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SENATE . . . . . No. 2508

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

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

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

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

"Former Franchisee", a dealer that has either (a) entered into a termination agreement or deferred termination agreement with a predecessor or successor manufacturer related to such franchise; or (b) has had such franchise canceled, terminated, non-renewed, non-continued, rejected, non-assumed, or otherwise ended.

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 are offered for sale, lease, or distribution pursuant to a common brand name or mark; provided, however (a) 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 (b) motor vehicles bearing a common brand name or mark may constitute separate line makes when pertaining to motor vehicles subject to separate dealer agreements or when such vehicle are intended for different types of uses.

SECTION 3. Section 4 of chapter 93B of the General Laws, as appearing in the 2008 Official Edition, is hereby amended in subsection (c) by striking paragraph (5) and inserting in place thereof the following paragraph:--

(5) to offer to sell or to sell any new motor vehicle to any person located in the commonwealth at a lower actual price therefor than the actual price offered contemporaneously to any motor vehicle dealer located in the commonwealth for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in the lesser actual price unless available on equal terms to all dealers located in the commonwealth; provided, however, that this paragraph shall not apply to sales to a motor vehicle dealer for resale to any unit of the federal government or any agency thereof or to the commonwealth or any of its political subdivisions; provided, further, that this paragraph shall not apply to sales to a motor vehicle dealer of any motor vehicle ultimately sold, donated or used by the dealer in a driver education program. In connection with a sale of a motor 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 order to prove a violation of this paragraph, it shall be the dealer's burden to demonstrate a price, discount or incentive was not reasonably available. Proof of a discrepancy between the price offered and reasonably available to different dealers shall be presumptive evidence of discrimination, without further necessary proof of lost sales or lost opportunities, and shall, amongst other remedies, warrant an injunction curing any such discrepancy pending final adjudication of the issues and calculation of damages, if any, at the time of trial. The use intended by any customer shall not serve as a means for any manufacturer or distributor to justify a price discrepancy. Should a dealer successfully demonstrate the existence of a price discrepancy, said dealer shall be awarded his or her reasonable costs of suit, including reasonable attorneys' fees.

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

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

(ii) A manufacturer or distributor may require that any director, officer, partner or stockholder of a motor vehicle dealer, or any other person holding or otherwise owning an interest therein, be identified as such and may establish reasonable standards concerning the capital and facilities needed for dealership operations and concerning continuity of dealership management subject to the provisions of paragraph (13). There shall be no assignment, delegation or transfer of the franchise or management or control thereunder without the written consent of the manufacturer or distributor, which consent shall not unreasonably be withheld; provided, however, that the manufacturer or distributor shall not deny to the surviving spouse or heirs of an individual franchised motor vehicle dealer or of a partner of an unincorporated franchised motor vehicle dealer or of a stockholder of a corporate franchised motor vehicle dealer the right to submit a proposal as provided in this Section to succeed to the interest of the decedent in such franchised motor vehicle dealership enterprise or directly or indirectly to interfere with, hinder or prevent the continuance of the business of the franchised motor vehicle dealer by reason of such succession to the interest of the decedent during the pendency of any such proposal, which shall take into account the familial relationship of the parties; provided, further, that the continuation of the business of the franchised motor vehicle dealer shall be conducted under competent management acceptable to the franchisor, whose acceptance shall not be unreasonably withheld; provided, further, that in the event the franchised motor vehicle dealer and franchisor have duly executed an agreement concerning succession rights prior to the individual dealer's, partner's or stockholder's death and if such agreement has not been revoked by the franchised motor vehicle dealer, such agreement shall be observed, even if it designates an individual other than the surviving spouse or heirs of the decedent.

