

H. B. 4611

(By Delegate Craig)

[Introduced February 17, 2014; referred to the
Committee on the Judiciary.]

A BILL to amend and reenact §17A-6A-1, §17A-6A-3, §17A-6A-4,
§17A-6A-5, §17A-6A-6, §17A-6A-7, §17A-6A-8, §17A-6A-8a,
§17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-18,
§17A-6A-19, §17A-6A-20 and §17A-6A-21, of the Code of West
Virginia, 1931, as amended; and to amend said code by adding
thereto seven new sections, designated §17A-6A-12a,
§17A-6A-12b, §17A-6A-12c, §17A-6A-14a, §17A-6A-15, §17A-6A-16,
and §17A-6A-17, all relating to motor vehicle dealers,
distributors, wholesalers and manufacturers.

Be it enacted by the Legislature of West Virginia:

That §17A-6A-1, §17A-6A-3, §17A-6A-4, §17A-6A-5, §17A-6A-6,
§17A-6A-7, §17A-6A-8, §17A-6A-8a, §17A-6A-10, §17A-6A-11,
§17A-6A-12, §17A-6A-13, §17A-6A-18, §17A-6A-19, §17A-6A-20 and
§17A-6A-21, of the Code of West Virginia, 1931, as amended, be
amended and reenacted; and that said code be amended by adding

1 thereto seven new sections, designated §17A-6A-12a, §17A-6A-12b,
2 §17A-6A-12c, §17A-6A-14a, §17A-6A-15, §17A-6A-16, and §17A-6A-17,
3 all to read as follows:

4 **ARTICLE 6A. MOTOR VEHICLE DEALERS, DISTRIBUTORS, WHOLESALERS AND**
5 **MANUFACTURERS.**

6 **§17A-6A-1. Legislative finding.**

7 The Legislature finds and declares that the distribution and
8 sale of motor vehicles in this state vitally affects the general
9 economy and the public interest and welfare and that in order to
10 promote the public interest and welfare and in exercise of its
11 police power, it is necessary to regulate motor vehicle dealers,
12 manufacturers, distributors, and representatives of vehicle
13 manufacturers and distributors doing business in this state in
14 order to avoid inequitable conduct and undue control of the
15 independent new motor vehicle dealer by the vehicle manufacturer or
16 distributor and to insure that dealers fulfill their obligations
17 under their franchises and provide adequate and sufficient service
18 to consumers generally, and to protect and preserve the investments
19 and properties of the citizens and motor vehicle dealers of this
20 State.

21 **§17A-6A-3. Definitions.**

22 For the purposes of this article, the words and phrases
23 defined in this section have the meanings ascribed to them, except

1 where the context clearly indicates a different meaning.

2 (1) "Dealer agreement" means the franchise, agreement or
3 contract in writing between a manufacturer, distributor and a new
4 motor vehicle dealer which purports to establish the legal rights
5 and obligations of the parties to the agreement or contract with
6 regard to the purchase, lease or sale of new motor vehicles,
7 accessories, service and sale of parts for motor vehicles.

8 (2) "Designated family member" means the spouse, child,
9 grandchild, parent, brother or sister of a deceased new motor
10 vehicle dealer who is entitled to inherit the deceased dealer's
11 ownership interest in the new motor vehicle dealership under the
12 terms of the dealer's will, or who has otherwise been designated in
13 writing by a deceased dealer to succeed the deceased dealer in the
14 new motor vehicle dealership, or is entitled to inherit under the
15 laws of intestate succession of this state. With respect to an
16 incapacitated new motor vehicle dealer, the term means the person
17 appointed by a court as the legal representative of the new motor
18 vehicle dealer's property. The term also includes the appointed
19 and qualified personal representative and the testamentary trustee
20 of a deceased new motor vehicle dealer. However, the term means
21 only that designated successor nominated by the new motor vehicle
22 dealer in a written document filed by the dealer with the
23 manufacturer or distributor, if such a document is filed.

24 (3) "Distributor" means any person, resident or nonresident,

1 who, in whole or in part, offers for sale, sells or distributes any
2 new motor vehicle to a new motor vehicle dealer or who maintains a
3 factor representative, resident or nonresident, or who controls any
4 person, resident or nonresident, who, in whole or in part, offers
5 for sale, sells or distributes any new motor vehicle to a new motor
6 vehicle dealer.

7 (4) "Established place of business" means a permanent,
8 enclosed commercial building located within this state easily
9 accessible and open to the public at all reasonable times and at
10 which the business of a new motor vehicle dealer, including the
11 display and repair of motor vehicles, may be lawfully carried on in
12 accordance with the terms of all applicable building codes, zoning
13 and other land-use regulatory ordinances and as licensed by the
14 Division of Motor Vehicles.

15 (5) "Factory branch" means an office maintained by a
16 manufacturer or distributor for the purpose of selling or offering
17 for sale vehicles to a distributor, wholesaler or new motor vehicle
18 dealer, or for directing or supervising, in whole or in part,
19 factory or distributor representatives. The term includes any
20 sales promotion organization maintained by a manufacturer or
21 distributor which is engaged in promoting the sale of a particular
22 make of new motor vehicles in this state to new motor vehicle
23 dealers.

24 (6) "Factory representative" means an agent or employee of a

1 manufacturer, distributor or factory branch retained or employed
2 for the purpose of making or promoting the sale of new motor
3 vehicles or for supervising or contracting with new motor vehicle
4 dealers or proposed motor vehicle dealers.

5 (7) "Good faith" means honesty in fact and the observation of
6 reasonable commercial standards of fair dealing in the trade.

7 (8) "Manufacturer" means any person who manufactures or
8 assembles new motor vehicles, ~~or any distributor, factory branch or~~
9 ~~factory representative.~~ and, in the case of a school bus, truck
10 tractor, road tractor or truck as defined in Section 1, Article 1
11 of Chapter 17A, also means a person engaged in the business of
12 manufacturing a school bus, truck tractor, road tractor or truck,
13 their engines, power trains or rear axles, including when such
14 engines, power trains, or rear axles are not warranted by the final
15 manufacturer or assembler, and any distributor, factory branch or
16 representative. The term manufacturer also includes a captive
17 finance source as herein defined in section 10(1)(k)(i) of this
18 article.

19 (9) "Motor vehicle" means that term as defined in section one,
20 article one of this chapter, including motorcycle, school bus,
21 truck tractor, road tractor, truck, and recreational vehicle,
22 all-terrain vehicle, and utility terrain vehicle as defined in
23 subsections (c), (d), (ff), (h), (i), and (nn) and (vv)
24 respectively, of said section, but not including a farm tractor or

1 farm equipment. The term "motor vehicle" shall also include, for
2 a school bus, truck tractor, road tractor and truck,-its component
3 parts, including, but not limited to, its engine, transmission, or
4 real axle manufactured for installation in a school bus, truck
5 tractor, road tractor or truck.

6 (10) "New motor vehicle" means a motor vehicle which is in the
7 possession of the manufacturer, distributor or wholesaler, or has
8 been sold only to a new motor vehicle dealer and on which the
9 original title has not been issued from the new motor vehicle
10 dealer.

11 (11) "New motor vehicle dealer" means a person who holds a
12 dealer agreement granted by a manufacturer or distributor for the
13 sale of its motor vehicles, who is engaged in the business of
14 purchasing, selling, leasing, exchanging or dealing in new motor
15 vehicles, service of said vehicles, warranty work and sale of parts
16 who has an established place of business in this state and is
17 licensed by the Division of Motor Vehicles.

18 (12) "Person" means a natural person, partnership,
19 corporation, association, trust, estate or other legal entity.

20 (13) "Proposed new motor vehicle dealer" means a person who
21 has an application pending for a new dealer agreement with a
22 manufacturer or distributor. "Proposed motor vehicle dealer" does
23 not include a person whose dealer agreement is being renewed or
24 continued.

1 (14) "Relevant market area" means the area located within a
2 twenty air-mile radius around an existing same line-make new motor
3 vehicle dealership.

4 **§17A-6A-4. Cancellation of dealer contract; notification.**

5 (1) Notwithstanding any agreement, a manufacturer or
6 distributor shall not cancel, terminate, fail to renew or refuse to
7 continue any dealer agreement with a new motor vehicle dealer
8 unless the manufacturer or distributor has complied with all of the
9 following:

10 (a) Satisfied the notice requirement of section seven of this
11 article;

12 (b) Acted in good faith;

13 (c) Engaged in full and open communication with franchised
14 dealer; and

15 (d) Has good cause for the cancellation, termination,
16 nonrenewal or discontinuance.

17 (2) Notwithstanding any agreement, good cause exists when a
18 manufacturer or distributor can demonstrate termination is
19 necessary due to a material breach of a reasonable term or terms of
20 the agreement by a dealer when weighed against the interests of the
21 dealer and the public. The burden of proof is on the manufacturer
22 to prove good cause by a preponderance of the evidence. The
23 interests of the dealer and the public shall include consideration
24 of:

1 (a) The relationship of the dealer's sales to the sales in the
2 relevant market;

3 (b) The investment and financial obligations of the dealer
4 under the terms of the franchise agreement;

5 (c) The effect on the public cancellation of the franchise
6 agreement would cause;

7 (d) The adequacy of the dealer's sales and service facilities,
8 equipment, parts and personnel in relation to other dealers in the
9 relevant market;

10 (e) Whether the dealer is honoring existing warranties;

11 (f) Whether the dealer is complying, or can comply within a
12 reasonable time, with reasonable capitalization requirements; and

13 (g) The dealer's overall performance under the reasonable
14 terms of the franchise agreement. This shall include the overall
15 fairness of the agreement terms, the enforceability of the
16 agreement and the relative bargaining power of the parties.

17 (h) Whether the manufacturer provided the requested
18 appropriate volumes and type of motor vehicles to the dealer,
19 training, tools, parts and support to the dealer.

20 (3) In addition to the requirements of subsection (2), if the
21 failure by the new motor vehicle dealer to comply with a provision
22 of the dealer agreement relates to the performance of the new motor
23 vehicle dealer in sales or service, good cause exists for the
24 purposes of a termination, cancellation, nonrenewal or

1 discontinuance under subsection (1) of this section when the new
2 motor vehicle dealer failed to effectively carry out the
3 performance provisions of the dealer agreement if all of the
4 following have occurred:

5 (a) The new motor vehicle dealer was given written notice by
6 the manufacturer or distributor of the failure;

7 (b) The notification stated that the notice of failure of
8 performance was provided pursuant to this article;

9 (c) The new motor vehicle dealer was afforded a reasonable
10 opportunity to exert good faith efforts to carry out the dealer
11 agreement; and

12 (d) The failure continued for more than three hundred sixty
13 days after the date notification was given pursuant to subdivision
14 (a) of this subsection.

