

HOUSE No. 3757

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, November 12, 2013.

The committee on Consumer Protection and Professional Licensure to whom was referred the joint petition (accompanied by bill, House, No. 184) of Garrett J. Bradley, John A. Hart, Jr., and others relative to making corrective changes to the "Right to Repair" law, so-called, reports recommending that the accompanying bill (House, No. 3757) ought to pass.

For the committee,

JOHN W. SCIBAK.

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The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act to reconcile Chapter 241 and Chapter 368 of the Acts of 2012.

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. Chapter 93J of the General Laws, as inserted by Chapter 241 of the Acts of
2 2012, is hereby repealed.

3 SECTION 2. Chapter 93J of the General Laws, as inserted by Chapter 368 of the Acts of
4 2012, is hereby repealed.

5 SECTION 3. The General Laws are hereby amended by inserting after chapter 93J the
6 following chapter:-

7

8 CHAPTER 93K

9 Section (1) As used in this chapter, the following words shall, unless the context clearly
10 indicates a different meaning, have the following meanings:

11 “Dealer”, any person or business who, in the ordinary course of its business, is engaged
12 in the business of selling or leasing new motor vehicles to consumers or other end users pursuant
13 to a franchise agreement and who has obtained a class 1 license pursuant to the provisions of
14 section 58 and 59 of chapter 140 and is engaged in the diagnosis, service, maintenance or repair
15 of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

16 “Franchise agreement”, an oral or written arrangement for a definite or indefinite period
17 in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade
18 name, service mark or related characteristic and in which there is a community of interest in the
19 marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or
20 otherwise.

21 “Fair and Reasonable Terms”. In determining whether a price is on “fair and reasonable
22 terms,” consideration may be given to relevant factors, including, but not limited to, the
23 following:

24 (i) The net cost to the manufacturer franchised dealerships for similar information
25 obtained from manufacturers, less any discounts, rebates, or other incentive programs.

26 (ii) The cost to the manufacturer for preparing and distributing the information, excluding
27 any research and development costs incurred in designing and implementing, upgrading or
28 altering the onboard computer and its software or any other vehicle part or component.
29 Amortized capital costs for the preparation and distribution of the information may be included.

30 (iii) The price charged by other manufacturers for similar information.

31 (iv) The price charged by manufacturers for similar information prior to the launch of
32 manufacturer web sites.

33 (v) The ability of aftermarket technicians or shops to afford the information.

34 (vi) The means by which the information is distributed.

35 (vii) The extent to which the information is used, which includes the number of users,
36 and frequency, duration, and volume of use.

37 (viii) Inflation.

38 "Immobilizer system", an electronic device designed for the sole purpose of preventing
39 the theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting
40 without the correct activation or authorization code.

41 “Independent repair facility”, a person or business operating in the commonwealth that is
42 not affiliated with a manufacturer or manufacturer’s authorized dealer of motor vehicles, which
43 is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle
44 engines; provided, however, that, for the purposes of this chapter, a dealer, notwithstanding its
45 affiliation with any manufacturer, shall be considered an independent repair facility for purposes
46 of those instances when said dealer engages in the diagnosis, service, maintenance or repair of
47 motor vehicles or motor vehicle engines that are not affiliated with the dealer’s franchise
48 manufacturer.

49 "Manufacturer", any person or business engaged in the business of manufacturing or
50 assembling new motor vehicles.

51 "Motor vehicle", a vehicle, originally manufactured for distribution and sale in the United
52 States, driven or drawn by mechanical power and manufactured primarily for use on public
53 streets, roads and highways, but excluding: (i) a vehicle that may be operated only on a rail line;

54 (ii) a recreational vehicle or auto home equipped for habitation; (iii) an ambulance; (iv) a bus,
55 motor coach or trackless trolley designed for the carriage of persons for hire or for school-related
56 purposes; (v) vehicles used exclusively for the building, repair and maintenance of highways or
57 designed primarily for use elsewhere than on the traveled part of ways; (vi) any vehicle with a
58 gross vehicle weight rating of more than 14,000 pounds; (vii) any vehicle excluded from the
59 definition of "motor vehicle" in chapter 90; and (viii) a motorcycle, as defined in section 1 of
60 chapter 90.

61 "Owner", a person or business who owns or leases a motor vehicle registered in the
62 commonwealth.

63 "Trade secret", anything, tangible or intangible or electronically stored or kept, which
64 constitutes, represents, evidences or records intellectual property including secret or
65 confidentially held designs, processes, procedures, formulas, inventions, or improvements, or
66 secret or confidentially held scientific, technical, merchandising, production, financial, business
67 or management information, or anything within the definition of 18 U.S.C. § 1839(3).

