

SENATE No. 179

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>José F. Tosado</i>	<i>9th Hampden</i>	<i>1/30/2019</i>

SENATE No. 179

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 179) of Marc R. Pacheco and José F. Tosado 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. 146 OF 2017-2018.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

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 2016 Official
2 Edition, is hereby amended by striking out paragraph (5) and inserting in place thereof the
3 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 so appearing, is hereby amended, in line 222, by inserting after the word “distributor.” the
34 following sentence:- This blanket prohibition on manufacturer ownership applies
35 notwithstanding whether a manufacturer or distributor has previously used independently owned
36 or operated dealerships to distribute its vehicles.

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

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

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

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

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

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

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

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

120 (17) to offer, directly or indirectly, vehicles for lease or subscription in the
121 commonwealth of the same line make as any of the vehicles manufactured, assembled or
122 distributed by the manufacturer, distributor or franchise representative in the commonwealth and
123 sold or leased in the commonwealth by a dealer affiliated with such manufacturer, distributor or

124 franchisor representative, unless such lease or subscription is offered through, or in partnership
125 with, a dealer of the same line make affiliated with said manufacturer, distributor or franchisor
126 representative. For purposes of this paragraph, “subscription” means a contract or arrangement
127 whereby a person, for a recurring fee, secures the exclusive use of a specific vehicle of the same
128 line make for a term exceeding thirty days. This paragraph shall not apply to a rental company or
129 rental agreement regulated pursuant to Section 32E ½ of chapter 90 of the General Laws.

130 SECTION 4. Said section 4 of said chapter 93B, as so appearing, is hereby further
131 amended by inserting at the end thereof the following subsection:-

132 (e)(1) It shall be a violation of this section for a manufacturer, distributor, or franchisor
133 representative to coerce or require any dealer, whether by agreement, program, incentive
134 provision, or provision for loss of incentive payments or other benefits, to refrain from selling
135 any used motor vehicle subject to (i) recall, (ii) stop sale or do not drive directive, (iii) technical
136 service bulletin, or (iv) other manufacturer, distributor, or franchisor representative notification
137 to perform work on such used motor vehicle, unless the manufacturer, distributor, or franchisor
138 representative has a remedy and parts available to the dealer to remediate the basis for the
139 coercion or requirement of the dealer to refrain from selling each affected used motor vehicle. If
140 there is no remedy or there are no parts available from the manufacturer, distributor, or
141 franchisor representative to remediate each affected used motor vehicle in the inventory of the
142 dealer, the manufacturer, distributor, or franchisor representative shall (i) compensate the dealer
143 for any affected used motor vehicle in the inventory of the dealer that it cannot sell because of
144 such coercion or requirement at the rate of at least three percent per month or any part thereof of
145 the cost of such used motor vehicle, including repairs and reconditioning expenses based on the
146 financial records of the dealer, and (ii) establish a written procedure to compensate dealers under

147 this subsection that it shall provide to dealers; provided, however, that such amount of
148 compensation shall not be less than the retail repair and parts rates set pursuant to section 9. Any
149 claim for compensation by a dealer shall be submitted on a monthly basis for the amount owed
150 pursuant to this section. The manufacturer or distributor shall process and pay the claim in the
151 same manner as a claim for warranty reimbursements as provided in section 9.

152 (2) This section shall not prevent a manufacturer or distributor from (i) requiring that a
153 motor vehicle not be subject to an open recall or stop sale or do not drive directive in order to be
154 qualified, remain qualified, or be sold as a certified pre-owned vehicle or similar designation; (ii)
155 paying incentives for selling used vehicles with no unremedied recalls; or (iii) paying incentives
156 for performing recall repairs on a vehicle in the dealer's inventory.

157 (3) Nothing in this subsection shall prevent a manufacturer or distributor from instructing
158 that a dealer repair used vehicles of the line-make for which the dealer holds a franchise with an
159 open recall; provided, that the instruction does not involve coercion that imposes a penalty or
160 provision of loss of benefits on the dealer.

161 (4) This section shall apply only to used vehicles subject to safety or emissions recalls
162 pursuant to and recalled in accordance with federal law and regulations adopted thereunder or
163 where a stop sale or do not drive notification has been issued, and to motor vehicle
164 manufacturers and new motor vehicle dealers with used vehicles of the line-make that the dealer
165 is franchised to sell or is authorized to perform recall repairs.

