

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.

SECTION 2. Paragraph (10) of said subsection (c) of said section 4 of said chapter 93B, as so appearing, is hereby amended, in line 222, by inserting after the word “distributor.” the following sentence:- This blanket prohibition on manufacturer ownership applies notwithstanding whether a manufacturer or distributor has previously used independently owned or operated dealerships to distribute its vehicles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5)(i) 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 with any of its dealers in this state for compensation under this section which is inconsistent with this section.

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

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

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

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

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

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