

**H. B. 2701**

(By Delegates McCuskey, Ashley, E. Nelson, Rohrbach and Westfall)

[Introduced February 12, 2015; referred to the

Committee on Roads and Transportation then 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-9, §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-15, §17A-6A-16, §17A-6A-17 and §17A-6A-18 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto six new sections, designated §17A-6A-12a, §17A-6A-12b, §17A-6A-14a, §17A-6A-19, §17A-6A-20 and §17A-6A-21, 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-9, §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-15, §17A-6A-16, §17A-6A-17 and §17A-6A-18 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto six new sections, designated §17A-6A-12a, §17A-6A-12b, §17A-6A-14a, §17A-6A-19, §17A-6A-20 and

1 §17A-6A-21, all to read as follows:

2 **ARTICLE 6A. MOTOR VEHICLE DEALERS, DISTRIBUTORS, WHOLESALERS AND**  
3 **MANUFACTURERS.**

4 **§17A-6A-1. Legislative finding.**

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

14 **§17A-6A-3. Definitions.**

15 For the purposes of this article, the words and phrases defined in this section have the  
16 meanings ascribed to them, except where the context clearly indicates a different meaning.

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

21 (2) "Designated family member" means the spouse, child, grandchild, parent, brother or sister  
22 of a deceased new motor vehicle dealer who is entitled to inherit the deceased dealer's ownership

1 interest in the new motor vehicle dealership under the terms of the dealer's will, or who has  
2 otherwise been designated in writing by a deceased dealer to succeed the deceased dealer in the new  
3 motor vehicle dealership, or is entitled to inherit under the laws of intestate succession of this state.  
4 With respect to an incapacitated new motor vehicle dealer, the term means the person appointed by  
5 a court as the legal representative of the new motor vehicle dealer's property. The term also includes  
6 the appointed and qualified personal representative and the testamentary trustee of a deceased new  
7 motor vehicle dealer. However, the term means only that designated successor nominated by the  
8 new motor vehicle dealer in a written document filed by the dealer with the manufacturer or  
9 distributor, if such a document is filed.

10 (3) "Distributor" means any person, resident or nonresident, who, in whole or in part, offers  
11 for sale, sells or distributes any new motor vehicle to a new motor vehicle dealer or who maintains  
12 a factor representative, resident or nonresident, or who controls any person, resident or nonresident,  
13 who, in whole or in part, offers for sale, sells or distributes any new motor vehicle to a new motor  
14 vehicle dealer.

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

20 (5) "Factory branch" means an office maintained by a manufacturer or distributor for the  
21 purpose of selling or offering for sale vehicles to a distributor, wholesaler or new motor vehicle  
22 dealer, or for directing or supervising, in whole or in part, factory or distributor representatives. The

1 term includes any sales promotion organization maintained by a manufacturer or distributor which  
 2 is engaged in promoting the sale of a particular make of new motor vehicles in this state to new  
 3 motor vehicle dealers.

4 (6) "Factory representative" means an agent or employee of a manufacturer, distributor or  
 5 factory branch retained or employed for the purpose of making or promoting the sale of new motor  
 6 vehicles or for supervising or contracting with new motor vehicle dealers or proposed motor vehicle  
 7 dealers.

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

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

17 (9) "Motor vehicle" means that term as defined in section one, article one of this chapter,  
 18 including motorcycle, school bus, truck tractor, road tractor, truck, and recreational vehicle,  
 19 all-terrain vehicle, and utility terrain vehicle as defined in subsections (c), (d), (f), (h), (i), ~~and~~ (ii)  
 20 (nn) ~~and~~ (vv) respectively, of ~~said~~ that section, but not including a farm tractor or farm equipment.  
 21 The term "motor vehicle" also includes, for a school bus, truck tractor, road tractor and truck, its  
 22 component parts, including, but not limited to, its engine, transmission or real axle manufactured for

1 installation in a school bus, truck tractor, road tractor or truck.

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

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

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

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

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

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

18 (1) Notwithstanding any agreement, a manufacturer or distributor ~~shall~~ may not cancel,  
19 terminate, fail to renew or refuse to continue any dealer agreement with a new motor vehicle dealer  
20 unless the manufacturer or distributor has complied with all of the following:

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

22 (b) Acted in good faith;

- 1 (c) Engaged in full and open communication with franchised dealer; and
- 2 (d) Has good cause for the cancellation, termination, nonrenewal or discontinuance.
- 3 (2) Notwithstanding any agreement, good cause exists when a manufacturer or distributor
- 4 can demonstrate termination is necessary due to a material breach of a reasonable term or terms of
- 5 the agreement by a dealer when weighed against the interests of the dealer and the public. The
- 6 burden of proof is on the manufacturer to prove good cause by a preponderance of the evidence. The
- 7 interests of the dealer and the public shall include consideration of:
- 8 (a) The relationship of the dealer's sales to the sales in the relevant market;
- 9 (b) The investment and financial obligations of the dealer under the terms of the franchise
- 10 agreement;
- 11 (c) The effect on the public cancellation of the franchise agreement would cause;
- 12 (d) The adequacy of the dealer's sales and service facilities, equipment, parts and personnel
- 13 in relation to other dealers in the relevant market;
- 14 (e) Whether the dealer is honoring existing warranties;
- 15 (f) Whether the dealer is complying, or can comply within a reasonable time, with reasonable
- 16 capitalization requirements; and
- 17 (g) The dealer's overall performance under the reasonable terms of the franchise agreement.
- 18 This shall include the overall fairness of the agreement terms, the enforceability of the agreement
- 19 and the relative bargaining power of the parties.
- 20 (h) Whether the manufacturer provided the requested appropriate volumes and type of motor
- 21 vehicles to the dealer, and the requested sales and service training to the dealer.
- 22 (3) In addition to the requirements of subsection (2) of this section, if the failure by the new