(iii) The manufacturer or distributor shall promptly mail a dealership application to a proposed assignee, delegee or transferee following any request therefor submitted by the proposed assigning, delegating or transferring motor vehicle dealer. The proposed assignee, delegee, or transferee shall submit the application to the manufacturer or distributor with all supporting documentation as specified therein by the manufacturer or distributor. The manufacturer or distributor shall, within 30 days of receipt of the application and all supporting documentation as specified therein, review it and notify the assignee, delegee, or transferee what additional information, data, or documents, if any, is needed by the manufacturer or distributor to complete its review. Upon the submission of all specified additional information, data, or documents by the assignee, delegee, or transferee, said manufacturer or distributor shall, within 30 days of receipt of all of the specified additional information, make its decision to approve or reject the proposed sale, assignment, or transfer. If the manufacturer or distributor does not reject such application within 30 days after the submission of all of the requested additional information, data, or documents, the application shall be considered approved for all purposes, unless the 30 day deadline is extended by mutual agreement of the manufacturer or distributor and the proposed assigning, delegating, or transferring dealer. If the manufacturer or distributor did not request any additional information, data, or documents, the manufacturer or distributor shall, within 60 days of the receipt of the application and all supporting documentation as specified therein, review the application and approve or reject it. If the manufacturer or distributor does not reject the application within 60 days of receipt of the application and all supporting documentation as specified therein, the application shall be considered approved for all purposes, unless the 60 day deadline is extended by mutual agreement of the manufacturer or distributor and the proposed assigning, delegating, or transferring dealer.

(iv) If a franchise agreement specifies that the consent of the manufacturer or distributor must be obtained before a dealer engages in dualing, the consent shall not unreasonably be withheld; but this sentence shall not modify or supersede any term of a franchise agreement requiring a dealer to maintain an exclusive facility for its operations.

SECTION 5. Said section 4 of said chapter 93B, as so appearing, is hereby further amended in said subsection (c) by inserting at the end of paragraph (10) the following sentence:-- Upon the written request to a manufacturer or distributor by a dealer of the same line make as a dealership established pursuant to clause (ii), the manufacturer or distributor shall send the requesting dealer a written statement verifying that the relationship with said independent person is in compliance with the provisions of this paragraph; provided, however, that the manufacturer or distributor shall not disclose any personal or financial information of the independent person or dealership.

SECTION 6. Said section 4 of said chapter 93B, as so appearing, is hereby further amended in subsection (c) by inserting after paragraph (12) the following paragraph:--

(13) to require a motor vehicle dealer, by agreement, program, policy, standard, or otherwise, to relocate, to make substantial changes, alterations, or remodeling to, or to replace a motor vehicle dealer's sales or service facilities 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, and the motor vehicle dealer's market for the manufacturer or distributor's motor vehicles; 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 estimation to the dealer that it will offer 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 may 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. A manufacturer or distributor shall not 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.

SECTION 7. Section 5 of said chapter 93B, as so appearing, is hereby amended in subsection (c) by inserting at the end thereof the following:-- If such action is timely commenced, such action shall serve to stay, 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 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 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 pertaining to the dealership that demonstrates the dealer does not meet the performance standard cited.

SECTION 8. Said section 5 of said chapter 93B, as so appearing, is hereby further amended by striking subsection (k) and inserting in place thereof the following subsection:--

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

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

(2) if requested by the dealer within the same 90 day period, repurchase all genuine new and unused motor vehicle parts and accessories that it sold to the motor vehicle dealer so long as the same are undamaged, in their original packaging and listed in the current parts and accessories price list of the manufacturer or distributor, at a price equal to the wholesale price stated in the current parts and accessories price list of the manufacturer or distributor, including but not limited to transportation charges, less all incentives and allowances received by the dealer and without reduction for such repurchase or for processing or handling the repurchase;

provided, however, that the dealer has transferred to the manufacturer or distributor full right and legal title to the equipment before their repurchase;

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

(4) in the event of a termination that is the result of the cessation of a line make, if requested by the dealer within the same 90 day period, pay: (a) the fair market value of the goodwill of the franchise as of the date immediately preceding the manufacturer or distributor's announcement of a termination or announcement that a line make is being discontinued; (b) the cost of the lease for the facilities used for the franchise or line-make for the unexpired term of the lease not to exceed one year; provided, however, that if a facility is used for the operation of more than one franchise, the reasonable rent owed by the manufacturer shall be based on the portion of the facility utilized by the terminated franchise; and (c) the dealer’s cost of any facility upgrades or alterations required by the manufacturer or distributor within the 1 years preceding the notice of termination or announcement that a line make is being discontinued.