15 **§17A-6A-5. Circumstances not constituting good cause.**

16 Notwithstanding any agreement, the following alone shall not
17 constitute good cause for the termination, cancellation, nonrenewal
18 or discontinuance of a dealer agreement under subdivision (d),
19 subsection (1), section four of this article:

20 (a) A change in ownership of the new motor vehicle dealer's
21 dealership. The subdivision does not authorize any change in
22 ownership which would have the effect of a sale or an assignment of
23 the dealer agreement or a change in the principal management of the
24 dealership without the manufacturer's or distributor's prior

1 written consent, which shall not be unreasonably or untimely
2 withheld.

3 (b) The refusal of the new motor vehicle dealer to purchase or
4 accept delivery of any new motor vehicle parts, accessories, or any
5 other commodity or services not ordered by the new motor vehicle
6 dealer.

7 (c) The fact that the new motor vehicle dealer owns, has an
8 investment in, participates in the management of, or holds a dealer
9 agreement for the sale of another make or line of new motor
10 vehicles, or that the new motor vehicle dealer has established
11 another make or line of new motor vehicles in the same dealership
12 facilities as those of the manufacturer or distributor: *Provided,*
13 That the new motor vehicle dealer maintains a reasonable line of
14 credit for each make or line of new motor vehicles, and that the
15 new motor vehicle dealer remains in substantial compliance with the
16 terms and conditions of the dealer agreement and with any
17 reasonable facilities' requirements of the manufacturer or
18 distributor.

19 (d) The fact that the new motor vehicle dealer sells or
20 transfers ownership of the dealership or sells or transfers capital
21 stock in the dealership to the new motor vehicle dealer's spouse,
22 son or daughter: *Provided,* That the sale or transfer shall not
23 have the effect of a sale or an assignment of the dealer agreement
24 or a change in the principal management of the dealership without

1 the manufacturer's or distributor's prior written consent.

2 **§17A-6A-6. Burden of proof.**

3 For each termination, cancellation, nonrenewal or
4 discontinuance, the manufacturer or distributor shall have the
5 burden of proof by a preponderance of the evidence for showing that
6 he or she has acted in good faith, that the notice requirement has
7 been complied with, and that there was good cause by a
8 preponderance of the evidence for the termination, cancellation,
9 nonrenewal or discontinuance.

10 **§17A-6A-7. Notice provisions.**

11 Notwithstanding any agreement, prior to the termination,
12 cancellation, nonrenewal or discontinuance of any dealer agreement,
13 the manufacturer or distributor shall furnish notice of the
14 termination, cancellation, nonrenewal or discontinuance to the new
15 motor vehicle dealer as follows:

16 (a) Except as otherwise provided in this section, notice shall
17 be made not less than one hundred twenty days prior to the
18 effective date of the termination, cancellation, nonrenewal or
19 discontinuance.

20 (b) Notice shall be by certified mail with restrictive
21 delivery to the new motor vehicle dealer principal and shall
22 contain the following:

23 (1) A statement of intention to terminate, cancel, not renew
24 or discontinue the dealer agreement;

1 (2) A detailed written statement of all reasons for the
2 termination, cancellation, nonrenewal or discontinuance. The
3 statement shall include, at a minimum, a complete explanation of
4 each reason upon which the manufacturer or distributor relies to
5 support its proposed action, along with all supporting
6 documentation which is material to the proposed action and
7 available to the manufacturer or distributor at the time of
8 termination, cancellation, nonrenewal or discontinuance; and

9 (3) The date on which the termination, cancellation,
10 nonrenewal or discontinuance takes effect.

11 (c) Notwithstanding subdivision (a) of this subsection, notice
12 shall be made not less than thirty days prior to the effective date
13 of the termination, cancellation, nonrenewal or discontinuance for
14 any of the following reasons:

15 (1) Insolvency of the new motor vehicle dealer or the filing
16 of any petition by or against the new motor vehicle dealer under
17 any bankruptcy or receivership law;

18 (2) Failure of the new motor vehicle dealer to conduct his or
19 her customary sales and service operations during his or her
20 customary business hours for seven consecutive business days;

21 (3) Conviction of the new motor vehicle dealer or its
22 principal owners of a crime, but only if the crime is punishable by
23 imprisonment in excess of one year under the law under which the
24 dealer was convicted or the crime involved theft, dishonesty or

1 false statement regardless of the punishment;

2 (4) Revocation of a motor vehicle dealership license in
3 accordance with section eighteen, article six of this chapter; or

4 (5) A fraudulent misrepresentation by the new motor vehicle
5 dealer to the manufacturer or distributor, which is material to the
6 dealer agreement.

7 (d) Notwithstanding subdivision (a) of this subsection, notice
8 shall be made not less than twelve months prior to the effective
9 date of a termination, cancellation, nonrenewal or discontinuance
10 if a manufacturer or distributor discontinues production of the new
11 motor vehicle dealer's product line or discontinues distribution of
12 the product line in this state.

13 (e) Except as provided in subdivision (c) of this subsection,
14 any motor vehicle dealer who receives a notice of intent to
15 discontinue, cancel or not renew a dealer agreement may, within a
16 one hundred twenty-day notice period, file a petition or complaint
17 for a determination of whether such action is an unfair or
18 prohibited discontinuation, cancellation or nonrenewal. Dealer
19 agreements and certificates of appointment shall continue in effect
20 until a final determination of the issues raised in such petition
21 or complaint by the motor vehicle dealer. A discontinuance,
22 cancellation or nonrenewal is unfair if it is:

23 (1) Not clearly permitted by the dealer agreement;

24 (2) Not undertaken for good cause; or

1 (3) Is based on an alleged breach of the franchise agreement
2 which is not in fact a material and substantial breach.

3 (f) No replacement dealer shall be named for this point or
4 location to engage in business and the dealer's agreement shall
5 remain in effect until a final judgement is entered after all
6 appeals are exhausted: ~~Provided, That when a motor vehicle dealer
7 appeals a decision upholding a discontinuation, cancellation or
8 nonrenewal under subdivisions (f) and (g) of this section, the
9 dealer agreement shall remain in effect pending exhaustion of all
10 appeals only if the motor vehicle dealer establishes a likelihood
11 of success on appeal and that the public interest will not be
12 harmed by keeping the dealer agreement in effect pending entry of
13 final judgement after such appeal. Provided, that when a motor
14 vehicle dealer appeals a decision upholding a discontinuation,
15 cancellation or nonrenewal under sub-section (c) of this section,
16 the dealer agreement shall remain in effect pending exhaustion of
17 all appeals only if the motor vehicle dealer establishes a
18 likelihood of success on appeal and the public interest will not be
19 harmed by keeping the dealer agreement in effect pending entry of
20 final judgment after appeal.~~

21 (g) If a transfer of ownership is proposed after a notice to
22 discontinue, cancel or not renew a dealer agreement is received
23 but, prior to the final determination, including exhaustion of all
24 appellate remedies of a motor vehicle dealer's complaint or

1 petition contesting such action, the termination proceedings shall
2 be stayed, without bond, during the period the transfer is being
3 reviewed by the manufacturer or distributor. During the period
4 that the transfer is being reviewed by the manufacturer or
5 distributor, the dealer agreement shall remain in full force and
6 effect, and the motor vehicle dealer shall retain all rights and
7 remedies pursuant to the terms and conditions of the dealer
8 agreement and applicable law. This shall include, but is not
9 limited to, all rights of transfer under subdivision (2), section
10 ten, article six-a, chapter seventeen of this code until such time
11 as the manufacturer or distributor has accepted or rejected the
12 proposed transfer. If the proposed transfer is rejected, the motor
13 vehicle dealer shall retain all of its rights pursuant to section
14 sixteen of said article to a judicial determination as to whether
15 the manufacturer or distributor's rejection is in compliance with
16 the provisions of subdivision (2), section ten of said article and
17 during the pendency of such judicial proceeding, and any related
18 appellate proceedings, the termination proceedings shall remain
19 stayed without bond, the dealer agreement shall remain in full
20 force and effect and the motor vehicle dealer shall retain all
21 rights and remedies pursuant to the terms and conditions of the
22 dealer agreement and applicable law including all rights of
23 transfer. If a transfer is approved by the manufacturer or
24 distributor or mandated by law, the termination proceedings shall

1 be dismissed with prejudice as moot.

2 **§17A-6A-8. Reasonable compensation to dealer.**

3 (1) Upon the termination, cancellation, nonrenewal or
4 discontinuance of any dealer agreement, the new motor vehicle
5 dealer shall be allowed fair and reasonable compensation by the
6 manufacturer or distributor for the following:

7 (a) Any new motor vehicle inventory, manufactured for sale in
8 the United States, purchased from the manufacturer, distributor or
9 other dealers, which has not been materially altered, substantially
10 damaged or driven for more than ~~seven hundred fifty miles~~ one
11 thousand miles, except that for any new motorcycle, all terrain
12 vehicle and utility terrain vehicle inventory purchased from the
13 manufacturer or distributor, that inventory must not have been
14 materially altered, substantially damaged or driven for more than
15 fifty miles. For purposes of a school bus, truck tractor, road
16 tractor or truck, materially altered does not include dealer
17 add-ons, such as, but not limited to, racks, mud flaps, fifth wheel
18 assemblies, dump or tank bodies.

19 (b) Supplies, special tools, equipment and parts inventory at
20 the published list price of, purchased from or at the direction of
21 the manufacturer or distributor. Parts shall be restricted to those
22 and listed in the manufacturer's or distributor's current parts
23 catalog;

24 (c) Equipment, current and prior model year marketing

1 brochures and materials, furnishings and signs purchased or leased
2 from, or at the direction of, the manufacturer or distributor at
3 purchase price; and

4 (d) Special computer software, hardware, license fees and
5 other programs mandated by the manufacturer to provide training or
6 communication with the manufacturer.