1 motor vehicle dealer to comply with a provision of the dealer agreement relates to the performance  
2 of the new motor vehicle dealer in sales or service, good cause exists for the purposes of a  
3 termination, cancellation, nonrenewal or discontinuance under subsection (1) of this section when  
4 the new motor vehicle dealer failed to effectively carry out the performance provisions of the dealer  
5 agreement if all of the following have occurred:

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

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

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

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

14 **§17A-6A-5. Circumstances not constituting good cause.**

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

18 (a) A change in ownership of the new motor vehicle dealer's dealership. The subdivision  
19 does not authorize any change in ownership which would have the effect of a sale or an assignment  
20 of the dealer agreement or a change in the principal management of the dealership without the  
21 manufacturer's or distributor's prior written consent, which may not be unreasonably or untimely  
22 withheld.

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

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

12 (d) The fact that the new motor vehicle dealer sells or transfers ownership of the dealership  
13 or sells or transfers capital stock in the dealership to the new motor vehicle dealer's spouse, son or  
14 daughter: *Provided*, That the sale or transfer ~~shall~~ does not have the effect of a sale or an assignment  
15 of the dealer agreement or a change in the principal management of the dealership without the  
16 manufacturer's or distributor's prior written consent.

17 (e) This section does not apply to any voluntary agreement entered into after a dispute or  
18 civil action has arisen for which the dealer has accepted separate and valuable consideration. Any  
19 prospective agreement is void as a matter of law.

20 **§17A-6A-6. Burden of proof.**

21 For each termination, cancellation, nonrenewal or discontinuance, the manufacturer or  
22 distributor ~~shall have~~ has the burden of proof by a preponderance of the evidence for showing that



1 he or she has acted in good faith, that the notice requirement has been complied with, and that there  
2 was good cause by a preponderance of the evidence for the termination, cancellation, nonrenewal  
3 or discontinuance.

4 **§17A-6A-7. Notice provisions.**

5 Notwithstanding any agreement, prior to the termination, cancellation, nonrenewal or  
6 discontinuance of any dealer agreement, the manufacturer or distributor shall furnish notice of the  
7 termination, cancellation, nonrenewal or discontinuance to the new motor vehicle dealer as follows:

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

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

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

15 (2) A detailed written statement of all reasons for the termination, cancellation, nonrenewal  
16 or discontinuance. The statement shall include, at a minimum, a complete explanation of each  
17 reason upon which the manufacturer or distributor relies to support its proposed action, along with  
18 all supporting documentation which is material to the proposed action and available to the  
19 manufacturer or distributor at the time of termination, cancellation, nonrenewal or discontinuance;  
20 and

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

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

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

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

8 (3) Conviction of the new motor vehicle dealer or its principal owners of a crime, but only  
9 if the crime is punishable by imprisonment in excess of one year under the law under which the  
10 dealer was convicted or the crime involved theft, dishonesty or false statement regardless of the  
11 punishment;

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

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

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

20 (e) Except as provided in subdivision (c) of this subsection, any motor vehicle dealer who  
21 receives a notice of intent to discontinue, cancel or not renew a dealer agreement may, within a one  
22 hundred twenty-day notice period, file a petition or complaint for a determination of whether such

1 action is an unfair or prohibited discontinuation, cancellation or nonrenewal. Dealer agreements and  
2 certificates of appointment shall continue in effect until a final determination of the issues raised in  
3 such petition or complaint by the motor vehicle dealer. A discontinuance, cancellation or  
4 nonrenewal is unfair if it is:

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

6 (2) Not undertaken for good cause; or

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

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

17 (g) If a transfer of ownership is proposed after a notice to discontinue, cancel or not renew  
18 a dealer agreement is received but, prior to the final determination, including exhaustion of all  
19 appellate remedies of a motor vehicle dealer's complaint or petition contesting such action, the  
20 termination proceedings shall be stayed, without bond, during the period the transfer is being  
21 reviewed by the manufacturer or distributor. During the period that the transfer is being reviewed  
22 by the manufacturer or distributor, the dealer agreement shall remain in full force and effect, and the

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

14 **§17A-6A-8. Reasonable compensation to dealer.**

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

18 (a) Any new motor vehicle inventory, manufactured for sale in the United States, purchased  
19 from the manufacturer, distributor or other dealers, in the ordinary course of business, which has not  
20 been materially altered, substantially damaged or driven for more than ~~seven hundred fifty miles~~ one  
21 thousand miles, except that for any new motorcycle, all terrain vehicle and utility terrain vehicle  
22 inventory purchased from the manufacturer or distributor, that inventory must not have been

1 materially altered, substantially damaged or driven for more than fifty miles. For purposes of a  
2 school bus, truck tractor, road tractor or truck, materially altered does not include dealer add-ons,  
3 such as, but not limited to, racks, mud flaps, fifth wheel assemblies, dump or tank bodies.

4 (b) Supplies, equipment and parts inventory at the published list price which are purchased  
5 from or at the direction of the manufacturer or distributor. Parts shall be restricted to those and listed  
6 in the manufacturer's or distributor's current parts catalog;

7 (c) ~~Equipment~~ Special tools, furnishings and signs purchased or leased from, or at the  
8 direction of, the manufacturer or distributor at purchase price; and

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

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

1 pursuant to subsection (c), section ~~five~~ seven of this article.