(5) The above provisions do not apply in the event of a sale of the assets or stock of a motor vehicle dealership.

SECTION 9. Section 6 of said chapter 93B, as so appearing, is hereby amended in subsection (b) by inserting at the end thereof the following paragraph:-- A motor vehicle dealer shall be limited to a relocation of an existing point pursuant to clause (1) or to the appointment of a successor at a site pursuant to clause (2) once within a two-year period of time.

SECTION 10. Said section 6 of said chapter 93B, as so appearing, is hereby further amended by inserting after subsection (h) the following subsection:--

(i) In the event a dealer is terminated, cancelled, or not renewed as a result of the discontinuation of a line-make or insolvency of a franchisor, for a period of two years from the date that the former franchisee ceased operations, it shall be unlawful for any successor manufacturer or distributor to enter into a same line make franchise as that operated by the former franchisee of the predecessor manufacturer with any person, or to permit the relocation of any existing same line make franchise, for the same line make represented by the former franchisee that would be located or relocated within the relevant market area of the former franchisee without first receiving written permission to do so from the majority owner of the former franchisee or his designated successor should the dealer principal of the former franchisee be deceased or disabled. Written permission from the former franchisee shall not be required if (a) the manufacturer or distributor has offered to re-instate or appoint the former franchisee at no cost and without any requirements or restrictions other than those imposed generally on the manufacturer's other franchisees at that time; and provided the former franchisee meets the manufacturer’s reasonable requirements for appointment as a dealer, or (b) the manufacturer or distributor has paid the former franchisee or designated successor, all termination assistance as required by section 5, or (c) as a result of the former franchisee’s termination of the franchise, the predecessor manufacturer had consolidated the line make with another of its line makes for

which the predecessor manufacturer had a franchisee with a then existing dealership facility located within the relevant market area, or (d) unless the former franchisee was eligible to seek reinstatement of the franchise subject to such termination pursuant to Section 747 of the Consolidated Appropriations Act, 2010 and for any reason failed to secure such relief.

SECTION 11. Section 9 of chapter 93B, as so appearing, is hereby amended by striking subsection (b) and inserting in place thereof the following subsection:--

(b)(1) A manufacturer or distributor shall specify in writing to each of its dealers the dealer's obligations for pre-delivery preparation and warranty service on its products, and shall compensate the dealer for such preparation and service. Every manufacturer or distributor shall within a reasonable time fulfill its obligations under all express warranty agreements made by them with respect to any product manufactured, distributed or sold by them and shall adequately and fairly compensate any motor vehicle dealer who, in accordance with its franchise obligations, furnishes labor, parts and materials pursuant to the warranty or maintenance plan, extended warranty, certified pre-owned warranty, or a service contract, issued by the manufacturer or distributor or its common entity, unless issued by a common entity that is not a manufacturer; to fulfill a manufacturer or distributor's delivery or preparation procedures; or to repair a motor vehicle as a result of a manufacturer or distributor's or common entity's recall, campaign service, authorized goodwill, directive, or bulletin. For the purposes of motor vehicle dealers, fair and adequate compensation shall be not less than the rate and price customarily charged for retail customer repairs as defined herein and computed pursuant to paragraph (2); provided, however, that fair and adequate compensation shall, for purposes of this section for powersport vehicles, be computed at the rate normally charged by the motor vehicle dealer to the public for the labor and materials and shall include a fair charge for diagnostic and test services;