7 (2) Upon the termination, cancellation, nonrenewal or
8 discontinuance of a dealer agreement by the manufacturer or
9 distributor, the manufacturer or distributor shall also pay to the
10 new motor vehicle dealer a sum equal to the current, fair rental
11 value of his or her established place of business for a period of
12 three years from the effective date of termination, cancellation,
13 nonrenewal or discontinuance, or the remainder of the lease,
14 whichever is less. If the dealer, directly or indirectly, owns the
15 dealership facility, the manufacturer shall pay the dealer a sum
16 equal to the reasonable rental value of the dealership premises for
17 three years. However, the dealer shall have the obligation to
18 mitigate his or her damages, including, but not limited to, listing
19 the facility with a commercial real estate agent and other
20 reasonable steps to sell or lease the property. During this
21 three-year period the manufacturer shall have the right to occupy
22 and use the facilities until such time as the dealer is able to
23 otherwise sell or lease the property to another party. The payment
24 required by this subsection does not apply to any termination,

1 cancellation, nonrenewal or discontinuance made pursuant to
2 subsection (c), section five of this article.

3 (3) In addition to the items listed in subsection (1) and (2),
4 upon the termination, cancellation or nonrenewal where the
5 manufacturer or distributor is discontinuing the sale of a product
6 line, the manufacturer or distributor shall pay or provide to the
7 motor vehicle dealer:

8 (a) Compensation consistent with the length of time the dealer
9 carried the line and the investment and timing thereof required by
10 the manufacturer or distributor of the dealer; and

11 (b) Support of the manufacturer's or distributor's warranty
12 obligations by making parts available and compensating dealers for
13 warranty parts and labor for five years: *Provided*, That the motor
14 vehicle dealer has adequate facilities, trained personnel and
15 equipment to perform warranty repairs; and

16 (c) Any actual damages that can be proven by the dealer by a
17 preponderance of the evidence; and

18 (d) Any costs the dealer incurred for facility upgrades or
19 alternations required by the manufacturer, distributor, or factory
20 branch within the previous twelve years. This subdivision shall not
21 apply if the manufacturer has provided the motor vehicle dealer
22 with lump sum payments to assist dealer in making facility
23 improvements or to pay for signs or manufacturer image elements
24 when such payments are not dependent on the dealer selling or

1 purchasing specific numbers of new motor vehicles, and such
2 payments are equal to the entire cost of the facility improvements,
3 signs or image elements.

4 (e) Payment by the manufacturer to the dealer shall be made
5 within ninety days. Thereafter, interest shall accumulate at the
6 rate of twelve percent per annum.

7 **§17A-6A-8a. Compensation to dealers for service rendered.**

8 (1) Every motor vehicle manufacturer, distributor or
9 wholesaler, factory branch or distributor branch, or officer, agent
10 or representative thereof, shall:

11 (a) Specify in writing to each of its motor vehicle dealers,
12 the dealer's obligation for delivery, preparation, warranty and
13 factory recall services on its products;

14 (b) Compensate the motor vehicle dealer for warranty and
15 factory recall service required of the dealer by the manufacturer,
16 distributor or wholesaler, factory branch or distributor branch or
17 officer, agent or representative thereof; and

18 (c) Provide the dealer the schedule of compensation to be paid
19 the dealer for parts, work and service in connection with warranty
20 and recall services and the time allowance for the performance of
21 the work and service.

22 (2) In no event may:

23 (a) The schedule of compensation fail to compensate the
24 dealers for the work and services they are required to perform in

1 connection with the dealer's delivery and preparation obligations,
2 or fail to adequately and fairly compensate the dealers for labor,
3 parts and other expenses incurred by the dealer to perform under
4 and comply with manufacturer's warranty agreements and factory
5 recalls;

6 (b) Any manufacturer, distributor or wholesaler, or
7 representative thereof, pay its dealers an amount of money for
8 warranty or recall work that is less than that charged by the
9 dealer to the retail customers of the dealer for nonwarranty and
10 nonrecall work of the like kind; and

11 (c) Any manufacturer, distributor or wholesaler, or
12 representative thereof, compensate for warranty and recall work
13 based on a flat-rate figure that is less than what the dealer
14 charges for retail work.

15 (3) It is a violation of this section for any manufacturer,
16 distributor, wholesaler or representative to require any dealer to
17 pay in any manner, surcharges, limited allocation, audits, charge
18 backs or other retaliation, if the dealer seeks to recover its
19 nonwarranty retail rate for warranty and recall work.

20 (4) The retail rate charged by the dealer for parts is
21 established by the dealer submitting to the manufacturer or
22 distributor one hundred sequential nonwarranty customer-paid
23 service repair orders that contain warranty-like parts or ninety
24 consecutive days of nonwarranty customer-paid service repair orders

1 that contain warranty-like parts, whichever is less, covering
2 repairs made no more than one hundred eighty days before the
3 submission and declaring the average percentage markup.

4 (5) The retail rate customarily charged by the dealer for
5 labor must be established using the same process as provided under
6 subsection (4) and declaring the average labor rate. The average
7 labor rate must be determined by dividing the amount of the
8 dealer's total labor sales by the number of total hours that
9 generated those sales. If a labor rate and parts markup rate
10 simultaneously declared by the dealer, the dealer may use the same
11 repair orders to complete each calculation as provided under
12 subsection (4).

13 (6) In calculating the retail rate customarily charged by the
14 dealer for parts and labor, the following work may not be included
15 in the calculation:

16 (a) repairs for manufacturer or distributor special events,
17 specials, or promotional discounts for retail customer repairs:

18 (b) parts sold at wholesale;

19 (c) routine maintenance not covered under any retail customer
20 warranty, including fluids, filters, and belts not provided in the
21 course of repairs;

22 (d) nuts, bolts, fasteners, and similar items that do not have
23 an individual part number;

24 (e) tires; and

1 (f) vehicle reconditioning.

2 (7) The average of the parts markup rates and labor rate is
3 presumed to be fair and reasonable and must go into effect thirty
4 days following the manufacturer's approval. A manufacturer or
5 distributor may rebut the presumption by a preponderance of the
6 evidence that a rate is unreasonable in light of the practices of
7 all other franchised motor vehicle dealers in an economically
8 similar area of the state offering the dealer's declaration of the
9 same line-make vehicles, not later than thirty days after
10 submission. If the average parts markup rate or average labor rate
11 is rebutted, or both, the manufacturer or distributor shall propose
12 an adjustment of the average percentage markup based on that
13 rebuttal not later than thirty days after submission.

14 (8) Each manufacturer, in establishing a schedule of
15 compensation for warranty work, shall rely on the vehicle dealer's
16 written schedule of hourly labor rates and parts and may not
17 obligate any vehicle dealer to engage in unduly burdensome or
18 time-consuming documentation of rates or parts, including
19 obligating vehicle dealers to engage in transaction-by-transaction
20 or part-by-part calculations.

21 (9) A dealer or manufacturer may demand that the average parts
22 markup or average labor rate be calculated using the process
23 provided under subsections 4 and 5; however, the demand for the
24 average parts markup may not be made within twelve months of the

1 last parts markup declaration and the demand for the average labor
2 rate may not be amide within twelve months of the last labor rate
3 declaration. If a parts markup or labor rate is demanded by the
4 dealer or manufacturer, the dealer shall determine the repair
5 orders to be included in the calculation under subsection 4 and 5.

6 (10) As it applies to a school bus, truck tractor, road
7 tractor and truck as defined in Section 1, Article 1 of Chapter
8 17A, the manufacturer, distributor and/or O.E.M. supplier shall
9 paid the dealer its incurred actual time at the retail labor rate
10 for retrieving a motor vehicle and returning a motor vehicle to
11 dealer's designated parking area. Dealer will be paid \$50.00
12 minimum for each operation that requires the use of each electronic
13 tool, i.e. laptop computer. The manufacturer or distributor cannot
14 reduce what is paid to dealer for this retrieval or return time, or
15 for the electronic tool charge. Dealer will be allowed to add to
16 a completed warranty repair order three hours for every twenty-
17 four hours the manufacturer, distributor and/or O.E.M. supplier
18 makes the dealer stop working on a vehicle while the manufacturer,-
19 distributor and/or O.E.M. supplier decides how it wants the dealer
20 to proceed with the repairs.

21 ~~(4)~~(11) All claims made by motor vehicle dealers pursuant to
22 this section for compensation for delivery, preparation, warranty
23 and recall work, including labor, parts and other expenses, shall
24 be paid by the manufacturer within thirty days after approval and

1 shall be approved or disapproved by the manufacturer within thirty
2 days after receipt. When any claim is disapproved, the dealer
3 shall be notified in writing of the grounds for disapproval. No
4 claim which has been approved and paid may be charged back to the
5 dealer unless it can be shown that the claim was false or
6 fraudulent, that the repairs were not properly made or were
7 unnecessary to correct the defective condition or the dealer failed
8 to reasonably substantiate the claim in accordance with the written
9 requirements of the manufacturer or distributor in effect at the
10 time the claim arose. No charge back may be made until the dealer
11 has had notice and an opportunity to support the claim in question.
12 No otherwise valid reimbursement claims may be denied once properly
13 submitted within manufacturers' submission guidelines due to a
14 clerical error or omission or based on a different level of
15 technician technical certification or the dealer's failure to
16 subscribe to any manufacturer's computerized training programs.

17 ~~(5)~~ (12) Notwithstanding the terms of a franchise agreement or
18 provision of law in conflict with this section, the dealer's
19 delivery, preparation, warranty and recall obligations constitutes
20 the dealer's sole responsibility for product liability as between
21 the dealer and manufacturer, and, except for a loss caused by the
22 dealer's failure to adhere to these obligations, a loss caused by
23 the dealer's negligence or intentional misconduct or a loss caused
24 by the dealer's modification of a product without manufacturer

1 authorization, the manufacturer shall reimburse the dealer for all
2 loss incurred by the dealer, including legal fees, court costs and
3 damages, as a result of the dealer having been named a party in a
4 product liability action.