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

6 (a) Compensation consistent with the length of time the dealer carried the line and the  
7 investment and timing thereof required by the manufacturer or distributor of the dealer; ~~and~~

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

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

14 (d) Any costs the dealer incurred for facility upgrades or alternations required by the  
15 manufacturer, distributor or factory branch within the previous twelve years. This subdivision does  
16 not apply if the manufacturer has provided the motor vehicle dealer with lump sum payments to  
17 assist the dealer in making facility improvements or to pay for signs or manufacturer image elements  
18 when the payments are not dependent on the dealer selling or purchasing specific numbers of new  
19 motor vehicles, and the payments are equal to the entire cost of the facility improvements, signs or  
20 image elements.

21 (e) Payment by the manufacturer to the dealer shall be made within ninety days. Thereafter,  
22 interest accumulates at the rate of the Fifth Federal Reserve District's secondary discount rate in

1 effect on the second day of January of the year in which payment is due plus five percentage points.

2 **§17A-6A-8a. Compensation to dealers for service rendered.**

3 (1) Every motor vehicle manufacturer, distributor or wholesaler, factory branch or distributor  
4 branch or officer, agent or representative thereof, shall:

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

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

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

13 (2) In no event may:

14 (a) The schedule of compensation fail to compensate the dealers for the work and services  
15 they are required to perform in connection with the dealer's delivery and preparation obligations, or  
16 fail to adequately and fairly compensate the dealers for labor, parts and other expenses incurred by  
17 the dealer to perform under and comply with manufacturer's warranty agreements and factory recalls;

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

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

1 work.

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

6 (4) The retail rate charged by the dealer for parts is established by the greater of the  
7 manufacturer's suggested retail price, or dealer submitting to the manufacturer or distributor one  
8 hundred sequential nonwarranty customer-paid service repair orders that contain warranty-like parts  
9 or ninety consecutive days of nonwarranty customer-paid service repair orders that contain  
10 warranty-like parts covering repairs made no more than one hundred eighty days before the  
11 submission and declaring the average percentage markup.

12 (5) The retail rate customarily charged by the dealer for labor rate and labor time allowance  
13 must be established using the same process as provided under subsection (4) and declaring the  
14 average labor rate. The average labor rate must be determined by dividing the amount of the dealer's  
15 total labor sales by the number of total hours that generated those sales. If a labor rate and parts  
16 markup rate simultaneously declared by the dealer, the dealer may use the same repair orders to  
17 complete each calculation as provided under subsection (4) of this section. Labor for diagnostic time  
18 is a separate compensable item.

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

21 (a) Repairs for manufacturer or distributor special events, specials or promotional discounts  
22 for retail customer repairs:



1 (b) Parts sold at wholesale;

2 (c) Routine maintenance not covered under any retail customer warranty, including fluids,  
3 filters, and belts not provided in the course of repairs;

4 (d) Nuts, bolts, fasteners and similar items that do not have an individual part number;

5 (e) Tires;

6 (f) Vehicle reconditioning;

7 (g) Private discount agreements with retail customers;

8 (h) State inspections; and

9 (i) Quick service operations.

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

18 (8) Each manufacturer, in establishing a schedule of compensation for warranty work, shall  
19 rely on the vehicle dealer's written schedule of hourly labor rates and parts as stated in subsections  
20 (4), (5) and (6), of this section, and may not obligate any vehicle dealer to engage in unduly  
21 burdensome or time-consuming documentation of rates or parts, including obligating vehicle dealers  
22 to engage in transaction-by-transaction or part-by-part calculations.

1           (9) A dealer or manufacturer may demand that the average parts markup or average labor rate  
2 be calculated using the process provided under subsections (4) and (5) of this section; however, the  
3 demand for the average parts markup may not be made within twelve months of the last parts  
4 markup declaration and the demand for the average labor rate may not be made within twelve  
5 months of the last labor rate declaration. If a parts markup or labor rate is demanded by the dealer  
6 or manufacturer, the dealer shall determine the repair orders to be included in the calculation under  
7 subsections (4) and (5) of this section.

8           (10) As it applies to a school bus, truck tractor, road tractor and truck as defined in section  
9 one, article one of this chapter, the manufacturer, distributor and/or O.E.M. supplier shall pay the  
10 dealer its incurred actual time at the retail labor rate for retrieving a motor vehicle and returning a  
11 motor vehicle to dealer's designated parking area. Dealer shall be paid \$50 minimum for each  
12 operation that requires the use of each electronic tool, i.e. laptop computer. The manufacturer or  
13 distributor may not reduce what is paid to a dealer for this retrieval or return time, or for the  
14 electronic tool charge. The dealer is allowed to add to a completed warranty repair order three hours  
15 for every twenty-four hours the manufacturer, distributor and/or O.E.M. supplier makes the dealer  
16 stop working on a vehicle while the manufacturer, distributor and/or O.E.M. supplier decides how  
17 it wants the dealer to proceed with the repairs.

18           ~~(4)~~ (11) All claims made by motor vehicle dealers pursuant to this section for compensation  
19 for delivery, preparation, warranty and recall work, including labor, parts and other expenses, shall  
20 be paid by the manufacturer within thirty days after approval and shall be approved or disapproved  
21 by the manufacturer within thirty days after receipt. When any claim is disapproved, the dealer shall  
22 be notified in writing of the grounds for disapproval. No claim which has been approved and paid

1 may be charged back to the dealer unless it can be shown that the claim was false or fraudulent, that  
2 the repairs were not properly made or were unnecessary to correct the defective condition or the  
3 dealer failed to reasonably substantiate the claim in accordance with the written requirements of the  
4 manufacturer or distributor in effect at the time the claim arose. No charge back may be made until  
5 the dealer has had notice and an opportunity to support the claim in question. No otherwise valid  
6 reimbursement claims may be denied once properly submitted within manufacturers' submission  
7 guidelines due to a clerical error or omission or based on a different level of technician technical  
8 certification or the dealer's failure to subscribe to any manufacturer's computerized training  
9 programs.