68 Section (2)(a) Except as provided in subsection (2)(e), for Model Year 2002 motor
69 vehicles and thereafter, a manufacturer of motor vehicles sold in the commonwealth shall make
70 available for purchase by owners of motor vehicles manufactured by such manufacturer and by
71 independent repair facilities the same diagnostic and repair information, including repair
72 technical updates, that such manufacturer makes available to its dealers through the
73 manufacturer's internet-based diagnostic and repair information system or other electronically
74 accessible manufacturer's repair information system. All content in any such manufacturer's
75 repair information system shall be made available to owners and to independent repair facilities
76 in the same form and manner and to the same extent as is made available to dealers utilizing such
77 diagnostic and repair information system. Each manufacturer shall provide access to such
78 manufacturer's diagnostic and repair information system for purchase by owners and independent
79 repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable
80 terms.

81 (2)(b) Any manufacturer that sells any diagnostic, service, or repair information to any
82 independent repair facility or other third party provider in a format that is standardized with other
83 manufacturers, and on terms and conditions more favorable than the manner and the terms and
84 conditions pursuant to which the dealer obtains the same diagnostic, service or repair
85 information, shall be prohibited from requiring any dealer to continue purchasing diagnostic,
86 service, or repair information in a proprietary format, unless such proprietary format includes
87 diagnostic, service, repair or dealership operations information or functionality that is not
88 available in such standardized format.

89 (2)(c)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor
90 vehicles sold in the commonwealth shall make available for purchase by owners and independent

91 repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless
92 capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate
93 the same functional repair capabilities that such manufacturer makes available to dealers. Each
94 manufacturer shall offer such tools for sale to owners and to independent repair facilities upon
95 fair and reasonable terms.

96 (2)(c)(ii) Any diagnostic tool or information necessary to diagnose, service or repair a
97 motor vehicle that a manufacturer sells to any independent repair facility in a manner and on
98 terms and conditions more favorable than the manner and the terms and conditions pursuant to
99 which the dealer obtains the same diagnostic tool or information necessary to diagnose, service
100 or repair a motor vehicle, shall also be offered to the dealer in the same manner and on the same
101 terms and conditions as provided to such independent repair facility.

102 Any manufacturer that sells to any independent repair facility any diagnostic tool
103 necessary to diagnose, service or repair a motor vehicle and such diagnostic tool communicates
104 with the vehicle using the same non-proprietary interface used by other manufacturers, the
105 manufacturer delivering such a diagnostic tool shall be prohibited from requiring any dealer from
106 continuing to purchase that manufacturer's proprietary tool and interface unless such proprietary
107 interface has a capability not available in the non-proprietary interface.

108 (2)(c)(iii) Each manufacturer shall provide diagnostic repair information to each
109 aftermarket scan tool company and each third party service information provider with whom the
110 manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole
111 purpose of building aftermarket diagnostic tools and third party service information publications
112 and systems. Once a manufacturer makes such information available pursuant to this section, the
113 manufacturer will have fully satisfied its obligations under this section and thereafter not be
114 responsible for the content and functionality of aftermarket diagnostic tools or service
115 information systems.

116 (2)(d)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e),
117 manufacturers of motor vehicles sold in the commonwealth shall provide access to their onboard
118 diagnostic and repair information system, as required under this section, using an off-the-shelf
119 personal computer with sufficient memory, processor speed, connectivity and other capabilities
120 as specified by the vehicle manufacturer and: (i) a non-proprietary vehicle interface device that
121 complies with the Society of Automotive Engineers SAE J2534, the International Standards
122 Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or
123 published by the Society of Automotive Engineers or the International Standards Organizations;
124 or, (ii) an on-board diagnostic and repair information system integrated and entirely self-
125 contained within the vehicle including, but not limited to, service information systems integrated
126 into an onboard display, or (iii) a system that provides direct access to on-board diagnostic and
127 repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial
128 Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board

129 diagnostic and repair information available to their dealers, including technical updates to such
130 on-board systems, through such non-proprietary interfaces as referenced in this paragraph.

131 Nothing in this Chapter shall be construed to require a dealer to use the non-proprietary
132 vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this
133 subsection, nor shall this Chapter be construed to prohibit a manufacturer from developing a
134 proprietary vehicle diagnostic and reprogramming device, provided that (i) the manufacturer also
135 complies with Section 2(d)(i), and (ii) the manufacturer also makes this device available to
136 independent repair facilities upon fair and reasonable terms, and otherwise complies with Section
137 2(a).