5 **§17A-6A-10. Prohibited practices.**

6 (1) A manufacturer or distributor may not require any new
7 motor vehicle dealer in this state to do any of the following:

8 (a) Order or accept delivery of any new motor vehicle, part or
9 accessory of the vehicle, equipment or any other commodity not
10 required by law which was not voluntarily ordered by the new motor
11 vehicle dealer. This section does not prevent the manufacturer or
12 distributor from requiring that new motor vehicle dealers carry a
13 reasonable inventory of models offered for sale by the manufacturer
14 or distributor;

15 (b) Order or accept delivery of any new motor vehicle with
16 special features, accessories or equipment not included in the list
17 price of the new motor vehicle as publicly advertised by the
18 manufacturer or distributor;

19 (c) Unreasonably participate monetarily in any advertising
20 campaign or contest, or purchase any promotional materials, display
21 devices, display decorations, brand signs and dealer
22 identification, nondiagnostic computer equipment and displays or
23 other materials at the expense of the new motor vehicle dealer;

24 (d) Enter into any agreement with the manufacturer or

1 distributor or do any other act prejudicial to the new motor
2 vehicle dealer by threatening to terminate a dealer agreement,
3 limit inventory, invoke sales and service warranty or other types
4 of audits or any contractual agreement or understanding existing
5 between the dealer and the manufacturer or distributor. Notice in
6 good faith to any dealer of the dealer's violation of any terms or
7 provisions of the dealer agreement is not a violation of this
8 article;

9 (e) Change the capital structure or financial requirements of
10 the new motor vehicle dealership without reasonable business
11 justification in light of the dealer's market, historical
12 performance and compliance with prior capital structure or
13 financial requirements and business necessity, or the means by or
14 through which the dealer finances the operation of the dealership
15 if the dealership at all times meets any reasonable capital
16 standards determined by the manufacturer in accordance with
17 uniformly applied criteria. The burden of proof shall be on the
18 manufacturer to prove business justification by a preponderance of
19 the evidence;

20 (f) Refrain from participation in the management of,
21 investment in or the acquisition of any other line of new motor
22 vehicle or related products, provided that the dealer maintains a
23 reasonable line of credit for each make or line of vehicle, remains
24 in compliance with reasonable facilities requirements and makes no

1 change in the principal management of the dealer. Notwithstanding
2 the terms of any franchise agreement, a manufacturer or distributor
3 may not enforce any requirements, including facility requirements,
4 that a new motor vehicle dealer establish or maintain exclusive
5 facilities, personnel or display space, when the requirements are
6 unreasonable considering current economic conditions and are not
7 otherwise justified by reasonable business considerations. The
8 burden of proving that current economic conditions or reasonable
9 business considerations justify exclusive facilities is on the
10 manufacturer or distributor and must be proven by a preponderance
11 of the evidence;

12 (g) Change the location of the new motor vehicle dealership or
13 make any substantial alterations to the dealership premises, where
14 to do so would be unreasonable. The burden of proof is on the
15 manufacturer or distributor to prove the reasonableness by a
16 preponderance of the evidence; and

17 (h) Prospectively assent to a waiver of a trial by jury,
18 release, arbitration, assignment, novation, waiver or estoppel
19 which would relieve any person from liability imposed by this
20 article or require any controversy between a new motor vehicle
21 dealer and a manufacturer or distributor to be referred to a person
22 other than the duly constituted courts of ~~the~~ this state or ~~the~~
23 ~~United States,~~ if the referral would be binding upon the new motor
24 ~~vehicle dealer~~ the United States District Courts for the Southern

1 and Northern Districts of West Virginia. Nothing contained herein
2 shall prevent a motor vehicle dealer, after a civil action is
3 filed, to enter into any agreement of settlement, arbitration,
4 assignment or waiver of a trial by jury.

5 (i) To coerce or require any dealer, whether by agreement,
6 program, incentive provision, or otherwise, to construct
7 improvements to its facilities or to install new signs or other
8 franchisor image elements that replace or substantially alter those
9 improvements, signs, or franchisor image elements completed within
10 the preceding ten years that were required or approved by the
11 manufacturer, factory branch, distributor, or distributor branch or
12 one of its affiliates. If a manufacturer, factory branch,
13 distributor, or distributor branch offers incentives, or other
14 payments under a program offered after the effective date of this
15 subdivision and available to more than one dealer in the state that
16 are premised wholly or in part on dealer facility improvements or
17 installation of franchisor signs or other franchisor image
18 elements, a dealer that constructed improvements or installed signs
19 or other franchisor image elements required by or approved by the
20 manufacturer, factory branch, distributor, or distributor branch
21 and completed within the ten years preceding the program shall be
22 deemed to be in compliance with the program requirements pertaining
23 to construction of facilities or installation of signs or other
24 franchisor image elements that would replace or substantially alter

1 those previously constructed or installed within that ten-year
2 period. This subdivision shall not apply to a program that provides
3 lump sum payments to assist dealers in making facility improvements
4 or to pay for signs or franchisor image elements when such payments
5 are not dependent on the dealer selling or purchasing specific
6 numbers of new vehicles, and such payments are equal to the entire
7 cost of the facility improvements, signs or image elements.

8 (j) To condition the award, sale, transfer, relocation, or
9 renewal of a franchise or dealer agreement or to condition sales,
10 service, parts, or finance incentives upon site control or an
11 agreement to renovate or make substantial improvements to a
12 facility; provided, however, that voluntary and non-coerced
13 acceptance of such conditions by the dealer in writing, including,
14 but not limited to, a written agreement for which the dealer has
15 accepted separate and valuable consideration, shall not constitute
16 a violation.

17 (k) To enter into a contractual requirement imposed by the
18 manufacturer, distributor or a captive finance source as follows:

19 (i) In this section, "captive finance source" means any
20 financial source that provides automotive-related loans or
21 purchases retail installment contracts or lease contracts for motor
22 vehicles in this state, and is, directly or indirectly, owned,
23 operated, or controlled by such manufacturer, factory branch,
24 distributor, or distributor branch.

1 (ii) It shall be unlawful for any manufacturer, factory
2 branch, captive finance source, distributor, or distributor branch,
3 or any field representative, officer, agent, or any representative
4 of them, notwithstanding the terms, provisions, or conditions of
5 any agreement or franchise, to require any of its franchised
6 dealers located in this state to agree to any terms, conditions, or
7 requirements in subparagraphs (a)-(h) in order for any dealer to
8 sell to any captive finance source any retail installment contract,
9 loan, or lease of any motor vehicles purchased or leased by any of
10 the dealer's customers, or to be able to participate in, or
11 otherwise, directly or indirectly, obtain the benefits of any
12 consumer transaction incentive program payable to the consumer or
13 the dealer and offered by or through any captive finance source:

14 (a) Require a dealer to grant such captive finance source a
15 power of attorney to do anything on behalf of the dealer other than
16 sign the dealer's name on any check, draft, or other instrument
17 received in payment or proceeds under any contract for the sale or
18 lease of a motor vehicle that is made payable to the dealer but
19 which is properly payable to the captive finance source, is for the
20 purpose of correcting an error in a customer's finance application
21 or title processing document, or is for the purpose of processing
22 regular titling of the vehicle.

23 (b) Require a dealer to warrant or guarantee the accuracy and
24 completeness of any personal, financial, or credit information

1 provided by the customer on the credit application and/or in the
2 course of applying for credit other than to require that the dealer
3 make reasonable inquiry regarding the accuracy and completeness of
4 such information and represent that such information is true and
5 correct to the best of the dealer's knowledge.

6 (c) Require a dealer to repurchase, pay off, or guaranty any
7 contract for the sale or lease of a motor vehicle or to require a
8 dealer to indemnify, defend, or hold harmless the captive finance
9 source for settlements, judgments, damages, litigation expenses, or
10 other costs or expenses incurred by such captive finance source
11 unless the obligation to repurchase, pay off, guaranty, indemnify,
12 or hold harmless resulted directly from (i) the subject dealer's
13 material breach of the terms of a written agreement with the
14 captive finance source or the terms for the purchase of an
15 individual contract for sale or lease that the captive finance
16 source communicates to the dealer before each such purchase, except
17 to the extent the breached terms are otherwise prohibited under
18 subparagraphs (a)-(h), or (ii) the subject dealer's violation of
19 applicable law. However, for purposes of this section, the dealer
20 may contractually obligate itself to warrant the accuracy of the
21 information provided in the finance contract, but such warranty may
22 only be enforced if the captive finance source gives the dealer a
23 reasonable opportunity to cure or correct any errors in the finance
24 contract where cure or correction is possible. For purposes of this

1 section, any allegation by a third party that would constitute a
2 breach of the terms of a written agreement between the dealer and
3 a captive finance source shall be considered a material breach.

4 (d) Notwithstanding the terms of any contract or agreement,
5 treat a dealer's breach of an agreement between the dealer and a
6 captive finance source with respect to the captive finance source's
7 purchase of individual contracts for the sale or lease of a motor
8 vehicle as a breach of such agreement with respect to purchase of
9 other such contracts, nor shall such a breach in and of itself,
10 constitute a breach of any other agreement between the dealer and
11 the captive finance source, or between the dealer and any affiliate
12 of such captive finance source.

13 (e) Require a dealer to waive any defenses that may be
14 available to it under its agreements with the captive finance
15 source or under any applicable laws.

16 (f) Require a dealer to settle or contribute any of its own
17 funds or financial resources toward the settlement of any
18 multiparty or class action litigation without obtaining the
19 dealer's voluntary and written consent subsequent to the filing of
20 such litigation.

21 (g) Require a dealer to contribute to any reserve or
22 contingency account established or maintained by the captive
23 finance source, for the financing of the sale or lease of any motor
24 vehicles purchased or leased by any of the dealer's customers, in

1 any amount or on any basis other than the reasonable expected
2 amount of future finance reserve chargebacks to the dealer's
3 account. This section shall not apply to or limit:

4 (1) Reasonable amounts reserved and maintained related to the
5 sale or financing of any products ancillary to the sale, lease, or
6 financing of the motor vehicle itself;

7 (2) A delay or reduction in the payment of dealer's portion of
8 the finance income pursuant to an agreement between the dealer and
9 a captive finance source under which the dealer agrees to such
10 delay or reduction in exchange for the limitation, reduction, or
11 elimination of the dealer's responsibility for finance reserve
12 chargebacks; or

13 (3) A chargeback to a dealer, or offset of any amounts
14 otherwise payable to a dealer by the captive finance source, for
15 any indebtedness properly owing from a dealer to the captive
16 finance source as part of a specific program covered by this
17 section, the terms of which have been agreed to by the dealer in
18 advance, except to the extent such chargeback would otherwise be
19 prohibited by this section.

20 (h) Require a dealer to repossess or otherwise gain possession
21 of a motor vehicle at the request of or on behalf of the captive
22 finance source. This section shall not apply to any requirements
23 contained in any agreement between the dealer and the captive
24 finance source wherein the dealer agrees to receive and process

1 vehicles that are voluntarily returned by the customer or returned
2 to the lessor at the end of the lease term.