10 ~~(5)~~ (12) Notwithstanding the terms of a franchise agreement or provision of law in conflict  
11 with this section, the dealer's delivery, preparation, warranty and recall obligations constitutes the  
12 dealer's sole responsibility for product liability as between the dealer and manufacturer, and, except  
13 for a loss caused by the dealer's failure to adhere to these obligations, a loss caused by the dealer's  
14 negligence or intentional misconduct or a loss caused by the dealer's modification of a product  
15 without manufacturer authorization, the manufacturer shall reimburse the dealer for all loss incurred  
16 by the dealer, including legal fees, court costs and damages, as a result of the dealer having been  
17 named a party in a product liability action.

18 **§17A-6A-9. Payment of compensation.**

19 (1) Compensation for new motor vehicle inventory under subdivision (a), subsection (1),  
20 section eight of this article shall be paid within sixty days after the effective date of the termination,  
21 cancellation, nonrenewal or discontinuance. Compensation for items of personal property required  
22 by subdivisions (b), (c) and (d), subsection (1), section eight of this article shall be paid within sixty

1 days after the effective date of the termination, cancellation, nonrenewal or discontinuance if the new  
2 motor vehicle dealer has met all reasonable requirements of the dealer agreement with respect to the  
3 return of the repurchased personal property, including providing clear title.

4 (2) Reasonable compensation pursuant to subdivision (a), subsection (1), section eight of this  
5 article may not be less than the new motor vehicle dealer's net acquisition cost, including any special  
6 promotions ordered by the manufacturer, such as advertising charges, and special tools purchased  
7 from the manufacturer or distributor within three years of the date of termination, cancellation,  
8 nonrenewal or discontinuance. Reasonable compensation pursuant to subdivision (b) of said  
9 subsection shall be the amount stated in the manufacturer's or distributor's current parts price list.  
10 Reasonable compensation pursuant to subdivisions (c) and (d) of said subsection shall be the fair  
11 market value of the personal property.

12 (3) In the event payment is not made within ninety days as provided in subsection (1) of this  
13 section, ~~interest accrues on all amounts due the new motor vehicle dealer at a rate of twelve percent~~  
14 ~~per annum.~~ shall accumulate at the rate of the Fifth Federal Reserve District's secondary discount rate  
15 in effect on the second day of January of the year in which payment is due plus five percentage  
16 points.

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

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

20 (a) Order or accept delivery of any new motor vehicle, part or accessory of the vehicle,  
21 equipment or any other commodity not required by law which was not voluntarily ordered by the  
22 new motor vehicle dealer. This section does not prevent the manufacturer or distributor from

1 requiring that new motor vehicle dealers carry a reasonable inventory of models offered for sale by  
2 the manufacturer or distributor;

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

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

10 (d) Enter into any agreement with the manufacturer or distributor or do any other act  
11 prejudicial to the new motor vehicle dealer by threatening to terminate a dealer agreement, limit  
12 inventory, invoke sales and service warranty or other types of audits or any contractual agreement  
13 or understanding existing between the dealer and the manufacturer or distributor. Notice in good  
14 faith to any dealer of the dealer's violation of any terms or provisions of the dealer agreement is not  
15 a violation of this article;

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

1 (f) Refrain from participation in the management of, investment in or the acquisition of any  
2 other line of new motor vehicle or related products, provided that the dealer maintains a reasonable  
3 line of credit for each make or line of vehicle, remains in compliance with reasonable facilities  
4 requirements and makes no change in the principal management of the dealer. Notwithstanding the  
5 terms of any franchise agreement, a manufacturer or distributor may not enforce any requirements,  
6 including facility requirements, that a new motor vehicle dealer establish or maintain exclusive  
7 facilities, personnel or display space, when the requirements are unreasonable considering current  
8 economic conditions and are not otherwise justified by reasonable business considerations. The  
9 burden of proving that current economic conditions or reasonable business considerations justify  
10 exclusive facilities is on the manufacturer or distributor and must be proven by a preponderance of  
11 the evidence;

12 (g) Change the location of the new motor vehicle dealership or make any substantial  
13 alterations to the dealership premises, where to do so would be unreasonable. ~~and~~ The burden of  
14 proof is on the manufacturer or distributor to prove the reasonableness by a preponderance of the  
15 evidence: *Provided*, That this section does not apply to any voluntary agreement entered into after  
16 a dispute or civil action has arisen for which the dealer has accepted separate and valuable  
17 consideration. Any prospective agreement is void as a matter of law;

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

1 for the Southern and Northern Districts of West Virginia. This section does not prevent a motor  
2 vehicle dealer, after a civil action is filed, to enter into any agreement of settlement, arbitration,  
3 assignment or waiver of a trial by jury;

4 (i) To coerce or require any dealer, whether by agreement, program, incentive provision or  
5 otherwise, to construct improvements to its facilities or to install new signs or other franchisor image  
6 elements that replace or substantially alter those improvements, signs or franchisor image elements  
7 completed within the preceding twelve years that were required or approved by the manufacturer,  
8 factory branch, distributor or distributor branch or one of its affiliates. If a manufacturer, factory  
9 branch, distributor or distributor branch offers incentives or other payments under a program offered  
10 after the effective date of this subdivision and available to more than one dealer in the state that are  
11 premised, wholly or in part, on dealer facility improvements or installation of franchisor signs or  
12 other franchisor image elements, a dealer that constructed improvements or installed signs or other  
13 franchisor image elements required by or approved by the manufacturer, factory branch, distributor  
14 or distributor branch and completed within the ten years preceding the program shall be deemed to  
15 be in compliance with the program requirements pertaining to construction of facilities or installation  
16 of signs or other franchisor image elements that would replace or substantially alter those previously  
17 constructed or installed within that ten-year period. This subdivision does not apply to a program  
18 that provides lump sum payments to assist dealers in making facility improvements or to pay for  
19 signs or franchise or image elements when such payments are not dependent on the dealer selling  
20 or purchasing specific numbers of new vehicles, and such payments are equal to the entire cost of  
21 the facility improvements, signs or image elements.