provided, further, that notwithstanding the foregoing fair and adequate compensation shall, for purposes of this section for recreational vehicles, be computed at the rate normally charged by the motor vehicle dealer to the public for the labor and shall include a fair charge for diagnostic and test services, and shall, for the purposes of this section for recreational vehicles, be computed for the materials at the rate of not less than actual wholesale cost, plus a handling charge of 30 per cent of the cost and the cost, if any, of freight to return the warranty materials to the manufacturer. The term “labor” shall include time spent by employees for diagnosis and repair of a vehicle. The term “parts” shall include replacement parts and accessories. The term “retail customer repair” shall mean work, including parts and labor, performed by a dealer which does not come within the provisions of a manufacturer’s or distributor’s or its common entity’s warranty, extended warranty, certified pre-owned warranty, service contract, or maintenance plan, and excludes parts and labor described in clause (iii) of paragraph (2).

(2)(i) For purposes of determining the rate and price customarily charged by the motor vehicle dealer to the public for parts, the compensation may be an agreed percentage markup over the dealer's cost pursuant to a writing separate and distinct from the franchise agreement signed after the dealer’s request, but if an agreement is not reached within 30 days after a dealer's written request to be compensated pursuant to this section, compensation for parts will be calculated by utilizing the following method described herein:

The retail rate customarily charged by the dealer for parts shall be established by the dealer submitting to the manufacturer or distributor 100 sequential non-warranty or customer-paid service repair orders which contain warranty-like parts, or 60 consecutive days of non-warranty customer-paid service repair orders which contain warranty-like parts, whichever is less, covering repairs made no more than one hundred eighty days before the submission and

declaring the average percentage markup. The average of the markup rates shall be presumed to be fair and reasonable. The retail rate shall go into effect 30 days following the declaration, subject to audit of the submitted repair orders by the franchisor; provided, however, that nothing in this subsection precludes a dealer from seeking compensation or damages for a discrepancy between the rate paid and their average markup during periods of time preceding the request. If the declared rate is rebutted, the manufacturer or distributor shall propose an adjustment of the average percentage markup based on that rebuttal not later than 30 days after submission. If the dealer does not agree with the proposed average percentage markup, the dealer may file an action with a court of competent jurisdiction not later than thirty days after receipt of that proposal by the manufacturer or distributor. In any action commenced pursuant to this subsection, the manufacturer or distributor shall have the burden of proving that the rate declared by the dealer was inaccurate or unreasonable.

(ii) The retail rate customarily charged by the dealer for labor may be established by submitting to the manufacturer or distributor 100 sequential non-warranty customer-paid service repair orders, or 60 consecutive days of non-warranty customer-paid service repair orders, whichever is less, covering repair orders made no more than one hundred eighty days before the submission and dividing the amount of the dealer's total labor sales by the number of total labor hours that generated those sales. The average labor rate shall be presumed to be fair and reasonable. The average labor rate shall go into effect 30 days following the declaration, subject to audit of the submitted repair orders by the franchisor and a rebuttal of such declared rate; provided, however, that nothing in this subsection precludes a dealer from seeking compensation or damages for a discrepancy between the rate paid and their average markup during periods of time preceding the request. If the declared rate is rebutted, the manufacturer or distributor shall

propose an adjustment of the average labor rate based on such rebuttal not later than 30 days after submission. If the dealer does not agree with the proposed average labor rate, the dealer may file an action with a court of competent jurisdiction not later than thirty days after receipt of that proposal by the manufacturer or distributor. In any action commenced pursuant to this subsection, the manufacturer or distributor shall have the burden of proving that the rate declared by the dealer was inaccurate or unreasonable.

