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SENATE . . . . No. 2162

The Commonwealth of Massachusetts

In the Year Two Thousand Twelve

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

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

SECTION 1. Section 1 of chapter 93B of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by inserting after the definition of "Dual" the following definition:-

"Former Franchisee", a dealer that has either: (i) entered into a termination agreement or a deferred termination agreement with a predecessor or successor manufacturer related to the franchise; or (ii) had the franchise canceled, terminated, nonrenewed, noncontinued, rejected, nonassumed or otherwise ended by the predecessor or successor manufacturer.

SECTION 2. Said section 1 of said chapter 93B, as so appearing, is hereby further amended by inserting after the definition of "Franchisor representative" the following definition:-

"Line make", a collection of models, series or groups of motor vehicles manufactured by or for a particular manufacturer, distributor or importer that is offered for sale, lease or distribution under a common brand name or mark; provided, however, that: (i) multiple brand names or marks may constitute a single line make, but only when included in a common dealer agreement and the manufacturer, distributor or importer offers such vehicles bearing the multiple names or marks together only, and not separately, to its authorized dealers; and (ii) motor vehicles that share a common brand name or mark may constitute separate line makes when such vehicles are of different vehicle types or are intended for different types of use, provided that either: (A) the manufacturer has expressly defined or covered the line makes of vehicles as separate and distinct line makes in the applicable dealer agreements; or (B) the manufacturer has consistently characterized the vehicles as constituting separate and distinct line makes to its dealer networks.

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

(8) to impose upon a motor vehicle dealer or a 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 an individual, proprietor or stockholder to use, sell or transfer any interest in the dealership or to enter into and implement a testamentary arrangement with respect thereto; provided, however, that:

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

(ii) 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;

(iii) the manufacturer or distributor shall not deny to the surviving spouse or heirs of an individual franchised motor vehicle dealer the right to submit a proposal as provided in this section to succeed to the interest of the decedent in a 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; provided, however, that the surviving spouse or heirs submit that proposal within 90 days after the decedent's death and provide all information requested by the manufacturer or distributor in a timely manner, including the familial and business relationship of the parties, and 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; but, in the event that the franchised motor vehicle dealer and franchisor have 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, the agreement shall control even if it designates an individual other than the surviving spouse or heirs of the decedent;

(iv) the manufacturer or distributor shall promptly mail a dealership application to a proposed assignee, delegatee or transferee following a request submitted by the proposed assigning, delegating or transferring motor vehicle dealer and the proposed assignee, delegatee or transferee shall submit the application to the manufacturer or distributor with all supporting documentation as specified by the manufacturer or distributor; and 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, delegatee or transferee what additional information, data or documents, if any, is needed by the manufacturer or distributor to complete its review and, upon the submission of all specified additional information, data or documents by the assignee, delegatee or transferee, the manufacturer or distributor shall, within 30 days after receipt, make its decision to approve or reject the proposed sale, assignment, or transfer; provided, that 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; provided further, that 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, review the application and approve or reject it but, if the manufacturer or distributor does not reject the application within that 60-day period and the 60-day period is not otherwise extended by mutual agreement of the manufacturer or distributor and the proposed assigning, delegating or transferring dealer, the application shall be considered approved for all purposes; and

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

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

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

(k) In the event of a termination of a franchise agreement 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 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, that this clause 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; and provided further, that the dealer shall have 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 parts and accessories 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 shall have 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 3 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, the repurchase amount shall include transportation charges assessed on the dealer; provided, however, that the dealer shall have 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: (i) 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; and (ii) if the dealer leases the facility from an unrelated and unaffiliated person or entity, 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 1 year; provided, however, that if a facility is used for the operation of more than 1 franchise, the reasonable rent owed by the manufacturer shall be based on the portion of the facility utilized by the terminated franchise; provided further, that the dealer shall attempt in good faith to mitigate the expense by attempting to terminate its lease obligations or to sublease or assign the lease, reimbursing or crediting the manufacturer or distributor for any money received in connection with the termination, sublease or assignment of the lease; provided further, that the dealer shall provide the manufacturer or distributor with documentation indicating that it has made a good faith effort to terminate its lease obligations and to assign the lease or sublease the space including, but not limited to, a copy of an agreement with a commercial real estate broker to obtain such an assignment or sublease; and (iii) if requested by the manufacturer or distributor, the dealer shall make the facility available to the manufacturer or distributor for use by it or its nominee for a time period equivalent to the time period covered by any such payment from the manufacturer or distributor to the dealer; provided further, that this clause shall not apply to a termination of a recreational vehicle or a powersport vehicle franchise or a termination of a recreational vehicle or powersport vehicle line make; provided further, that this clause shall only apply to a manufacturer or distributor that made the decision to terminate or

discontinue the line make and shall not impose any obligations on a manufacturer or distributor that was not the decision maker.