22 (j) To condition the award, sale, transfer, relocation or renewal of a franchise or dealer

1 agreement or to condition sales, service, parts or finance incentives upon site control or an agreement  
2 to renovate or make substantial improvements to a facility: *Provided*, That voluntary and  
3 noncoerced acceptance of such conditions by the dealer in writing, including, but not limited to, a  
4 written agreement for which the dealer has accepted separate and valuable consideration, does not  
5 constitute a violation.

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

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

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

21 (A) Require a dealer to grant such captive finance source a power of attorney to do anything  
22 on behalf of the dealer other than sign the dealer's name on any check, draft or other instrument



1 received in payment or proceeds under any contract for the sale or lease of a motor vehicle that is  
2 made payable to the dealer but which is properly payable to the captive finance source, is for the  
3 purpose of correcting an error in a customer's finance application or title processing document, or  
4 is for the purpose of processing regular titling of the vehicle;

5 (B) Require a dealer to warrant or guarantee the accuracy and completeness of any personal,  
6 financial or credit information provided by the customer on the credit application and/or in the  
7 course of applying for credit other than to require that the dealer make reasonable inquiry regarding  
8 the accuracy and completeness of such information and represent that such information is true and  
9 correct to the best of the dealer's knowledge;

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

1 breach of the terms of a written agreement between the dealer and a captive finance source shall be  
2 considered a material breach;

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

9 (E) Require a dealer to waive any defenses that may be available to it under its agreements  
10 with the captive finance source or under any applicable laws;

11 (F) Require a dealer to settle or contribute any of its own funds or financial resources toward  
12 the settlement of any multiparty or class action litigation without obtaining the dealer's voluntary and  
13 written consent subsequent to the filing of such litigation;

14 (G) Require a dealer to contribute to any reserve or contingency account established or  
15 maintained by the captive finance source, for the financing of the sale or lease of any motor vehicles  
16 purchased or leased by any of the dealer's customers, in any amount or on any basis other than the  
17 reasonable expected amount of future finance reserve chargebacks to the dealer's account. This  
18 section does not apply to or limit:

19 (I) Reasonable amounts reserved and maintained related to the sale or financing of any  
20 products ancillary to the sale, lease or financing of the motor vehicle itself;

21 (II) A delay or reduction in the payment of dealer's portion of the finance income pursuant  
22 to an agreement between the dealer and a captive finance source under which the dealer agrees to

1 such delay or reduction in exchange for the limitation, reduction or elimination of the dealer's  
2 responsibility for finance reserve chargebacks; or

3 (III) A chargeback to a dealer, or offset of any amounts otherwise payable to a dealer by the  
4 captive finance source, for any indebtedness properly owing from a dealer to the captive finance  
5 source as part of a specific program covered by this section, the terms of which have been agreed to  
6 by the dealer in advance, except to the extent such chargeback would otherwise be prohibited by this  
7 section.

8 (H) Require a dealer to repossess or otherwise gain possession of a motor vehicle at the  
9 request of or on behalf of the captive finance source. This section does not apply to any  
10 requirements contained in any agreement between the dealer and the captive finance source wherein  
11 the dealer agrees to receive and process vehicles that are voluntarily returned by the customer or  
12 returned to the lessor at the end of the lease term.

13 (iii) Any clause or provision in any franchise or agreement between a dealer and a  
14 manufacturer, factory branch, distributor or distributor branch, or between a dealer and any captive  
15 finance source, that is in violation of or that is inconsistent with any of the provisions of this section  
16 shall be deemed null and void and without force and effect to the extent it violates this section.

17 (iv) Any captive finance source who engages directly or indirectly in purposeful contacts  
18 within this state in connection with the offering or advertising the availability of financing for the  
19 sale or lease of motor vehicles within this state, or who has business dealings within this state, shall  
20 be subject to the provisions of this section and shall be subject to the jurisdiction of the courts of this  
21 state.

22 (v) The applicability of this section is not affected by a choice of law clause in any

1 agreement, waiver, novation or any other written instrument.

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

6 (2) A manufacturer or distributor may not do any of the following:

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

14 (ii) Fail or refuse to offer to its same line-make new motor vehicle dealers all models  
15 manufactured for that line-make, including, but not limited to, any model that contains a separate  
16 label or badge indicating a upgraded version of the same model; or

17 (iii) Require as prerequisite to receiving a model or series of vehicles that a new motor  
18 vehicle dealer pay an extra fee or purchase unreasonable advertising displays or other materials, or  
19 remodel, renovate or recondition the dealer's existing facilities;

20 (b) Refuse to disclose to a new motor vehicle dealer the method and manner of distribution  
21 of new motor vehicles by the manufacturer or distributor, including any numerical calculation or  
22 formula used, nationally or within the dealer's market, to make the allocations within thirty days of

1 a request. Any information or documentation provided by the manufacturer may be subject to a  
2 reasonable confidentiality agreement;

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

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

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

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

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

1 (e) Offer any refunds or other types of inducements to any dealer for the purchase of new  
2 motor vehicles of a certain line-make to be sold to this state or any political subdivision of this state  
3 without making the same offer available upon request to all other new motor vehicle dealers of the  
4 same line-make;

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

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

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

16 (i) Operating a pre-existing dealership temporarily for a reasonable period.

