

SENATE No. 177

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>Theodore C. Speliotis</i>	<i>13th Essex</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>
<i>Stephen L. DiNatale</i>	<i>3rd Worcester</i>
<i>Michael F. Rush</i>	<i>Norfolk and Suffolk</i>
<i>Dennis A. Rosa</i>	<i>4th Worcester</i>

SENATE No. 177

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 177) of Marc R. Pacheco 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. 129 OF 2013-2014.]

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

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 2014
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. The
16 preceding provisions of this paragraph shall not apply so long as a manufacturer, distributor or
17 franchisor representative offers to sell or sells new motor vehicles to all motor vehicle dealers
18 located in the commonwealth at an equal price. In connection with a sale of a motor vehicle or
19 vehicles to a motor vehicle dealer for resale to any unit of the federal government or any agency
20 thereof or to the commonwealth or to any political subdivision thereof, no manufacturer or
21 distributor shall offer any discounts, refunds or any other similar type of inducement to any
22 dealer without making the same offer available to all other of its dealers within the relevant
23 market area, and if the inducements are made, the manufacturer or distributor shall give
24 simultaneous notice thereof to all of its dealers within the relevant market area. In addition, a
25 manufacturer, distributor, or franchisor representative shall not unreasonably withhold
26 participation in any lead generation marketing programs or warranty policy adjustments and shall
27 distribute leads from direct internet-based inquiries in an equitable manner to dealers based on
28 geographic proximity and vehicle availability. In order to prove a violation of the price
29 discrimination prohibitions in this paragraph, it shall be the dealer's burden to demonstrate a
30 price, discount or incentive provided to at least one other dealer was not reasonably available to
31 it.

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

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

40 (13) to require, coerce, or attempt to coerce any dealer by program, policy, standard, or
41 otherwise to: (a) change location of the dealership; (b) construct, renovate, or make any
42 substantial changes, alterations, or remodeling to a dealer's sales or services facilities; or (c) add
43 to or replace a dealer's sales or services facilities; provided, however, that nothing herein shall
44 prohibit a manufacturer or distributor from continuing a facility improvement program that is in
45 effect as of the effective date of this paragraph with more than one dealer in the commonwealth
46 or to renewing or modifying such program, or providing lump sum or regularly-scheduled
47 payments to assist a dealer in making a facility improvement, including construction, alteration
48 or remodeling, or installing signage or an image element of the manufacturer or distributor;
49 provided further, that the provisions of the facility improvement program in which such dealer
50 participates be contained in a written agreement voluntarily entered into by the dealer and must
51 be made available, on substantially similar terms, to any of the manufacturer's or distributor's
52 other same line-make dealers in the commonwealth with whom the manufacturer or distributor
53 offers to enter into such an agreement; provided further, that, except as necessary to comply with
54 a health or safety law or to comply with a technology requirement which is necessary to sell or

55 service a motor vehicle that the motor vehicle dealer is authorized or licensed by the
56 manufacturer or distributor, a manufacturer, distributor, or franchisor representative shall not
57 require, coerce, or attempt to coerce a motor vehicle dealer, by program, policy, facility guide,
58 standard or otherwise, to change the location of the dealership, replace, or construct a new dealer
59 facility or substantially alter or remodel an existing dealer facility before the date that is seven
60 years after the date the construction of the new dealer facility or substantial alteration or
61 remodeling at that location was completed regardless of whether a successor dealer has been
62 appointed provided that such construction, alteration or remodeling substantially complied with
63 the manufacturer's or distributor's brand image standards or plans that the manufacturer or
64 distributor provided at the time the construction, alteration, or remodeling was completed.

65 (14) to require a dealer to provide to the franchisor representative, manufacturer or
66 distributor its customer lists, service files, or information about a retail customer unless
67 necessary: (a) for the sale and delivery of a new motor vehicle to a retail buyer; (b) to validate
68 and pay customer or dealer incentives; (c) for reasonable marketing purposes; (d) for warranty
69 reimbursement substantiation under this chapter or; (e) to enable the manufacturer to fulfill
70 safety, recall, or other legal obligations imposed by state or federal law. A manufacturer or
71 distributor shall not share, sell, or transfer to other dealers or third parties customer information
72 obtained from a dealer and not otherwise publically available unless otherwise agreed to by the
73 originating dealer or unless the franchise has been terminated. Notwithstanding any consent,
74 authorization, release, franchise agreement or other agreement or contract, a manufacturer or
75 distributor, or any third party acting on behalf or through a manufacturer or distributor, having
76 electronic access to consumer or customer data or other information in a computer system
77 utilized by a dealer, or who has otherwise been provided consumer or customer data or

78 information by the dealer, shall fully indemnify and hold harmless the dealer from whom it has
79 acquired the consumer or customer data or other information from all claims, demands, damages,
80 liabilities, costs, and expenses incurred by the dealer, arising out of any alleged or actual data
81 security breaches or other unlawful use of said customer or consumer data or other information
82 by said manufacturer, distributor or third party acting on behalf of same, including, but not
83 limited to, judgments, settlements, fines, penalties, expenses related to the disclosure of security
84 breaches to customers and consumers, and attorneys' fees and expenses arising out of
85 complaints, claims, demands, security breaches, civil or administrative actions, and, to the fullest
86 extent allowable under the law, attorneys' fees and expenses arising from governmental
87 investigations and prosecutions relating to the access, storage, maintenance, use, sharing,
88 disclosure, or retention of the dealer's consumer or customer data or other information, or
89 maintenance or services provided to any computer system utilized by the dealer, by the
90 manufacturer, distributor or third party acting on behalf of or through the manufacturer or
91 distributor.