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

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

(v) A manufacturer or distributor shall not require a dealer to establish the retail rate customarily charged by the dealer for parts and labor by an unduly burdensome or time consuming method or by requiring information that is unduly burdensome or time consuming to provide, including, but not limited to, part-by-part or transaction-by-transaction calculations. A

dealer shall not declare an average percentage markup or average labor rate more than once in one calendar year.

(vi) A manufacturer or distributor shall not establish or implement a special part or component number for parts used in pre-delivery, dealer preparation, warranty, extended warranty, certified pre-owned warranty, recall, campaign service, authorized goodwill, or maintenance-only applications if that results in lower compensation to the dealer than as calculated in this subsection.

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

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

(4) All claims by dealers under this section for such labor and parts and all claims for compensation relative to any sales incentive programs shall be paid not later than thirty days after approval by the manufacturer or distributor; provided, however, that manufacturers or distributors shall retain the right to audit such claims and to charge-back the dealer for false or unsubstantiated claims pursuant to this section. Dealers shall be required to maintain defective parts for a period of not longer than ninety days following submission of claims. All such claims shall be either approved or disapproved not later than thirty days after their receipt on forms, and in the manner specified by, the manufacturer or distributor. Any claim not disapproved in writing

or by means of electronic transmission not later than thirty days after receipt shall be deemed approved and payment shall be made within thirty days.

(6) A manufacturer or distributor shall not take or threaten to take adverse action against a motor vehicle dealer who seeks to obtain compensation pursuant to this section. As used in this subsection, the term "adverse action" shall include, without limitation, acting or failing to act, other than in good faith; creating or implementing an obstacle or process that is inconsistent with the manufacturer or distributor's obligations to the dealer under this section; hindering, delaying, or rejecting the proper and timely payment of compensation due under this section to a dealer; establishing, implementing, enforcing, or applying any policy, standard, rule, program, or incentive regarding compensation due under this section other than in a uniform and non-disparate manner among the manufacturer or distributor's dealers in this state.

SECTION 12. Said section 9 of said chapter 93B, as so appearing, is hereby further amended in subsection (e) by inserting at the end thereof the following:-- A manufacturer or distributor may not charge a motor vehicle dealer back subsequent to the payment of a claim unless a representative of the manufacturer or distributor first meets in person or by video or teleconference with an officer or employee of the dealer designated by the motor vehicle dealer. The unexcused failure or refusal of a dealer or dealer-designated representative to schedule, attend, or participate in a meeting with the manufacturer or distributor to which the dealer or dealer-designated representative consented shall relieve the manufacturer or distributor of any further obligation under this section; provided, however, that for the purposes of this section, an “excused failure or refusal” of a dealer or a dealer-designated representative to schedule, attend, or participate in a meeting with the manufacturer or distributor shall include, but not be limited to, the illness, hospitalization, or death of the dealer or his designee; the dealer or his designee

attending to an emergency regarding or the death of a family member; the dealer or his designee attending to an emergency regarding the dealership; absence caused by military deployment; a weather emergency; an act of God; and the dealer or his designee attending another dealership-related meeting scheduled by the manufacturer or distributor away from the dealership. At such meeting the manufacturer or distributor shall provide a detailed explanation, with supporting documentation, as to the basis for each of the claims for which the manufacturer or distributor proposed a charge-back to the dealer and a written statement containing the basis upon which the motor vehicle dealer was selected for audit or review. Thereafter, the manufacturer or distributor shall provide the motor vehicle dealer's representative a reasonable period after the meeting within which to respond to the proposed charge-backs, with such period to be commensurate with the volume of claims under consideration, but in no case less than 30 days after the meeting. The manufacturer or distributor shall be prohibited from changing or altering the basis for each of the proposed charge-backs as presented to the motor vehicle dealer's representative following the conclusion of the audit unless the manufacturer or distributor receives new information affecting the basis for one or more charge-backs. If the manufacturer or distributor claims the existence of new information, the dealer shall have the same right to a meeting and right to respond as when the charge-back was originally presented.