17 (ii) Operating a pre-existing dealership which is for sale at a reasonable price.

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

21 (i) A manufacturer may not, except as provided by this section, directly or indirectly:

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

1 (ii) Operate a dealership; or

2 (iii) Act in the capacity of a new motor vehicle dealer: *Provided*, That a manufacturer may  
3 own an interest, other than stock in a publicly held company, solely for investment purposes;

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

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

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

11 (k) The twelve-month period may be extended for an additional twelve months. Notice of  
12 any such extension of the original twelve-month period must be given to any dealer of the same  
13 line-make whose dealership is located in the same county, or within twenty air miles of, the  
14 dealership owned or controlled by the manufacturer or distributor prior to the expiration of the  
15 original twelve-month period. Any dealer receiving the notice may protest the proposed extension  
16 within thirty days of receiving notice by bringing a declaratory judgment action in the circuit court  
17 for the county in which the new motor vehicle dealer is located to determine whether good cause  
18 exists for the extension;

19 (l) For the purpose of broadening the diversity of its dealer body and enhancing opportunities  
20 for qualified persons who are part of a group who have historically been under represented in its  
21 dealer body, or other qualified persons who lack the resources to purchase a dealership outright, but  
22 for no other purpose, a manufacturer or distributor may temporarily own an interest in a dealership

1 if the manufacturer's or distributor's participation in the dealership is in a bona fide relationship with  
 2 a franchised dealer who:

- 3 (i) Has made a significant investment in the dealership, subject to loss;
- 4 (ii) Has an ownership interest in the dealership; and
- 5 (iii) Operates the dealership under a plan to acquire full ownership of the dealership within  
 6 a reasonable time and under reasonable terms and conditions;
- 7 (m) Unreasonably withhold consent to the sale, transfer or exchange of the dealership to a  
 8 qualified buyer capable of being licensed as a new motor vehicle dealer in this state;
- 9 (n) Fail to respond in writing to a request for consent to a sale, transfer or exchange of a  
 10 dealership within sixty days after receipt of a written application from the new motor vehicle dealer  
 11 on the forms generally ~~utilized~~ used by the manufacturer or distributor for ~~such~~ that purpose and  
 12 containing the information required therein. Failure to respond to the request within the sixty days  
 13 is consent;
- 14 (o) Unfairly prevent a new motor vehicle dealer from receiving reasonable compensation for  
 15 the value of the new motor vehicle dealership;
- 16 (p) Audit any motor vehicle dealer in this state for warranty parts or warranty service  
 17 compensation, service compensation, service or sales incentives, manufacturer rebates or other forms  
 18 of sales incentive compensation more than twelve months after the claim for payment or  
 19 reimbursement has been made by the automobile dealer. No chargeback may be made until the  
 20 dealer has had notice and an opportunity to support the claim in question. No otherwise valid  
 21 reimbursements claims may be denied once properly submitted with the manufacturer's submission  
 22 guidelines due to clerical error or omission. ~~Provided, That the provisions of This subsection do~~



1 does not apply where a claim is fraudulent. In addition, the manufacturer or distributor is responsible  
2 for reimbursing the audited dealer for all copying, postage and administrative costs incurred by the  
3 dealer during the audit. Any charges to a dealer as a result of the audit must be separately billed to  
4 the dealer;

5 (q) Unreasonably restrict a dealer's ownership of a dealership through noncompetition  
6 covenants, site control, sublease, collateral pledge of lease, right of first refusal, option to purchase,  
7 or otherwise. A right of first refusal is created when:

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

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

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

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

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

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

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

1 (ii) To provide for the succession of the franchise agreement to designated family members  
2 or qualified management in the event of death or incapacity of the dealer or its principle owner or  
3 owners.

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

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

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

19 (s) Make any material or unreasonable change in any franchise agreement, including, but not  
20 limited to, the dealer's area of responsibility, without giving the new motor vehicle dealer written  
21 notice by certified mail of the change at least sixty days prior to the effective date of the change, and  
22 shall include an explanation of the basis for the alteration. This explanation shall include, but is not

1 limited to, a reasonable and commercially acceptable copy of all information, data, evaluations, and  
2 methodology considered, reviewed or relied on or based its decision on, to propose the change to the  
3 dealer's area of responsibility. Any information or documentation provided by the manufacturer or  
4 distributor may be produced subject to a reasonable confidentiality agreement. At any time prior to  
5 the effective date of an alteration of a new motor vehicle dealer's area of responsibility, and after the  
6 completion of any internal appeal process pursuant to the manufacturer's or distributor's policy  
7 manual, the motor vehicle dealer may petition the court to enjoin or prohibit the alteration. The court  
8 shall enjoin or prohibit the alteration of a motor vehicle dealer's area of responsibility unless the  
9 franchisor shows, by a preponderance of the evidence, that the alteration is reasonable and justifiable  
10 in light of market conditions. If a motor vehicle dealer petitions the court, no alteration to a motor  
11 vehicle dealer's area of responsibility shall become effective until a final determination by the court.  
12 If a new motor vehicle dealer's area of responsibility is altered, the manufacturer shall allow  
13 twenty-four months for the motor vehicle dealer to become sales effective prior to taking any action  
14 claiming a breach or nonperformance of the motor vehicle dealer's sales performance  
15 responsibilities;

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

19 (u) Compel a new motor vehicle dealer through its finance subsidiaries to agree to  
20 unreasonable operating requirements or to directly or indirectly terminate a franchise through the  
21 actions of a finance subsidiary of the franchisor. This subsection does not limit the right of a finance  
22 subsidiary to engage in business practices in accordance with the usage of trade in retail or wholesale

1 vehicle financing;

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

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

6 (x) Sell, offer to sell or sell exclusively an extended service contract, maintenance plan or  
7 similar product, including gap or other products, offered, endorsed or sponsored by the manufacturer  
8 or distributor by the following means:

9 (i) By an act or statement that the manufacturer or distributor will impact the dealer, whether  
10 it is express or implied or made directly or indirectly.