92 (15) to arbitrarily or unreasonably alter the geographic area of responsibility within which
93 it measures the dealer's performance. A manufacturer or distributor shall give advance notice of
94 any proposed alteration of a dealer's so-called area of responsibility at least 60 days before the
95 effective date of a proposed alteration. Notice shall include an explanation of the basis for the
96 change, and, upon request by such motor vehicle dealer within 30 days of the manufacturer's or
97 distributor's notice, the manufacturer or distributor immediately shall provide sufficient
98 supporting documentation. At any time prior to the effective date of such alteration, and after
99 completion of any internal appeal process provided by a manufacturer or distributor, a dealer
100 may protest the proposed alteration pursuant to section 15. Filing of a protest shall mean no

101 alteration is effective until an agreement is reached by the parties or a court makes a final
102 determination. The court may affirm, deny, or modify the proposed alteration of the dealer's
103 area of responsibility, may enter any other orders necessary to ensure that an alteration of the
104 dealer's area of responsibility is reasonable in light of all the relevant circumstances, and may
105 assess the attorneys' fees and expenses among the parties to the protest as appropriate. A
106 manufacturer or distributor shall not take any adverse action against a dealer as a result of a
107 change to the dealer's area or responsibility for at least 18 months after the effective date of the
108 change.

109 (16) to require a dealer to purchase goods or services from a vendor selected, identified,
110 or designated by a manufacturer or distributor by agreement, program, incentive provision, or
111 otherwise in connection with a dealer expanding, constructing, or significantly modifying its
112 dealership facility without allowing the dealer the option to obtain a good or service of
113 substantially similar quality from a vendor chosen by the dealer and approved by the
114 manufacturer, which approval may not be unreasonably withheld. For purposes of this
115 subdivision, the term "goods" does not include moveable displays, brochures, and promotional
116 materials containing material subject to intellectual property rights of, or parts to be used in
117 repairs under warranty obligations of, a manufacturer or a distributor, or special tools and
118 training as required by the manufacturer or distributor. Nothing under this paragraph shall be
119 construed to (i) allow a dealer or vendor to eliminate or impair a manufacturer's or distributor's
120 intellectual property rights, including trademarks, or (ii) permit a dealer to erect or maintain signs
121 that do not conform to the intellectual property usage guidelines of the manufacturer.

122 SECTION 4. Said section 5 of said chapter 93B, as so appearing, is hereby
123 further amended by inserting after subsection (m) the following subsection:-

124 (n) Where a termination or nonrenewal will result from use of any agreement to terminate
125 or not renew that was executed by the dealer and obtained by a manufacturer, distributor or
126 franchisor representative more than 90 days before the purported date of use, exercise of rights
127 under such written agreement shall be void. In any case in which a manufacturer, distributor or
128 franchisor representative fails to properly advise a dealer that it does not intend to renew a
129 franchise or take any action to renew a franchise beyond its expiration date, the franchise in
130 question shall continue in effect on the terms last agreed to by the parties.

131 SECTION 5. Section 8 of said chapter 93B, as so appearing, is hereby
132 amended by striking out subsection (a) and inserting in place thereof the following subsection:

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

144 SECTION 6. Subsection (b) of section 9 of said chapter 93B, as most recently
145 amended by section 8 of chapter 152 of the acts of 2012, is hereby amended by inserting after
146 paragraph (4) the following paragraph:-

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

152 (ii) A manufacturer or distributor shall not otherwise recover its costs for reimbursing a
153 dealer for parts and labor pursuant to this section; provided, however, that a manufacturer or
154 distributor shall not be prohibited from increasing prices for vehicles or parts in the normal
155 course of business.

156 SECTION 7. Said section 9 of said chapter 93B, as so appearing, is hereby further
157 amended by inserting after subsection (j) the following subsection:-

158 (k) Notwithstanding any term of a franchise agreement, it shall be a violation of this
159 chapter for a distributor or manufacturer to charge back or otherwise hold liable a franchised
160 motor vehicle dealer for sales incentives or charges, deny vehicle allocation, withhold payments
161 or other things of value for which the dealer is eligible, or take or threaten to take any other
162 adverse actions against, in connection with or as a result of any new motor vehicle sold by the
163 dealer and subsequently exported from the United States, provided such dealer can demonstrate
164 that after exercising due diligence and acting in good faith he did not know nor reasonably
165 should have known of the purchaser's intention to export the motor vehicle. A franchised motor

166 vehicle dealer which causes a new motor vehicle to be registered in the commonwealth or in a
167 foreign state and causes to be collected the appropriate sales and use tax, or that reasonably
168 relied on a franchisor to complete a sale shall be presumed to have exercised due diligence and
169 acted in good faith. Prior to taking an adverse action against a dealer, including but not limited to
170 a chargeback, as a result of an export, a manufacturer or distributor shall provide written notice
171 to the franchised motor vehicle dealer of the adverse action, and, if a chargeback, the specific
172 amount of the chargeback, and the vehicle or vehicles at issue. A dealer shall not be liable for the
173 delivery of any vehicle sold through a franchisor's fleet program where the sale or lease was not
174 initiated or negotiated by the dealer and dealer's function was solely to provide delivery on
175 behalf of the manufacturer or distributor.

176 SECTION 8. Section 15 of said chapter 93B, as so appearing, is hereby amended by
177 striking out subsection (a) and inserting in place thereof the following subsection:-

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