

SENATE No. 129

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 adoption of the accompanying bill:

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

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Marc R. Pacheco</i>	<i>First Plymouth and Bristol</i>
<i>Stephen L. DiNatale</i>	<i>3rd Worcester</i>
<i>Dennis A. Rosa</i>	<i>4th Worcester</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>
<i>Theodore C. Speliotis</i>	<i>13th Essex</i>
<i>Michael F. Rush</i>	<i>Norfolk and Suffolk</i>
<i>Barry R. Finegold</i>	<i>Second Essex and Middlesex</i>

SENATE No. 129

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 129) of Marc R. Pacheco, Stephen L. DiNatale, Dennis A. Rosa, Michael O. Moore and other members of the General Court for legislation to further regulate business practices between motor vehicle dealers, manufacturers, and distributors. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

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:

1 SECTION 1. Subsection (c) of section 4 of chapter 93B, as appearing in the 2010
2 Official Edition, is hereby amended by striking out paragraph (5) and inserting in place thereof
3 the following paragraph:-

4 (5) to offer to sell or to sell any new motor vehicle to any person located in the
5 commonwealth at a lower actual price therefor than the actual price offered contemporaneously
6 to any other motor vehicle dealer located in the commonwealth for the same model vehicle
7 similarly equipped or to utilize any device including, but not limited to, sales promotion plans or
8 programs, facility compliance or any form of incentive program, which result in the lesser actual
9 price unless available on equal terms to all dealers located in the commonwealth; provided,
10 however, that, for the purposes of this paragraph, "equal terms" shall not include the opportunity
11 to participate in any program that requires facility investment; provided, further, that this
12 paragraph shall not apply to sales to a motor vehicle dealer for resale to any unit of the federal
13 government or any agency thereof or to the commonwealth or any of its political subdivisions;
14 provided, further, that this paragraph shall not apply to sales to a motor vehicle dealer of any
15 motor vehicle ultimately sold, donated or used by the dealer in a driver education program. In
16 addition, a manufacturer, distributor, or franchisor representative shall not unreasonably
17 withhold participation in any sales promotion, incentive or bonus program, or otherwise dictate
18 terms of participation in such programs, including, but not limited to, requiring any dealer to
19 adjust or alter the costs or fees it charges to consumers. In connection with a sale of a motor
20 vehicle or vehicles to a motor vehicle dealer for resale to any unit of the federal government or

any agency thereof or to the commonwealth or to any political subdivision thereof, no manufacturer or distributor shall offer any discounts, refunds or any other similar type of inducement to any dealer without making the same offer available to all other of its dealers within the state, and if the inducements are made, the manufacturer or distributor shall give simultaneous notice thereof to all of its dealers within the state. In addition, a manufacturer, distributor, or franchisor representative shall not unreasonably withhold participation in any lead generation marketing programs or warranty policy adjustments and shall distribute leads from direct internet-based inquiries in an equitable manner to dealers based only on geographic proximity and vehicle availability.

(i) In order to prove a violation of the price discrimination prohibitions in this paragraph, it shall be the dealer's burden to demonstrate a price, discount or incentive was not reasonably available; provided, however, that proof of a price discrepancy alone shall be presumptive evidence of discrimination and a violation of this paragraph without further necessary proof of lost sales or lost opportunities; provided, further, that the use intended by any customer shall not serve as a means for any manufacturer or distributor to justify a price discrepancy.

(ii) Damages for a violation of this paragraph may be calculated by applying the percentage of any discrepancy to each new vehicle sold by the affected dealer during the applicable program period. This manner of calculating damages shall not prevent a dealer from demonstrating additional damages that were incurred or may be due to lost sales resulting from any discrepancy.

SECTION 2. Paragraph (10) of said subsection (c) of said section 4 of said chapter 93B, as most recently amended by section 4 of chapter 152 of the acts of 2012, is hereby amended by inserting before the first full sentence the following sentence:- This blanket prohibition on manufacturer ownership applies notwithstanding whether a manufacturer or distributor has previously used independently owned or operated dealerships to distribute its vehicles.

SECTION 3. Said subsection (c) of said section 4 of said chapter 93B, as so appearing, is hereby further amended by inserting after paragraph (12) the following five paragraphs:-

(13) to require a motor vehicle dealer, by agreement, program, policy, standard, or otherwise, to relocate, to make substantial changes, operational modifications, alterations, or remodeling to, or to replace a motor vehicle dealer's sales or service facilities, or to deny or threaten to deny a motor vehicle dealer any benefit, unless the manufacturer's or distributor's requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations, the motor vehicle dealer's market for the manufacturer or distributor's motor vehicles, and the motor vehicle dealer will be able, in the ordinary course of business as conducted by such motor vehicle dealer, to earn a reasonable return on his total investment in such facility or from such operational modifications; provided,