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

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

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

21 (v) Nothing in this paragraph prohibits a manufacturer or distributor from providing incentive  
22 programs to a new vehicle dealer who makes the voluntary decision to offer to sell, sell or sell

1 exclusively an extended service contract, extended maintenance plan or similar product offered,  
2 endorsed or sponsored by the manufacturer or distributor.

3       (y) (i) Require a dealer to purchase goods or services from a vendor selected, identified, or  
4 designated by a manufacturer, factory branch, distributor, distributor branch or one of its affiliates  
5 by agreement, program, incentive provision or otherwise without making available to the dealer the  
6 option to obtain the goods or services of substantially similar quality and overall design from a  
7 vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor or  
8 distributor branch: *Provided*, That such approval may not be unreasonably withheld, and: *Provided*,  
9 *however*, That the dealer's option to select a vendor is not available if the manufacturer or distributor  
10 provides substantial reimbursement for the goods or services offered. Substantial reimbursement is  
11 equal to or greater than sixty-five percent of the cost, which may not be greater than the cost of  
12 reasonably available similar goods and services in close proximity to the dealer's market: *Provided*,  
13 further, That the goods are not subject to the manufacturer or distributor's intellectual property or  
14 trademark rights, or trade dress usage guidelines. This section does not apply to any voluntary  
15 agreement entered into after a dispute or civil action has arisen for which the dealer has accepted  
16 separate and valuable consideration. Any prospective agreement is void as a matter of law.

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

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

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

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

15 (5) Except when prevented by an act of God, labor strike, transportation disruption outside  
16 the control of the manufacturer or time of war, a manufacturer or distributor may not refuse or fail  
17 to deliver, in reasonable quantities and within a reasonable time, to a dealer having a franchise  
18 agreement for the retail sale of any motor vehicle sold or distributed by the manufacturer, any new  
19 motor vehicle or parts or accessories to new motor vehicles as are covered by the franchise if the  
20 vehicles, parts and accessories are publicly advertised as being available for delivery or are actually  
21 being delivered. All models offered for sale by the manufacturer, without any enrollment, surcharge,  
22 unreasonable facility or building or any other unreasonable type of upgrade requirement or

1 acquisition fee, shall be available to the franchised dealer at no additional cost for that particular  
2 model of vehicle.

3 **§17A-6A-11. Where motor vehicle dealer deceased or incapacitated.**

4 (1) Any designated family member of a deceased or incapacitated new motor vehicle dealer  
5 may succeed the dealer in the ownership or operation of the dealership under the existing dealer  
6 agreement if the designated family member gives the manufacturer or distributor written notice of  
7 his or her intention to succeed to the dealership within one hundred twenty days after the dealer's  
8 death or incapacity, agrees to be bound by all of the terms and conditions of the dealer agreement,  
9 and the designated family member meets the current criteria generally applied by the manufacturer  
10 or distributor in qualifying new motor vehicle dealers. A manufacturer or distributor may refuse to  
11 honor the existing dealer agreement with the designated family member only for good cause. In  
12 determining whether good cause exists for refusing to honor the agreement, the manufacturer or  
13 distributor has the burden of proving that the designated successor is a person who is not of good  
14 moral character or does not meet the manufacturer's existing written, reasonable and uniformly  
15 applied standards for business experience and financial qualifications. The designated family  
16 member will have a minimum of one year to satisfy the manufacturer's written and reasonable  
17 standards and financial qualifications for appointment as the dealer principal.

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

22 (3) If a manufacturer or distributor believes that good cause exists for refusing to honor the

1 succession, the manufacturer or distributor may, within forty-five days after receipt of the notice of  
2 the designated family member's intent to succeed the dealer in the ownership and operation of the  
3 dealership, or within forty-five days after the receipt of the requested personal and financial data,  
4 serve upon the designated family member notice of its refusal to approve the succession.

5 (4) The notice of the manufacturer or distributor provided in subsection (3) above shall state  
6 the specific grounds for the refusal to approve the succession and that discontinuance of the  
7 agreement shall take effect not less than ~~ninety days~~ one hundred and eighty days after the date the  
8 notice is served.

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

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

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



1 designated person was convicted, the dealer agreement shall remain in effect pending exhaustion of  
2 all appeals only if the motor vehicle dealer establishes a likelihood of success on appeal and the  
3 public interest will not be harmed by keeping the dealer agreement in effect pending entry of final  
4 judgment after the appeal.

5 **§17A-6A-12. Relocation.**

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

15 (2) Before a manufacturer or distributor enters into a dealer agreement establishing or  
16 relocating a new motor vehicle dealer within a relevant market area where the same line-make is  
17 represented, the manufacturer or distributor shall give written notice to each new motor vehicle  
18 dealer of the same line-make in the relevant market area of its intention to establish an additional  
19 dealer or to relocate an existing dealer within that relevant market area.