138 (2)(d)(ii) No manufacturer shall be prohibited from making proprietary tools available to
139 dealers if such tools are for a specific specialized diagnostic or repair procedure developed for
140 the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR
141 579.5, or performance of a specific technical service bulletin or recall after the vehicle was
142 produced, and where original vehicle design was not originally intended for direct interface
143 through the non-proprietary interface set out in (2)(d)(i). Provision of such proprietary tools
144 under this paragraph shall not constitute a violation of this chapter even if such tools provide
145 functions not available through the interface set forth in (2)(d)(i), provided such proprietary tools
146 are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection
147 (2)(d)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-
148 proprietary equivalent as set forth in (2)(d)(i), for diagnostic or repair procedures that fall outside
149 the provisions of (2)(d)(ii) or to otherwise operate in a manner inconsistent with the requirements
150 of (2)(d)(i).

151 (2)(e) Manufacturers of motor vehicles sold in the commonwealth may exclude
152 diagnostic, service and repair information necessary to reset an immobilizer system or security-
153 related electronic modules from information provided to owners and independent repair
154 facilities. If excluded under this paragraph, the information necessary to reset an immobilizer
155 system or security-related electronic modules shall be obtained by owners and independent repair
156 facilities through the secure data release model system as currently used by the National
157 Automotive Service Task Force or other known, reliable and accepted systems.

158 (2)(f) With the exception of telematics diagnostic and repair information that is provided
159 to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to
160 an independent repair facility via the tools specified in 2(c)(i) and 2(d)(i) above, nothing in this
161 chapter shall apply to telematics services or any other remote or information service, diagnostic
162 or otherwise, delivered to or derived from the vehicle by mobile communications; provided,
163 however, that nothing in this chapter shall be construed to abrogate a telematics services or other
164 contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a
165 dealer. For purposes of this chapter, telematics services include but are not limited to automatic
166 airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location,

167 remote door unlock, transmitting emergency and vehicle location information to public safety
168 answering points as well as any other service integrating vehicle location technology and
169 wireless communications. Nothing in this chapter shall require a manufacturer or a dealer to
170 disclose to any person the identity of existing customers or customer lists.

171 Section (3) Nothing in this chapter shall be construed to require a manufacturer to divulge
172 a trade secret.

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174 Section (4) Notwithstanding any general or special law or any rule or regulation to the
175 contrary, no provision in this chapter shall be read, interpreted or construed to abrogate, interfere
176 with, contradict or alter the terms of any provision of chapter 93B or the terms of any franchise
177 agreement executed and in force between a dealer and a manufacturer including, but not limited
178 to, the performance or provision of warranty or recall repair work by a dealer on behalf of a
179 manufacturer pursuant to such franchise agreement; provided, however, that any provision in
180 such a franchise agreement that purports to waive, avoid, restrict or limit a manufacturer's
181 compliance with this chapter shall be void and unenforceable.

182 Section (5) Nothing in this chapter shall be construed to require manufacturers or dealers
183 to provide an owner or independent repair facility access to non-diagnostic and repair
184 information provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to
185 the terms of a franchise agreement.

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187 Section (6)(a) In addition to any other remedies that may be available under law, a
188 violation of this chapter shall be deemed to be an unfair method of competition and an unfair or
189 deceptive act or practice in the conduct of trade or commerce in violation of section 2 of chapter
190 93A.

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192 Section (6)(b) An independent repair facility or owner who believes that a manufacturer
193 has failed to provide information or a tool required by this chapter must notify the manufacturer
194 in writing through the National Automotive Service Task Force (NASTF) Service Information
195 Request process or its successor organization or process, and give the manufacturer thirty (30)
196 days from the time the manufacturer receives the complaint to cure the failure. If the
197 manufacturer cures said complaint within the cure period, damages shall be limited to actual
198 damages in any subsequent 93A litigation.

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200 Section (6)(c) If the manufacturer fails to respond to the notice provided pursuant to
201 (6)(b), or if an independent repair facility or owner is not satisfied with the manufacturer's cure,
202 the independent repair facility or owner may file a complaint in the superior court, or if
203 applicable in the federal district court for the district of Massachusetts. Such complaint shall
204 include, but not be limited to the following: (i) written information confirming that the
205 complainant has visited the relevant manufacturer website and attempted to effect a proper repair
206 utilizing information provided on such website, including communication with customer
207 assistance via the manufacturer's toll-free call-in assistance, if made available by such
208 manufacturer; (ii) written information confirming that the complainant has obtained and utilized
209 the relevant manufacturer's scan or diagnostic tool necessary for such repair; and (iii) evidence
210 of manufacturer notification as set out in (6)(b).

211 Section (6)(d) Except in the instance of a dispute arising between a franchisor
212 manufacturer and its franchisee dealer related to either party's compliance with an existing
213 franchise agreement, which is required to be resolved pursuant to chapter 93B, a dealer shall
214 have all the rights and remedies provided in this chapter, including, but not limited to, in the
215 instance when exercising rights and remedies as allowed as an independent repair facility under
216 chapter 93K.