3 (i) Any clause or provision in any franchise or agreement
4 between a dealer and a manufacturer, factory branch, distributor,
5 or distributor branch, or between a dealer and any captive finance
6 source, that is in violation of or that is inconsistent with any of
7 the provisions of this section shall be deemed null and void and
8 without force and effect to the extent it violates this section.

9 (iv) Any captive finance source who engages directly or
10 indirectly in purposeful contacts within this state in connection
11 with the offering or advertising the availability of financing for
12 the sale or lease of motor vehicles within this state, or who has
13 business dealings within this state, shall be subject to the
14 provisions of this section and shall be subject to the jurisdiction
15 of the courts of this state.

16 (v) The applicability of this section shall not be affected by
17 a choice of law clause in any agreement, waiver, novation, or any
18 other written instrument.

19 (vi) It shall be unlawful for a captive finance source to use
20 any subsidiary corporation, affiliated corporation, or any other
21 controlled corporation, partnership, association, or person to
22 accomplish what would otherwise be illegal conduct under this
23 section on the part of the captive finance source.

24 (2) A manufacturer or distributor may not do any of the

1 following:

2 (a) Fail to deliver new motor vehicles or new motor vehicle
3 parts or accessories within a reasonable time and in reasonable
4 quantities relative to the new motor vehicle dealer's market area
5 and facilities, unless the failure is caused by acts or occurrences
6 beyond the control of the manufacturer or distributor, or unless
7 the failure results from an order by the new motor vehicle dealer
8 in excess of quantities reasonably and fairly allocated by the
9 manufacturer or distributor. No manufacturer or distributor may
10 penalize a new motor vehicle dealer for an alleged failure to meet
11 sales quotas where the alleged failure is due to actions of the
12 manufacturer or distributor;

13 (b) Refuse to disclose to a new motor vehicle dealer the
14 method and manner of distribution of new motor vehicles by the
15 manufacturer or distributor, including any numerical calculation or
16 formula used, nationally or within the dealer's market, to make the
17 allocations within thirty days of a request;

18 (c) Refuse to disclose to a new motor vehicle dealer the total
19 number of new motor vehicles of a given model, which the
20 manufacturer or distributor has sold during the current model year
21 within the dealer's marketing district, zone or region, whichever
22 geographical area is the smallest within thirty days of a request;

23 (d) Increase prices of new motor vehicles which the new motor
24 vehicle dealer had ordered and then eventually delivered to the

1 same retail consumer for whom the vehicle was ordered, if the order
2 was made prior to the dealer's receipt of the written official
3 price increase notification. A sales contract signed by a private
4 retail consumer and binding on the dealer is evidence of each
5 order. In the event of manufacturer or distributor price reductions
6 or cash rebates, the amount of any reduction or rebate received by
7 a dealer shall be passed on to the private retail consumer by the
8 dealer. Any price reduction in excess of \$5 shall apply to all
9 vehicles in the dealer's inventory which were subject to the price
10 reduction. A price difference applicable to new model or series
11 motor vehicles at the time of the introduction of the new models or
12 the series is not a price increase or price decrease. This
13 subdivision does not apply to price changes caused by the
14 following:

15 (i) The addition to a motor vehicle of required or optional
16 equipment pursuant to state or federal law;

17 (ii) In the case of foreign made vehicles or components,
18 revaluation of the United States dollar; or

19 (iii) Any increase in transportation charges due to an
20 increase in rates charged by a common carrier and transporters;

21 (e) Offer any refunds or other types of inducements to any
22 dealer for the purchase of new motor vehicles of a certain
23 line-make to be sold to this state or any political subdivision of
24 this state without making the same offer available upon request to

1 all other new motor vehicle dealers of the same line-make;

2 (f) Release to an outside party, except under subpoena or in
3 an administrative or judicial proceeding to which the new motor
4 vehicle dealer or the manufacturer or distributor are parties, any
5 business, financial or personal information which has been provided
6 by the dealer to the manufacturer or distributor, unless the new
7 motor vehicle dealer gives his or her written consent;

8 (g) Deny a new motor vehicle dealer the right to associate
9 with another new motor vehicle dealer for any lawful purpose;

10 (h) Establish a new motor vehicle dealership which would
11 unfairly compete with a new motor vehicle dealer of the same
12 line-make operating under a dealer agreement with the manufacturer
13 or distributor in the relevant market area. A manufacturer or
14 distributor shall not be considered to be unfairly competing if the
15 manufacturer or distributor is:

16 (i) Operating a dealership temporarily for a reasonable
17 period.

18 (ii) Operating a dealership which is for sale at a reasonable
19 price.

20 (iii) Operating a dealership with another person who has made
21 a significant investment in the dealership and who will acquire
22 full ownership of the dealership under reasonable terms and
23 conditions;

24 (i) A manufacturer may not, except as provided by this

1 section, directly or indirectly:

2 (i) Own an interest in a dealer or dealership;

3 (ii) Operate a dealership; or

4 (iii) Act in the capacity of a new motor vehicle dealer:

5 *Provided*, That a manufacturer may own an interest, other than stock
6 in a publicly held company, solely for investment purposes;

7 (j) A manufacturer or distributor may own an interest in a
8 franchised dealer, or otherwise control a dealership, for a period
9 not to exceed twelve months from the date the manufacturer or
10 distributor acquires the dealership if:

11 (i) The person from whom the manufacturer or distributor
12 acquired the dealership was a franchised dealer; and

13 (ii) The dealership is for sale by the manufacturer or
14 distributor at a reasonable price and on reasonable terms and
15 conditions;

16 (k) The twelve-month period may be extended for an additional
17 twelve months. Notice of any such extension of the original
18 twelve-month period must be given to any dealer of the same
19 line-make whose dealership is located in the same county, or within
20 twenty air miles of, the dealership owned or controlled by the
21 manufacturer or distributor prior to the expiration of the original
22 twelve-month period. Any dealer receiving the notice may protest
23 the proposed extension within thirty days of receiving notice by
24 bringing a declaratory judgment action in the circuit court for the

1 county in which the new motor vehicle dealer is located to
2 determine whether good cause exists for the extension;

3 (1) For the purpose of broadening the diversity of its dealer
4 body and enhancing opportunities for qualified persons who are part
5 of a group who have historically been under represented in its
6 dealer body, or other qualified persons who lack the resources to
7 purchase a dealership outright, but for no other purpose, a
8 manufacturer or distributor may temporarily own an interest in a
9 dealership if the manufacturer's or distributor's participation in
10 the dealership is in a bona fide relationship with a franchised
11 dealer who:

12 (i) Has made a significant investment in the dealership,
13 subject to loss;

14 (ii) Has an ownership interest in the dealership; and

15 (iii) Operates the dealership under a plan to acquire full
16 ownership of the dealership within a reasonable time and under
17 reasonable terms and conditions;

18 (m) Unreasonably withhold consent to the sale, transfer or
19 exchange of the dealership to a qualified buyer capable of being
20 licensed as a new motor vehicle dealer in this state;

21 (n) Fail to respond in writing to a request for consent to a
22 sale, transfer or exchange of a dealership within sixty days after
23 receipt of a written application from the new motor vehicle dealer
24 on the forms generally utilized by the manufacturer or distributor

1 for such purpose and containing the information required therein.

2 Failure to respond to the request within the sixty days is consent;

3 (o) Unfairly prevent a new motor vehicle dealer from receiving

4 reasonable compensation for the value of the new motor vehicle

5 dealership;

6 (p) Audit any motor vehicle dealer in this state for warranty

7 parts or warranty service compensation, service compensation,

8 service incentives, manufacturer rebates or other forms of sales

9 incentive compensation more than twelve months after the claim for

10 payment or reimbursement has been made by the automobile dealer. No

11 charge back may be made until the dealer has had notice and an

12 opportunity to support the claim in question. No otherwise valid

13 reimbursements claims may be denied once properly submitted with

14 the manufacturer's submission guidelines due to clerical error or

15 omission. ~~Provided, That~~ The provisions of this subsection do not

16 apply where a claim is fraudulent. In addition, the manufacturer

17 or distributor is responsible for reimbursing the audited dealer

18 for all copying, postage and administrative costs incurred by the

19 dealer during the audit. Any charges to a dealer as a result of

20 the audit must be separately billed to the dealer;

21 (q) Unreasonably restrict a dealer's ownership of a dealership

22 through noncompetition covenants, site control, sublease,

23 collateral pledge of lease, right of first refusal, option to

24 purchase, or otherwise. A right of first refusal is created when:

1 (i) A manufacturer has a contractual right of first refusal to
2 acquire the new motor vehicle dealer's assets where the dealer
3 owner receives consideration, terms and conditions that are either
4 the same as or better than those they have already contracted to
5 receive under the proposed change of more than fifty percent of the
6 dealer's ownership.

7 (ii) The proposed change of the dealership's ownership or the
8 transfer of the new vehicle dealer's assets does not involve the
9 transfer of assets or the transfer or issuance of stock by the
10 dealer or one of the dealer's owners to one of the following:

11 (A) A designated family member of one or more of the dealer
12 owners;

13 (B) A manager employed by the dealer in the dealership during
14 the previous five years and who is otherwise qualified as a dealer
15 operator;

16 (C) A partnership or corporation controlled by a designated
17 family member of one of the dealers;

18 (D) A trust established or to be established:

19 (i) For the purpose of allowing the new vehicle dealer to
20 continue to qualify as such under the manufacturer's or
21 distributor's standards; or

22 (ii) To provide for the succession of the franchise agreement
23 to designated family members or qualified management in the event
24 of death or incapacity of the dealer or its principle owner or

1 owners.

2 (iii) Upon exercising the right of first refusal by a
3 manufacturer, it eliminates any requirement under its dealer
4 agreement or other applicable provision of this statute that the
5 manufacturer evaluate, process or respond to the underlying
6 proposed transfer by approving or rejecting the proposal, is not
7 subject to challenge as a rejection or denial of the proposed
8 transfer by any party.