however, that a manufacturer or distributor may provide to a motor vehicle dealer a commitment to allocate additional vehicles or a loan or grant of money as an inducement for the motor vehicle dealer to relocate, expand, improve, remodel, alter, or renovate its facilities if the manufacturer or distributor delivers an assurance to the dealer that it will offer to supply to the dealer a sufficient quantity of new motor vehicles, consistent with its allocation obligations at law and to its other same line-make motor vehicle dealers, which will economically justify such relocation, expansion, improvement, remodeling, renovation, or alteration, in light of reasonably current and reasonably projected market and economic conditions. The provisions of the increase in vehicle allocation, the loan or grant and the assurance, and the basis for them must be contained in a written agreement voluntarily entered into by the dealer and must be made available, on substantially similar terms, to any of the manufacturer's or distributor's other same line-make dealers in the commonwealth with whom the manufacturer or distributor offers to enter into such an agreement. A manufacturer or distributor shall not withhold from a motor vehicle dealer a bonus, incentive, or other benefit that is available to its other same line-make motor vehicle dealers in the commonwealth, or to take or threaten to take action that is unfair or adverse to a dealer who does not enter into an agreement with the manufacturer or distributor pursuant to this paragraph no more often than every 7 years.

(14) to require or coerce a dealer to provide information about a retail customer unless the information is necessary for the sale and delivery of a new motor vehicle to a retail buyer, to validate and pay customer or dealer incentives, for warranty reimbursement substantiation under the law, or to enable the manufacturer to fulfill safety, recall, or other legal obligations. A manufacturer or distributor shall not share, sell, or transfer customer information, obtained from a dealer and not otherwise publically available, to other dealers or third parties unless otherwise agreed to by the originating dealer.

(15) to arbitrarily or unreasonably alter the geographic area of responsibility within which it measures the dealer's performance. A manufacturer or distributor shall give advance notice of any proposed alteration of a dealer's so-called area of responsibility at least 60 days before the effective date of a proposed alteration. Notice shall include an explanation of the basis for the change, and, upon request by such motor vehicle dealer, the manufacturer or distributor immediately shall provide any and all supporting documentation. At any time before the effective date of such alteration, and after completion of any internal appeal process provided by a manufacturer or distributor, a dealer may protest the proposed alteration. Filing of a protest shall mean no alteration is effective until an agreement is reached by the parties or a court makes a final determination. If a dealer's area of responsibility is altered, the manufacturer shall allow 18 months prior to taking any adverse action claiming a breach based on the new area of responsibility.

(16) to utilize an arbitrary or unreasonable formula or other calculation or process intended to gauge performance as a basis for making any decision or taking any action adverse to a dealer's interest. A dealer's inability to meet or substantially meet any performance standard

unilaterally established by the manufacturer or distributor shall not be considered a default or breach of a franchise agreement and shall not provide independent good cause for a termination.

(17) To require a dealer to purchase goods or services from a vendor selected, identified, or designated by a manufacturer or distributor by agreement, program, incentive provision, or otherwise without making available to the dealer the option to obtain the goods or services of substantially similar quality from a vendor chosen by the dealer. For purposes of this subdivision, the term "goods" does not include moveable displays, brochures, and promotional materials containing material subject to intellectual property rights of, or special tools and training as required by the manufacturer, or parts to be used in repairs under warranty obligations of, a manufacturer, factory branch, distributor, or distributor branch.

SECTION 4. Said section 4 of said chapter 93B, as so appearing, is hereby further amended by inserting after subsection (d) the following subsection:-

(e) For purposes of this chapter, it shall be presumed that a motor vehicle dealer has been coerced or required to agree to a term or condition in violation of this chapter as a condition of the offer, grant or renewal of a franchise or of any lease or agreement ancillary or collateral to a franchise, if the motor vehicle dealer, at the time of the offer, grant or renewal of the franchise, lease or agreement is not offered the option of an identical franchise agreement, lease or related agreement without the term or condition proscribed by this section.

SECTION 5. Subsection (c) of section 5 of said chapter 93B, as so appearing, is hereby amended by inserting at the end thereof the following paragraph:-

If such action is timely commenced, such action shall serve to stay as if enjoined, without bond, the proposed termination or non-renewal until a final judgment has been rendered in an adjudicatory proceeding or action, or until the parties mutually agree otherwise. If the termination is based in whole or in part upon performance of the dealer in sales and service, there shall be no good cause if the dealer substantially complies with the reasonable performance provisions established by the manufacturer or distributor during such cure period, and there shall be no good cause if the failure to demonstrate such substantial compliance was due to factors which were beyond the control of such dealer. In any situation where the manufacturer or distributor pursues a termination based in whole or in part on a failure to substantially comply with a performance standard, before any cure period commences, the manufacturer or distributor must provide the dealer with the underlying data that supports the performance standard cited.

SECTION 6. Said section 5 of said chapter 93B, as so appearing, is hereby further amended by inserting after subsection (m) the following subsection:-

(n) Where a termination or nonrenewal will result from use of any agreement to terminate or non-renew that was executed by the dealer and obtained more than 90 days before the purported date of use, exercise of rights under such written agreement shall be void. In any case

133 in which a manufacturer, distributor or franchisor representative fails to properly advise a dealer
134 that it does not intend to renew a franchise or take any action to renew a franchise beyond its
135 expiration date, the franchise in question shall continue in effect on the terms last agreed to by
136 the parties.