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

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

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

SECTION 7. Said section 6 of said chapter 93B, as so appearing, is hereby further amended by adding 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 2 years from the date that the former franchisee ceased operations, it shall be unlawful for a 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 the majority owner's designated successor if the dealer principal of the former franchisee is deceased or disabled. Written permission from the former franchisee shall not be required if: (i) the manufacturer or distributor has offered to reinstate 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 that the former franchisee meets the manufacturer’s reasonable requirements for appointment as a dealer; (ii) the manufacturer or distributor has paid the former franchisee or designated successor all termination assistance as required by section 5; (iii) 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 (iv) unless the former franchisee was eligible to seek reinstatement of the franchise subject to such termination under section 747 of the Consolidated Appropriations Act, 2010 and for any reason failed to secure such relief; provided, however that this clause shall not apply to franchisors and franchisees of recreational or powersport vehicles.

SECTION 8. Section 9 of said chapter 93B, as so appearing, is hereby amended by striking out 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 predelivery preparation and warranty service on its products and shall compensate the dealer for such preparation and service. A manufacturer or distributor shall within a reasonable time fulfill its obligations under all express warranty agreements made by it with respect to a product manufactured, distributed or sold by it and shall adequately and fairly compensate any motor vehicle dealer who, under its franchise obligations, furnishes labor, parts and materials under the warranty or maintenance plan, extended warranty, certified preowned 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 not be less than the rate and price customarily charged for retail customer repairs and computed under 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 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 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. For the purposes of this subsection, “labor” shall include time spent by employees for diagnosis and repair of a vehicle, “parts” shall include replacement parts and accessories and “retail customer repair” shall mean work, including parts and labor, performed by a dealer which does not come within a manufacturer’s, distributor’s or its common entity’s warranty, extended warranty, certified preowned warranty, service contract or maintenance plan and excludes parts and labor described in clause (iii) of paragraph (2).

(2) (i) In 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 under 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 under this section, compensation for parts shall be calculated by utilizing the method described in this paragraph.

The retail rate customarily charged by the dealer for parts shall be established by the dealer submitting to the manufacturer or distributor 100 sequential nonwarranty or customer-paid service repair orders or 60 consecutive days of nonwarranty, customer-paid service repair orders, whichever is less, each of which includes parts that would normally be used in warranty repairs and covered by the manufacturer’s warranty, covering repairs made not more than 180 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 and a rebuttal of the declared rate. If the declared rate is rebutted, the manufacturer or distributor shall propose an adjustment of the average percentage markup based on the 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 in a court of competent jurisdiction not later than 30 days after receipt of the proposal by the manufacturer or distributor. In an action commenced under this paragraph, 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 nonwarranty, customer-paid service repair orders or 60 consecutive days of nonwarranty, customer-paid service repair orders, whichever is less, covering repair orders made not more than 180 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 the declared rate. If the declared rate is rebutted, the manufacturer or distributor shall propose an adjustment of the average labor rate based on the 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 in a court of competent jurisdiction not later than 30 days after receipt of the proposal by the manufacturer or distributor. In any action commenced under this paragraph, 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: (A) routine maintenance not covered under any retail customer warranty, such as fluids, filters and belts not provided in the course of repairs; (B) items that do not have an individual part number such as some nuts, bolts, fasteners and similar items; (C) tires; and (D) 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 a calendar year.

(vi) A manufacturer or distributor shall not establish or implement a special part or component number for parts used in predelivery, dealer preparation, warranty, extended warranty, certified preowned warranty, recall, campaign service, authorized goodwill or maintenance-only applications if it 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 the commonwealth for compensation which is inconsistent with this subsection.

(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 subsection for labor and parts and all claims for compensation relative to any sales incentive programs shall be paid not later than 30 days after approval by the manufacturer or distributor; provided, however, that manufacturers or distributors shall retain the right to audit such claims and to chargeback the dealer for false or unsubstantiated claims under this section. Dealers shall be required to maintain defective parts for not longer than 90 days following submission of claims. All such claims shall be either approved or disapproved not later than 30 days after their receipt on forms provided by, and in the manner specified by, the manufacturer or distributor. A claim not disapproved in writing or

by means of electronic transmission not later than 30 days after receipt shall be considered approved and payment shall be made within 30 days.

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

A manufacturer or distributor shall not chargeback a motor vehicle dealer 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 or a dealer-designated representative. 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 subsection; provided, however, that for the purposes of this subsection, 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, (i) the illness, hospitalization or death of the dealer or the dealer's designee; (ii) the dealer or dealer's designee attending to an emergency or the death of a family member; (iii) the dealer or the dealer's designee attending to an emergency regarding the dealership; (iv) absence caused by military deployment, a weather emergency, an act of God; or (v) the dealer or the dealer's 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 chargeback 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 dealer or the dealer's representative with a reasonable period of time after the meeting within which to respond to the proposed chargebacks, 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 chargebacks as presented to the dealer or the dealer's representative following the conclusion of the audit unless the manufacturer or distributor receives new information affecting the basis for any of the chargebacks. 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 chargeback was originally presented.