166 (5) It shall be a violation of this section for a manufacturer, distributor, or franchisor
167 representative to reduce the amount of compensation otherwise owed to a new motor vehicle
168 dealer, whether through a chargeback, removal from an incentive program, reduction in amount

169 owed under an incentive program, or any other means, because the dealer has submitted a claim
170 for reimbursement under this section or was otherwise compensated for a vehicle subject to a
171 recall.

172 (6) It shall be a violation of this chapter for a manufacturer, distributor, or franchisor
173 representative to refuse to accept the return of, or to refuse to reimburse a dealer for the total cost
174 of, any motor vehicle appliance, equipment, part or accessory that the manufacturer, distributor,
175 or franchisor representative required the dealer to accept, buy, order or purchase in relation to a
176 (i) recall, (ii) stop sale or do not drive directive, (iii) technical service bulletin, or (iv) other
177 manufacturer, distributor, or franchisor representative notification to perform work, if the dealer
178 has requested, in writing, that the manufacturer, distributor, or franchise representative accept
179 return of and reimburse the dealer for the total cost of said motor vehicle appliance, equipment,
180 part, or accessory, including the total cost of shipping such items to the manufacturer, distributor,
181 or franchise representative.

182 (7) For the purposes of this subsection, a “stop sale” or “do not drive” notification shall
183 be defined as a notification issued by a manufacturer or distributor to some or all of its
184 franchised dealerships stating that certain used vehicles in inventory should not be sold or leased,
185 at retail or wholesale, due to a federal safety defect or noncompliance recall, a federal or
186 California emissions recall, or for any other reason.

187 (8) A dealer that sells a used motor vehicle at retail that (i) is subject to a recall pursuant
188 to 49 U.S.C. § 30111 et seq. and (ii) remains unremedied at the time of sale shall provide to the
189 buyer a written disclosure of the recall. If, at the time of sale, there is a remedy available for such
190 used motor vehicle, the dealer shall disclose to the buyer that (a) there is a remedy for the recall

191 and the buyer must return to have the dealer provide the remedy, if the dealer holds a franchise to
192 sell as new and to service the line-make of such used motor vehicle, or (b) there is a remedy for
193 the recall and the buyer must contact a dealer of the line-make to provide the remedy, if the
194 dealer does not hold a franchise to sell as new and to service the line-make of such used motor
195 vehicle. If, at the time of sale, there is no remedy available for such used motor vehicle, the
196 dealer shall disclose to the buyer that (1) there is no remedy for the recall and the buyer must
197 return to have the dealer provide the remedy when the buyer learns or has notice that the remedy
198 is available, if the dealer holds a franchise to sell as new and to service the line-make of such
199 used motor vehicle, or (2) there is no remedy for the recall and the buyer must contact a dealer of
200 the line-make to provide the remedy when the buyer learns or has notice that the remedy is
201 available, if the dealer does not hold a franchise to sell as new and to service the line-make of
202 such used motor vehicle.

203 SECTION 5. Section 5 of said chapter 93B, as so appearing, is hereby amended by
204 striking subsections (f) and (g) and replacing those subsections with the following:-

205 (f) Within the applicable notice period set forth in subsections (b) or (d), either the motor
206 vehicle dealer or the manufacturer or distributor may file a complaint in the superior court, or if
207 applicable in the federal district court for the district of Massachusetts, to enforce or enjoin a
208 termination, nonrenewal or renewal upon changes, amendments, additions or deletions of the
209 type described in subsection (a); but nothing contained in this subsection shall relieve a party
210 from the requirements of subsection (b) of section 15. Unless otherwise agreed to in writing by
211 the parties, trial shall be held within 120 days of the expiration of the applicable notice period but
212 not sooner than 90 days after the expiration of the applicable notice period, notwithstanding any
213 standing orders, presumptive time standards, or administrative directives issued or established by

214 the superior court or the federal district court providing for either an earlier or later time for trial.
215 Failure of either party to file a complaint within the time period set forth in subsections (b) and
216 (d) shall bar the filing of a complaint on such grounds at any time in the future. If no protest is
217 filed by any party having received proper notice, the termination, nonrenewal or modification
218 may proceed.