9 (iv) Except as otherwise provided in this subsection, the
10 manufacturer or distributor agrees to pay the reasonable expenses,
11 including reasonable out-of-pocket professional fees which shall
12 include, but not be limited to, accounting, legal or appraisal
13 services fees that are incurred by the proposed owner or transferee
14 before the manufacturer's or distributor's exercise of its right of
15 first refusal. Payment of the expenses and fees for professional
16 services are not required if the dealer fails to submit an
17 accounting of those expenses and fees within twenty days of the
18 dealer's receipt of the manufacturer's or distributor's written
19 request for such an accounting. Such a written account of fees and
20 expenses may be requested by a manufacturer or distributor before
21 exercising its right of first refusal;

22 (r) Except for experimental low-volume not-for-retail sale
23 vehicles, cause warranty and recall repair work to be performed by
24 any entity other than a new motor vehicle dealer;

1 (s) Make any material or unreasonable change in any franchise
2 agreement, including, but not limited to the dealer's area of
3 responsibility, without giving the new motor vehicle dealer written
4 notice by certified mail of the change at least sixty days prior to
5 the effective date of the change, and shall include an explanation
6 of the basis for the alteration. This explanation shall include,
7 but not be limited to, a reasonable and commercially acceptable
8 copy of all information, data, evaluations, and methodology
9 considered, reviewed, or relied on or based its decision on, to
10 propose the change to the dealer's area of responsibility. At any
11 time prior to the effective date of an alteration of a new motor
12 vehicle dealer's area of responsibility, and after the completion
13 of any internal appeal process pursuant to the manufacturer's or
14 distributor's policy manual, the motor vehicle dealer may petition
15 the court to enjoin or prohibit the alteration. The court shall
16 enjoin or prohibit the alteration of a motor vehicle dealer's area
17 of responsibility unless the franchisor shows, by a preponderance
18 of the evidence, that the alteration is reasonable and justifiable
19 in light of market conditions. If a motor vehicle dealer petitions
20 the court, no alteration to a motor vehicle dealer's area of
21 responsibility shall become effective until a final determination
22 by the court. If a new motor vehicle dealer's area of
23 responsibility is altered, the manufacturer shall allow twenty-four
24 months for the motor vehicle dealer to become sales effective prior

1 to taking any action claiming a breach or nonperformance of the
2 motor vehicle dealer's sales performance responsibilities;

3 (t) Fail to reimburse a new motor vehicle dealer, at the
4 dealer's regular rate, or the full and actual cost of providing a
5 loaner vehicle to any customer who is having a vehicle serviced at
6 the dealership if the provision of the loaner vehicle is required
7 by the manufacturer;

8 (u) Compel a new motor vehicle dealer through its finance
9 subsidiaries to agree to unreasonable operating requirements or to
10 directly or indirectly terminate a franchise through the actions of
11 a finance subsidiary of the franchisor. This subsection does not
12 limit the right of a finance subsidiary to engage in business
13 practices in accordance with the usage of trade in retail or
14 wholesale vehicle financing;

15 (v) Discriminate directly or indirectly between dealers on
16 vehicles of like grade or quantity where the effect of the
17 discrimination would substantially lessen competition; ~~and~~

18 (w) Use or employ any performance standard that is not fair
19 and reasonable and based upon accurate and verifiable data made
20 available to the dealer; and

21 (X) Sell, offer to sell or sell exclusively an extended
22 service contract, maintenance plan or similar product, including
23 gap or other products, offered, endorsed or sponsored by the
24 manufacturer or distributor by the following means:

1 (i) By an act or statement that the manufacturer or
2 distributor will in any manner impact the dealer, whether it is
3 express or implied or made directly or indirectly.

4 (ii) By a contract, or an express or implied offer of
5 contract, made to the dealer on the condition that the dealer shall
6 sell, offer to sell or sell exclusively an extended service
7 contract, extended maintenance plan or similar product offered,
8 endorsed or sponsored by the manufacturer or distributor.

9 (iii) By measuring the dealer's performance under the
10 franchise based on the sale of extended service contracts, extended
11 maintenance plans or similar products offered, endorsed or
12 sponsored by the manufacturer or distributor.

13 (iv) By requiring the dealer to actively promote the sale of
14 extended service contracts, extended maintenance plans or similar
15 products offered, endorsed or sponsored by the manufacturer or
16 distributor.

17 (v) Nothing in this paragraph shall prohibit a manufacturer or
18 distributor from providing incentive programs to a new vehicle
19 dealer who makes the voluntary decision to offer to sell, sell or
20 sell exclusively an extended service contract, extended maintenance
21 plan or similar product offered, endorsed or sponsored by the
22 manufacturer or distributor.

23 (y) (i) Require a dealer to purchase goods or services from a
24 vendor selected, identified, or designated by a manufacturer,

1 factory branch, distributor, distributor branch, or one of its
2 affiliates by agreement, program, incentive provision, or otherwise
3 without making available to the dealer the option to obtain the
4 goods or services of substantially similar quality and overall
5 design from a vendor chosen by the dealer and approved by the
6 manufacturer, factory branch, distributor, or distributor branch;
7 provided that such approval shall not be unreasonably withheld, and
8 further provided that the dealer's option to select a vendor shall
9 not be available if the manufacturer or distributor provides
10 substantial reimbursement for the goods or services offered.
11 Substantial reimbursement is equal to or greater than sixty-five
12 percent of the cost, which shall not be greater than the cost of
13 reasonably available similar goods and services in close proximity
14 to the dealer's market.

15 (ii) To fail to provide to a dealer, when the manufacturer,
16 factory branch, distributor, or distributor branch claims that a
17 vendor chosen by the dealer cannot supply goods and services of
18 substantially similar quality, a disclosure concerning the vendor
19 selected, identified, or designated by the franchisor stating: (i)
20 Whether the manufacturer, factory branch, distributor, distributor
21 branch, or one of its affiliates, or any officer, director, or
22 supervisory employee of the same, has an ownership interest, actual
23 or beneficial, in the vendor and, if so, the percentage of the
24 ownership interest; and (ii) whether the manufacturer, factory

1 branch, distributor, distributor branch, or one of its affiliates
2 has an agreement or arrangement by which the vendor pays to the
3 manufacturer, factory branch, distributor, distributor branch, or
4 one of its affiliates, or any officer, director, or supervisory
5 employee of the same, any compensation and, if so, the basis and
6 amount of the compensation to be paid as a result of any purchases
7 by the dealer, whether it is to be paid by direct payment by the
8 vendor or by credit from the vendor for the benefit of the
9 recipient.

10 (3) A manufacturer or distributor, either directly or through
11 any subsidiary, may not terminate, cancel, fail to renew or
12 discontinue any lease of the new motor vehicle dealer's established
13 place of business except for a material breach of the lease.

14 (4) Except as may otherwise be provided in this article, no
15 manufacturer or franchisor shall sell, directly or indirectly, any
16 new motor vehicle to a consumer in this state, except through a new
17 motor vehicle dealer holding a franchise for the line-make covering
18 such new motor vehicle. This subsection shall not apply to
19 manufacturer or franchisor sales of new motor vehicles to
20 charitable organizations, qualified vendors or employees of the
21 manufacturer or franchisor.

22 (5) Except when prevented by an act of God, labor strike,
23 transportation disruption outside the control of the manufacturer
24 or time of war, a manufacturer or distributor may not refuse or

1 fail to deliver, in reasonable quantities and within a reasonable
2 time, to a dealer having a franchise agreement for the retail sale
3 of any motor vehicle sold or distributed by the manufacturer, any
4 new motor vehicle or parts or accessories to new motor vehicles as
5 are covered by the franchise if the vehicles, parts and accessories
6 are publicly advertised as being available for delivery or are
7 actually being delivered. All models offered for sale by the
8 manufacturer, without any enrollment, surcharge, unreasonable
9 facility or building or any other unreasonable type of upgrade
10 requirement or acquisition fee, shall be available to the
11 franchised dealer at no additional cost for that particular model
12 of vehicle.

13 **§17A-6A-11. Where motor vehicle dealer deceased or incapacitated.**

14 (1) Any designated family member of a deceased or
15 incapacitated new motor vehicle dealer may succeed the dealer in
16 the ownership or operation of the dealership under the existing
17 dealer agreement if the designated family member gives the
18 manufacturer or distributor written notice of his or her intention
19 to succeed to the dealership within one hundred twenty days after
20 the dealer's death or incapacity, agrees to be bound by all of the
21 terms and conditions of the dealer agreement, and the designated
22 family member meets the current criteria generally applied by the
23 manufacturer or distributor in qualifying new motor vehicle
24 dealers. A manufacturer or distributor may refuse to honor the

1 existing dealer agreement with the designated family member only
2 for good cause. In determining whether good cause exists for
3 refusing to honor the agreement, the manufacturer or distributor
4 has the burden of proving that the designated successor is a person
5 who is not of good moral character or does not meet the
6 manufacturer's existing written, reasonable and uniformly applied
7 standards for business experience and financial qualifications. The
8 designated family member will have a minimum of one year to satisfy
9 the manufacturer's written and reasonable standards and financial
10 qualifications for appointment as the dealer principal.

11 (2) The manufacturer or distributor may request from a
12 designated family member such personal and financial data as is
13 reasonably necessary to determine whether the existing dealer
14 agreement should be honored. The designated family member shall
15 supply the personal and financial data promptly upon the request.

16 (3) If a manufacturer or distributor believes that good cause
17 exists for refusing to honor the succession, the manufacturer or
18 distributor may, within forty-five days after receipt of the notice
19 of the designated family member's intent to succeed the dealer in
20 the ownership and operation of the dealership, or within forty-five
21 days after the receipt of the requested personal and financial
22 data, serve upon the designated family member notice of its refusal
23 to approve the succession.

24 (4) The notice of the manufacturer or distributor provided in

1 subsection (3) above shall state the specific grounds for the
2 refusal to approve the succession and that discontinuance of the
3 agreement shall take effect not less than ~~ninety days~~ one hundred
4 and eighty days after the date the notice is served.

5 (5) If notice of refusal is not served within the sixty days
6 provided for in subsection (3) of this section, the dealer
7 agreement continues in effect and is subject to termination only as
8 otherwise permitted by this article.

9 (6) This section does not preclude a new motor vehicle dealer
10 from designating any person as his or her successor by will or any
11 other written instrument filed with the manufacturer or
12 distributor, and if such an instrument is filed, it alone
13 determines the succession rights to the management and operation of
14 the dealership.

