 manufacturer or distributor shall provide a detailed explanation, with supporting documentation,
299 as to the basis for each of the claims for which the manufacturer or distributor proposed a
300 chargeback to the dealer and a written statement containing the basis upon which the motor
301 vehicle dealer was selected for audit or review. Thereafter, the manufacturer or distributor shall
302 provide the dealer or the dealer's representative with a reasonable period of time after the
303 meeting within which to respond to the proposed chargebacks, with such period to be
304 commensurate with the volume of claims under consideration, but in no case less than 30 days
305 after the meeting. The manufacturer or distributor shall be prohibited from changing or altering
306 the basis for each of the proposed chargebacks as presented to the dealer or the dealer's
307 representative following the conclusion of the audit unless the manufacturer or distributor
308 receives new information affecting the basis for any of the chargebacks. If the manufacturer or
309 distributor claims the existence of new information, the dealer shall have the same right to a
310 meeting and right to respond as when the chargeback was originally presented.