137 SECTION 7. Section 8 of said chapter 93B, as so appearing, is hereby amended by
138 striking out subsection (a) and inserting in place thereof the following subsection:-

139 (a) Notwithstanding any terms or provisions of a franchise agreement to the contrary, a
140 manufacturer or distributor shall indemnify its motor vehicle dealers and hold them harmless
141 from and against all damages, liabilities, losses, and reasonable expenses of suit, including
142 reasonable attorneys' fees, arising out of or incurred in the defense of any claim brought by any
143 person seeking compensation or other relief predicated upon the negligent design or manufacture
144 of a new motor vehicle, or any part or component thereof, manufactured or distributed by the
145 manufacturer or distributor unless the basis for liability is finally determined by a court to be
146 solely the result of fault or neglect on the part of the motor vehicle dealer. The manufacturer or
147 distributor, after having been notified promptly in writing by the motor vehicle dealer that a
148 demand has been made or a formal claim has been asserted and is pending, shall assume the
149 defense thereof and resolve the same at its own expense.

150 SECTION 8. Subsection (b) of section 9 of said chapter 93B, as most recently amended
151 by section 8 of chapter 152 of the acts of 2012, is hereby amended by inserting after paragraph
152 (4) the following paragraph:-

153 (5) (i) A manufacturer or distributor shall not require, influence, or attempt to
154 influence a motor vehicle dealer to implement or change the prices for which it sells parts or
155 labor in retail customer repairs. A manufacturer or distributor shall not implement or continue a
156 policy, procedure, or program to any of its dealers in this state for compensation under this
157 section which is inconsistent with this section.

158 (ii) A manufacturer or distributor shall not otherwise recover its costs from
159 dealers, including an increase in the wholesale price of a vehicle or surcharge imposed on a
160 dealer intended to recover the cost of reimbursing a dealer for parts and labor pursuant to this
161 section; provided, however, that a manufacturer or distributor shall not be prohibited from
162 increasing prices for vehicles or parts in the normal course of business.

163 (iii) Time allowances for the diagnosis and performance of warranty work and
164 service shall be reasonable and adequate for the work to be performed.

165 SECTION 9. Said section 9 of said chapter 93B, as so appearing, is hereby further
166 amended by inserting after subsection (j) the following subsection:-

(k) Notwithstanding any term of a franchise agreement, it shall be a violation of this chapter for a distributor or manufacturer to charge back, deny vehicle allocation, withhold payments, or take any other adverse actions against a motor vehicle dealer because of a sale of a new motor vehicle that is exported from the United States, unless it is shown that the dealer knew or reasonably should have known on the date of the sale that the new motor vehicle was to be exported. A motor vehicle dealer shall rebuttably be presumed to have no knowledge of the export if the motor vehicle is sold by the dealer to anyone who presents documentation demonstrating he is a resident of the United States and he is titling and registering the motor vehicle in any state within the United States.

SECTION 10. Section 15 of said chapter 93B, as so appearing, is hereby amended by striking out subsection (a) and inserting in place thereof the following subsection:-

(a) Any manufacturer, distributor or motor vehicle dealer who alleges an unfair method of competition or an unfair or deceptive act or practice as defined by this chapter, any act prohibited or declared unlawful by this chapter, or any rule or regulation adopted under this chapter, may bring an action in the superior court, or if applicable in the federal district court for the district of Massachusetts, for damages and equitable relief, including injunctive relief, as described in the following sentence: The party filing suit may obtain equitable relief if it can demonstrate a substantial likelihood that the alleged conduct violates the provisions of this chapter.

SECTION 11. Said section 15 of said chapter 93B, as so appearing, is hereby further amended by striking out subsection (c) and inserting in place thereof the following subsection:-

(c) If the dealer prevails in any action or protest brought under this chapter and successfully demonstrates to the court that the actions, claims or defenses of the other party violated any provision of this chapter, then the court shall, in addition to other relief provided for by this chapter and notwithstanding the amount in controversy and whether the prevailing party has sustained any actual damage, award to the prevailing dealer its reasonable costs of suit, including reasonable attorneys' fees.

SECTION 12. Section 16 of said chapter 93B, as so appearing, is hereby amended by inserting at the end thereof the following subsection:-

(c) This chapter emphasizes the legislature's findings that there exists an inequality in the bargaining position between motor vehicle dealers, manufacturers and distributors. Accordingly, in any judicial proceeding, this chapter shall be liberally construed in order to achieve its purpose of preventing arbitrary and unfair treatment of dealers by manufacturers and distributors. Additionally, in an effort to avoid any retributionary fears that may cause dealers to refrain from asserting their rights, any association of dealers has standing to initiate an action pursuant to this chapter in its own name on behalf of one or more of its members so long as one or more of its members would otherwise have standing to initiate an action in their own right, and any relief

204 requested will benefit more than one member of said association. In any such situation, the
205 provisions of this chapter shall be liberally construed to allow such association act on behalf of
206 its members.