15 (7) If the manufacturer challenges the succession, it
16 maintains the burden of proof to show good cause by a preponderance
17 of the evidence. If the person seeking succession files a civil
18 action within the one hundred eighty days set forth in subsection
19 (4), no action may be taken by the manufacturer contrary to the
20 dealer agreement until such time as the civil action and any appeal
21 has been exhausted. Provided, that when a motor vehicle dealer
22 appeals a decision upholding a manufacturer's decision to not allow
23 succession based upon the designated person's insolvency,
24 conviction of a crime punishable by imprisonment in excess of one

1 year under the law which the designated person was convicted or the
2 crime involved theft, dishonesty, or false statement, regardless of
3 the punishment, the dealer agreement shall remain in effect pending
4 exhaustion of all appeals only if the motor vehicle dealer
5 establishes a likelihood of success on appeal and the public
6 interest will not be harmed by keeping the dealer agreement in
7 effect pending entry of final judgment after such appeal.

8 **§17A-6A-12. Establishment and relocation or establishment of**
9 **additional dealers.**

10 (1) As used in this section, "relocate" and "relocation" do
11 not include the relocation of a new motor vehicle dealer within
12 four air miles of its established place of business or an existing
13 new motor vehicle dealer sells or transfers the dealership to a new
14 owner and the successor new motor vehicle dealership owner
15 relocates to a location within four miles of the seller's last open
16 new motor vehicle dealership location. The relocation of a new
17 motor vehicle dealer to a site within the area of sales
18 responsibility assigned to that dealer by the manufacturing branch
19 or distributor may not be within six air miles of another dealer of
20 the same line-make.

21 (2) Before a manufacturer or distributor enters into a dealer
22 agreement establishing or relocating a new motor vehicle dealer
23 within a relevant market area where the same line-make is
24 represented, the manufacturer or distributor shall give written

1 notice to each new motor vehicle dealer of the same line-make in
2 the relevant market area of its intention to establish an
3 additional dealer or to relocate an existing dealer within that
4 relevant market area.

5 (3) Within sixty days after receiving the notice provided in
6 subsection (2) of this section, or within sixty days after the end
7 of any appeal procedure provided by the manufacturer or
8 distributor, a new motor vehicle dealer of the same line-make
9 within the affected relevant market area may bring a declaratory
10 judgment action in the circuit court for the county in which the
11 new motor vehicle dealer is located to determine whether good cause
12 exists for the establishing or relocating of the proposed new motor
13 vehicle dealer: *Provided*, That a new motor vehicle dealer of the
14 same line-make within the affected relevant market area shall not
15 be permitted to bring such an action if the proposed relocation
16 site would be further from the location of the new motor vehicle
17 dealer of the same line-make than the location from which the
18 dealership is being moved. Once an action has been filed, the
19 manufacturer or distributor may not establish or relocate the
20 proposed new motor vehicle dealer until the circuit court has
21 rendered a decision on the matter. An action brought pursuant to
22 this section shall be given precedence over all other civil matters
23 on the court's docket. The manufacturer has the burden of proving
24 that good cause exists for establishing or relocating a proposed

1 new motor vehicle dealer.

2 (4) This section does not apply to the reopening in a relevant
3 market area of a new motor vehicle dealer that has been closed or
4 sold within the preceding two years if the established place of
5 business of the new motor vehicle dealer is within four air miles
6 of the established place of business of the closed or sold new
7 motor vehicle dealer.

8 (5) In determining whether good cause exists for establishing
9 or relocating an additional new motor vehicle dealer for the same
10 line-make, the court shall take into consideration the existing
11 circumstances, including, but not limited to, the following:

12 (a) Permanency and amount of the investment, including any
13 obligations incurred by the dealer in making the investment;

14 (b) Effect on the retail new motor vehicle business and the
15 consuming public in the relevant market area;

16 (c) Whether it is injurious or beneficial to the public
17 welfare;

18 (d) Whether the new motor vehicle dealers of the same
19 line-make in the relevant market area are providing adequate
20 competition and convenient consumer care for the motor vehicles of
21 that line-make in the market area, including the adequacy of motor
22 vehicle sales and qualified service personnel;

23 (e) Whether the establishment or relocation of the new motor
24 vehicle dealer would promote competition;

1 (f) Growth or decline of the population and the number of new
2 motor vehicle registrations in the relevant market area; and

3 (g) The effect on the relocating dealer of a denial of its
4 relocation into the relevant market area.

5 **§17A-6A-12a. Restriction on Motor Vehicle Dealer's Use of**
6 **Dealership Property.**

7 Notwithstanding the terms of any dealer agreement, a
8 manufacturer, distributor, or representative may not:

9 (1) unreasonably limit or impair the ability of a franchised
10 dealer to use the dealership property as the dealer considers
11 appropriate;

12 (2) control the use of the dealership property after the
13 franchise is terminated or discontinued; or

14 (3) at any time exercise exclusive control over the use of the
15 dealership property.

16 **§17A-6A-12b. Property Use Agreement.**

17 (a) A manufacturer, distributor, or representative may not
18 require that a dealer enter into a property use agreement as a
19 condition of the manufacturer, distributor, or representative:

20 (1) entering into a franchise;

21 (2) approving a franchised dealer's application to add a
22 line-make;

23 (3) approving a franchised dealer's application to relocate a
24 franchise; or

1 (4) approving a sale or transfer of a dealer, dealership, or
2 franchise.

3 (b) The following provisions in a property use agreement are
4 void and unenforceable:

5 (1) a limitation on the franchised dealer's ability to add a
6 line-make; or

7 (2) a provision that binds a franchised dealer's successor.

8 (c) A property use agreement expires on the earlier of:

9 (1) the date provided by the property use agreement; or

10 (2) the termination of the franchise between the parties to
11 the property use agreement.

12 (d) This section applies to a subsidiary of, or a person
13 controlled by, a manufacturer, distributor, or representative.

14 **§17A-6A-12c. Certain Property Use Agreements.**

15 (a) Notwithstanding subsection (b) (1) of section twelve-b of
16 this article, and subject to this section, a dealer may enter into
17 a property use agreement for cash consideration that grants the
18 manufacturer or distributor the exclusive rights to direct the use
19 of the dealership.

20 (b) In the event the dealer breaches the terms of the property
21 use agreement described by Subsection (a) by altering the use of
22 the property during the term of the agreement in violation of the
23 agreement, the property use agreement is terminated and the dealer
24 must reimburse the manufacturer or distributor in an amount

1 determined by dividing the amount of the manufacturer's or
2 distributor's cash consideration provided under subsection (a) by
3 the market value of the property identified in the original
4 property use agreement at the time any necessary real estate has
5 been purchased and any necessary construction has been completed,
6 and multiplying the resulting quotient by the market value of the
7 property at the time of the breach.

8 (c) For purposes of this section, the market value of property
9 is to be determined by three appraisers chosen as follows:

10 (1) one selected by the affected manufacturer or distributor;

11 (2) one selected by the affected dealer; and

12 (3) one selected by mutual agreement of the manufacturer or
13 distributor and the dealer.

14 **§17A-6A-13. Obligations regarding warranties.**

15 (1) Each new motor vehicle manufacturer or distributor shall
16 specify in writing to each of its new motor vehicle dealers
17 licensed in this state the dealer's obligations for preparation,
18 delivery and warranty service on its products. The manufacturer or
19 distributor shall compensate the new motor vehicle dealer for
20 warranty service required of the dealer by the manufacturer or
21 distributor. The manufacturer or distributor shall provide the new
22 motor vehicle dealer with the schedule of compensation to be paid
23 to the dealer for parts, work and service, and the time allowance
24 for the performance of the work and service in a manner in

1 compliance with section eight-a of this article.

2 (2) The schedule of compensation shall include reasonable
3 compensation for diagnostic work, as well as repair service and
4 labor. Time allowances for the diagnosis and performance of
5 warranty work and service shall be reasonable and adequate for the
6 work to be performed. In the determination of what constitutes
7 reasonable compensation under this section, ~~the principal factor to~~
8 ~~be given consideration shall be the prevailing wage rates being~~
9 ~~paid by dealers in the community in which the dealer is doing~~
10 ~~business, and in no event may the compensation of a dealer for~~
11 ~~warranty labor and parts be less than the rates charged by the~~
12 ~~dealer for like service to retail customers for nonwarranty service~~
13 ~~and repairs, provided that the rates are reasonable. section~~
14 eight-a of this article shall govern. However, in the case of a new
15 motor vehicle dealer of motorcycles or recreational vehicles, in no
16 event may the compensation of a dealer for warranty parts be less
17 than the dealer's cost of acquiring the part plus twenty percent.

18 (3) A manufacturer or distributor may not do any of the
19 following:

20 (a) Fail to perform any warranty obligation;

21 (b) Fail to include in written notices of factory recalls to
22 new motor vehicle owners and dealers the expected date by which
23 necessary parts and equipment will be available to dealers for the
24 correction of the defects; or

1 (c) Fail to compensate any of the new motor vehicle dealers
2 licensed in this state for repairs effected by the recall.

3 (4) All claims made by a new motor vehicle dealer pursuant to
4 this section for labor and parts shall be paid within thirty days
5 after their approval. All claims shall be either approved or
6 disapproved by the manufacturer or distributor within thirty days
7 after their receipt on a proper form generally used by the
8 manufacturer or distributor and containing the usually required
9 information therein. Any claim not specifically disapproved in
10 writing within thirty days after the receipt of the form is
11 considered to be approved and payment shall be made within thirty
12 days. The manufacturer has the right to initiate an audit of a
13 claim within twelve months after payment and to charge back to the
14 new motor vehicle dealer the amount of any false, fraudulent or
15 unsubstantiated claim, subject to the requirements of section
16 eight-a of this article.

17 (5) The manufacturer shall accept the return of any new and
18 unused part, component or accessory that was ordered by the dealer,
19 and shall reimburse the dealer for the full cost charged to the
20 dealer for the part, component or accessory if the dealer returns
21 the part and makes a claim for the return of the part within one
22 year of the dealer's receipt of the part, component or accessory
23 and provides reasonable documentation, to include any changed part
24 numbers to match new part numbers, provided that the part was

1 ordered for a warranty repair.