219 (g) Upon the timely filing of a complaint by the dealer or manufacturer to enjoin or
220 enforce a termination, the effective date of termination or nonrenewal shall be automatically
221 enjoined pending a final determination after a trial on the merits by the trial court of the issues
222 raised by a complaint filed pursuant to subsection (f) and any subsequent appeal. The franchise
223 agreement shall remain in full force and effect and the franchisee shall retain all rights and
224 remedies pursuant to both this statute and the terms and conditions of the franchise agreement,
225 including, but not limited to, the right to sell or transfer such franchisee's ownership interest
226 prior to a final determination by the court and any appeal. The franchisor shall at all times prior
227 to a final determination by the trial court and any appeal give full consideration to any proposed
228 buyer applicant or successor dealer submitted by franchisee pursuant to Section 4(c)(8).

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

231 (n) Where a termination or nonrenewal will result from use of any agreement to terminate
232 or not renew that was executed by the dealer and obtained by a manufacturer, distributor or
233 franchisor representative more than 90 days before the purported date of use, exercise of rights
234 under such written agreement shall be void. In any case in which a manufacturer, distributor or
235 franchisor representative fails to properly advise a dealer that it does not intend to renew a

236 franchise or take any action to renew a franchise beyond its expiration date, the franchise in
237 question shall continue in effect on the terms last agreed to by the parties.

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

240 (a) Notwithstanding any terms or provisions of a franchise agreement to the contrary, a
241 manufacturer or distributor shall indemnify its motor vehicle dealers and hold them harmless
242 from and against all damages, liabilities, losses, settlement and reasonable expenses of suit,
243 including reasonable attorneys' fees, arising out of or incurred in the defense of any claim
244 brought by any person seeking compensation or other relief predicated upon the negligent or
245 defective design or manufacture of a new motor vehicle, including, but not limited to, claims for
246 breach of contract, claims asserted pursuant to chapter 93A of the General Laws, and claims for
247 breach of express or implied warranty relating to a new motor vehicle, or any part or component
248 thereof, manufactured or distributed by the manufacturer or distributor unless the basis for
249 liability is finally determined by a court to be solely the result of negligence on the part of the
250 motor vehicle dealer. The manufacturer or distributor, after having been notified promptly in
251 writing by the motor vehicle dealer that a demand has been made or a formal claim has been
252 asserted and is pending, shall promptly assume the defense thereof and resolve the same at its
253 own expense.

254 SECTION 8. Subsection (b) of section 9 of said chapter 93B, as so appearing, is hereby
255 amended by inserting after paragraph (4) the following paragraph:-

256 (5)(i) A manufacturer or distributor shall not require, influence, or attempt to influence a
257 motor vehicle dealer to implement or change the prices for which it sells parts or labor in retail

258 customer repairs. A manufacturer or distributor shall not implement or continue a policy,
259 procedure, or program with any of its dealers in this state for compensation under this section
260 which is inconsistent with this section.

261 (ii) A manufacturer or distributor shall not, pursuant to a surcharge or other assessment
262 stated on the vehicle invoice provided to the dealer or through such other charge or means,
263 otherwise recover its costs for reimbursing a dealer for parts and labor pursuant to this section;
264 provided, however, that a manufacturer or distributor shall not be prohibited from increasing
265 prices for vehicles or parts in the normal course of business.

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

268 (k) Notwithstanding any term of a franchise agreement, it shall be a violation of this
269 chapter for a manufacturer, distributor, or franchisor representative to charge back or otherwise
270 hold liable a franchised motor vehicle dealer for sales incentives or charges, deny vehicle
271 allocation, withhold payments or other things of value for which the dealer is eligible, or take or
272 threaten to take any other adverse actions against, in connection with or as a result of any new
273 motor vehicle sold by the dealer and subsequently exported from the United States; provided,
274 that such dealer can demonstrate that after exercising due diligence and acting in good faith he
275 did not know nor reasonably should have known of the purchaser's intention to export the motor
276 vehicle. A franchised motor vehicle dealer which causes a new motor vehicle to be registered in
277 the commonwealth or in a foreign state and causes to be collected the appropriate sales and use
278 tax, or that reasonably relied on a franchisor to complete a sale shall be presumed to have
279 exercised due diligence and acted in good faith. Prior to taking an adverse action against a dealer,

280 including, but not limited to, a chargeback, as a result of an export, a manufacturer or distributor
281 shall provide written notice to the franchised motor vehicle dealer of the adverse action, and, if a
282 chargeback, the specific amount of the chargeback, and the vehicle or vehicles at issue. A dealer
283 shall not be liable for the delivery of any vehicle sold through a franchisor's fleet program where
284 the sale or lease was not initiated or negotiated by the dealer and dealer's function was solely to
285 provide delivery on behalf of the manufacturer or distributor.

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

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