2 **§17A-6A-14a Open Account Protection.**

3 If there is a dispute between the manufacturer, factory
4 branch, distributor, or distributor branch and the dealer with
5 respect to any matter referred to this article, either party may
6 notify, in writing, the other party of its request to challenge,
7 through the manufacturer's appeal process or the circuit courts of
8 the State of West Virginia. A manufacturer, factory branch,
9 distributor, or distributor branch may not collect chargebacks,
10 fully or in part, either through direct payment or by charge to the
11 dealer's account, for warranty parts or service compensation,
12 including service incentives, sales incentives, other sales
13 compensation, surcharges, fees, penalties, or any financial
14 imposition of any type arising from an alleged failure of the
15 dealer to comply with a policy of, directive from, or agreement
16 with the manufacturer, factory branch, distributor, or distributor
17 branch until thirty days following final notice of the amount
18 charged to the dealer following all internal processes of the
19 manufacturer, factory, factory branch, distributor, or distributor
20 branch. Within thirty days following receipt of final notice, the
21 dealer may, in writing, request a hearing or seek civil relief from
22 the manufacturer's appeal process or the circuit courts of the
23 State of West Virginia . If a dealer requests a hearing or files a
24 civil action, the manufacturer, factory branch, distributor, or

1 distributor branch may not collect the chargeback, fully or in
2 part, either through direct payment or by charge to the dealer's
3 account, until the completion of the hearing or civil action, and
4 all appeal, civil or otherwise, have been exhausted concerning the
5 validity of the chargeback.

6 **§17A-6A-15 Dealer Data, Obligation of Manufacturer, Vendors,**
7 **Suppliers, and Others; Indemnification of Dealer.**

8 Notwithstanding any of the terms or provisions contained in
9 this section or in any consent, authorization, release, novation,
10 franchise, or other contract or agreement, whenever any
11 manufacturer, factory branch, distributor, distributor branch,
12 dealer management computer system vendor, or any third party acting
13 on behalf of or through or approved, referred, endorsed,
14 authorized, certified, granted preferred status, or recommended by,
15 any manufacturer, factory branch, distributor, distributor branch,
16 dealer management computer system vendor requires that a new motor
17 vehicle dealer provide any dealer, consumer, or customer data or
18 information through direct access to a dealer's computer system,
19 the dealer is not required to provide, and may not be required to
20 consent to provide in any written agreement, such direct access to
21 its computer system. The dealer may instead provide the same
22 dealer, consumer, or customer data or information specified by the
23 requesting party by timely obtaining and pushing or otherwise
24 furnishing the requested data to the requesting party in a widely

1 accepted file format; provided that, when a dealer would otherwise
2 be required to provide direct access to its computer system under
3 the terms of a consent, authorization, release, novation,
4 franchise, or other contract or agreement, a dealer that elects to
5 provide data or information through other means may be charged a
6 reasonable initial set-up fee and a reasonable processing fee based
7 on the actual incremental costs incurred by the party requesting
8 the data for establishing and implementing the process for the
9 dealer. Any term or provision contained in any consent,
10 authorization, release, novation, franchise, or other contract or
11 agreement which is inconsistent with any term or provision
12 contained in this subsection shall be voidable at the option of the
13 dealer.

14 Notwithstanding the terms or conditions of any consent,
15 authorization, release, novation, franchise or other contract or
16 agreement, every manufacturer, factory branch, distributor,
17 distributor branch, dealer management computer system vendor, or
18 any third party acting on behalf of or through any manufacturer,
19 factory branch, distributor, distributor branch, dealer management
20 computer system vendor, having electronic access to consumer or
21 customer data or other information in a computer system utilized by
22 a new motor vehicle dealer, or who has otherwise been provided
23 consumer or customer data or information by the dealer, shall fully
24 indemnify and hold harmless any dealer from all damages, costs, and

1 expenses incurred by the dealer. Such indemnification by the
2 manufacturer, factory branch, distributor, distributor branch,
3 dealer management computer system vendor, or any third party,
4 whether working for these entities or not, includes, but is not
5 limited to, judgments, settlements, fines penalties, litigation
6 costs, defense costs, court costs, costs related to the disclosure
7 of security breaches, and attorney fees arising out of complaints,
8 claims, civil and administrative actions, and, to the fullest
9 extent allowable under the law, governmental investigations and
10 prosecutions to the extent caused by a security breach or the
11 access, storage, maintenance, use, sharing, disclosure, or
12 retention of the dealer's consumer or customer data or other
13 information or maintenance or services provided to any computer
14 system utilized by a new motor vehicle dealer.

15 **§17A-6A-16. Exports; Rebuttable Presumption on Behalf of Dealer.**

16 It shall be unlawful for a manufacturer or distributor to take
17 or threaten to take any adverse action against a dealer pursuant to
18 an export or sale-for-resale prohibition because the dealer sold or
19 leased a vehicle to a customer who either exported the vehicle to
20 a foreign country or resold the vehicle in violation of the
21 prohibition, unless the export or sale-for-resale prohibition
22 policy was provided to the dealer in writing prior to the sale or
23 lease, and the dealer knew or reasonably should have known of the
24 customer's intent to export or resell the vehicle in violation of

1 the prohibition at the time of sale or lease. If the dealer causes
2 the vehicle to be registered in this state or any other state, a
3 rebuttable presumption is established that the dealer did not have
4 reason to know of the customer's intent to export or resell the
5 vehicle.

6 **§17A-6A-17. Manufacturer performance standards; uniform**
7 **application, prohibited practices.**

8 A manufacturer may not require dealer adherence to a
9 performance standard or standards which are not applied uniformly
10 to other similarly situated dealers. In addition to any other
11 requirements of the law, the following shall apply:

12 A performance standard, sales objective, or program for
13 measuring dealer performance that may have a material effect on a
14 dealer, including the dealer's right to payment under any incentive
15 or reimbursement program, and the application of the standard,
16 sales objective or program by a manufacturer, distributor or
17 factory branch, shall be fair, reasonable, equitable and based on
18 accurate information.

19 Prior to beginning any incentive or reimbursement program, the
20 manufacturer shall provide in writing to each dealer of the same
21 line-make that chooses to participate in the program the dealer's
22 performance requirement or sales goal or objective, which shall
23 include a reasonable and general explanation of the methodology,
24 criteria, and calculations used.

1 A manufacturer shall allocate an adequate supply of vehicles,
2 appropriate to the market and season, to its dealers by series,
3 product line, and model to assist the dealer in achieving any
4 performance standards established by the manufacturer and
5 distributor.

6 A dealer that claims that the application of a performance
7 standard, sales objective, or program for measuring dealership
8 performance does not meet the standards listed in subsection (a) of
9 this section, may seek relief and damages in the circuit courts of
10 the State of West Virginia.

11 The manufacturer or distributor has the burden of proving by
12 a preponderance of the evidence that the performance standard,
13 sales objective or program for measuring dealership performance
14 complies with this Article.

15 **§17A-6A-18. Indemnity.**

16 Notwithstanding the terms of any dealer agreement, a
17 manufacturer or distributor shall indemnify and hold harmless its
18 dealers for any reasonable expenses incurred, including damages,
19 court costs and attorney's fees, arising solely out of complaints,
20 claims or actions which relate to the manufacture, assembly, design
21 of a new motor vehicle or other functions by the manufacturer or
22 distributor beyond the control of the dealer, including, without
23 limitation, the selection by the manufacturer or distributor of
24 parts or components for the vehicle, and any damages to merchandise

1 occurring prior to acceptance of the vehicle by the dealer to the
2 dealer if the carrier is designated by the manufacturer or
3 distributor, if the new motor vehicle dealer gives timely notice to
4 the manufacturer or distributor of the complaint, claim or action.

5 **§17A-6A-19. Actions at law; damages.**

6 (1) If a manufacturer or distributor terminates, cancels,
7 fails to renew or discontinues a dealer agreement for other than
8 good cause as defined in this article, or commits any other
9 violation of this article, the new motor vehicle dealer adversely
10 affected by the actions may bring an action for damages and
11 equitable relief against the manufacturer or distributor. If the
12 new motor vehicle dealer prevails, the dealer may recover, in
13 addition to actual damages, treble damages up to three times the
14 amount of the actual damages awarded, plus reasonable attorney's
15 fees, regardless of the amount in controversy. For the purposes of
16 the award of attorney's fees and costs, whenever the new motor
17 vehicle dealer is seeking injunctive or other relief, the dealer
18 may be considered to have prevailed when a judgment or other final
19 order providing equitable relief is entered in its favor.

20 (2) A manufacturer or distributor who violates this article is
21 liable for all damages sustained by a new motor vehicle dealer as
22 a result of the violation.

23 (3) A manufacturer or distributor or new motor vehicle dealer
24 may bring an action for declaratory judgment for determination of

1 any controversy arising pursuant to this article.

2 (4) Any corporation or association which is primarily owned by
3 or composed of dealers and which primarily represents the interests
4 of dealers has standing to file a petition or cause of action with
5 the court of competent jurisdiction for itself or by, for or on
6 behalf of any, or a group of, new motor vehicle dealers for any
7 violation of this article or for the determination of any rights
8 created by this article.

9 (5) In addition to any county in which venue is proper in
10 accordance with the Constitution and laws of this state, in any
11 cause of action brought by a new motor vehicle dealer against a
12 manufacturer or distributor for any violation of this article or
13 for the determination of any rights created by the dealer's
14 franchise agreement, venue is proper in the county in which the
15 dealer is engaged in the business of selling the products or
16 services of the manufacturer or distributor.

17 **§17A-6A-20. Injunctive relief.**

18 Upon proper application to the circuit court, a manufacturer
19 or distributor or new motor vehicle dealer may obtain appropriate
20 injunctive relief against termination, cancellation, nonrenewal or
21 discontinuance of a dealer agreement or any other violation of this
22 article. The court may grant injunctive relief or a temporary
23 restraining order without bond.

24 **§17A-6A-21. West Virginia law to apply.**

1 Notwithstanding the terms, provisions or requirements of any
2 franchise agreement, contract or other agreement of any kind
3 between a new motor vehicle dealer and a manufacturer or
4 distributor, captive finance source, or any subsidiary, affiliate
5 or partner of a manufacturer or distributor, the provisions of the
6 Code of West Virginia apply to all such agreements and contracts.
7 Any provisions in the agreements and contracts which violate the
8 terms of this section are null and void.

NOTE: The purpose of this bill is to update and clarify the article of the code relating to motor vehicle dealers, distributors, wholesalers and manufacturers.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

Sections §17A-6A-12a; 12b; 12c; 14a; 15; 16 and 17 are new, therefore they have been completely underscored.

Sections §17A-6A-18; 19 and 20 and 21 have been renumbered.