20 (3) Within sixty days after receiving the notice provided in subsection (2) of this section, or  
21 within sixty days after the end of any appeal procedure provided by the manufacturer or distributor,  
22 a new motor vehicle dealer of the same line-make within the affected ~~relevant~~ relative market area

1 may bring a declaratory judgment action in the circuit court for the county in which the new motor  
2 vehicle dealer is located to determine whether good cause exists for the establishing or relocating  
3 of the proposed new motor vehicle dealer. ~~Provided, That a new motor vehicle dealer of the same~~  
4 ~~line-make within the affected relevant market area shall not be permitted to bring such an action if~~  
5 ~~the proposed relocation site would be further from the location of the new motor vehicle dealer of~~  
6 ~~the same line-make than the location from which the dealership is being moved.~~ Once an action has  
7 been filed, the manufacturer or distributor may not establish or relocate the proposed new motor  
8 vehicle dealer until the circuit court has rendered a decision on the matter. An action brought  
9 pursuant to this section shall be given precedence over all other civil matters on the court's docket.  
10 The manufacturer has the burden of proving that good cause exists for establishing or relocating a  
11 proposed new motor vehicle dealer.

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

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

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

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

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

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

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

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

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

12 **§17A-6A-12a. Restriction on motor vehicle dealer's use of dealership property.**

13 Notwithstanding the terms of any dealer agreement, or other agreement, a manufacturer,  
14 distributor or representative may not:

15 (1) Unreasonably limit or impair the ability of a franchised dealer to use the dealership  
16 property as the dealer considers appropriate;

17 (2) Control the use of the dealership property after the franchise is terminated or  
18 discontinued; or

19 (3) At any time exercise exclusive control over the use of the dealership property.

20 **§17A-6A-12b. Property use agreement.**

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

1 (1) Entering into a franchise;

2 (2) Approving a franchised dealer's application to add a line-make;

3 (3) Approving a franchised dealer's application to relocate a franchise;

4 (4) Approving a sale or transfer of a dealer, dealership or franchise; or

5 (5) Entering into a sales or service incentive, rebate or other agreement with the dealer or any  
6 agreement impacting dealers right to retail reimbursement for parts and labor rates.

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

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

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

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

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

12 (2) The termination of the franchise between the parties to the property use agreement.

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

15 **§17A-6A-13. Obligations regarding warranties.**

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

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

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

14           (a) Fail to perform any warranty obligation;

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

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

20           (4) All claims made by a new motor vehicle dealer pursuant to this section for labor and parts  
21 shall be paid within thirty days after their approval. All claims shall be either approved or  
22 disapproved by the manufacturer or distributor within thirty days after their receipt on a proper form

1 generally used by the manufacturer or distributor and containing the usually required information  
2 therein. Any claim not specifically disapproved in writing within thirty days after the receipt of the  
3 form is considered to be approved and payment shall be made within thirty days. The manufacturer  
4 has the right to initiate an audit of a claim within twelve months after payment and to charge back  
5 to the new motor vehicle dealer the amount of any false, fraudulent or unsubstantiated claim, subject  
6 to the requirements of section eight-a of this article.

7 (5) The manufacturer shall accept the return of any new and unused part, component or  
8 accessory that was ordered by the dealer, and shall reimburse the dealer for the full cost charged to  
9 the dealer for the part, component or accessory if the dealer returns the part and makes a claim for  
10 the return of the part within one year of the dealer's receipt of the part, component or accessory and  
11 provides reasonable documentation, to include any changed part numbers to match new part  
12 numbers, provided that the part was ordered for a warranty or recall repair.

13 **§17A-6A-14a. Open account protection.**

14 If there is a dispute between the manufacturer, factory branch, distributor or distributor  
15 branch and the dealer with respect to any matter referred to this article, either party may notify, in  
16 writing, the other party of its request to challenge, through the manufacturer's appeal process or the  
17 circuit courts of the State of West Virginia. A manufacturer, factory branch, distributor, or  
18 distributor branch may not collect chargebacks, fully or in part, either through direct payment or by  
19 charge to the dealer's account, for warranty parts or service compensation, including service  
20 incentives, sales incentives, other sales compensation, surcharges, fees, penalties or any financial  
21 imposition of any type arising from an alleged failure of the dealer to comply with a policy of,  
22 directive from, or agreement with the manufacturer, factory branch, distributor or distributor branch

1 until thirty days following final notice of the amount charged to the dealer following all internal  
2 processes of the manufacturer, factory, factory branch, distributor or distributor branch. Within thirty  
3 days following receipt of final notice, the dealer may, in writing, request a hearing or seek civil relief  
4 from the manufacturer's appeal process or the circuit courts of the State of West Virginia. If a dealer  
5 requests a hearing or files a civil action, the manufacturer, factory branch, distributor or distributor  
6 branch may not collect the chargeback, fully or in part, either through direct payment or by charge  
7 to the dealer's account, until the completion of the hearing or civil action, and all appeal, civil or  
8 otherwise, have been exhausted concerning the validity of the chargeback.

9 **§17A-6A-15. Dealer data, obligation of manufacturer, vendors, suppliers and others; consent**  
10 **to access dealership information; indemnification of dealer.**

11 (a) Except as expressly authorized in this section, no manufacturer, factory branch, distributor  
12 or distributor branch may require a new motor vehicle dealer to provide its customer lists, customer  
13 information, consumer contact information, transaction data or service files. Any requirement by a  
14 manufacturer, factory branch, distributor or distributor branch that a new motor vehicle dealer  
15 provide its customer lists, customer information, consumer contact information, transaction data or  
16 service files as a condition to the dealer's participation in any incentive program or contest for a  
17 customer or dealer to receive any incentive payments otherwise earned under an incentive program  
18 or contest, for the dealer to obtain consumer or customer leads, or for the dealer to receive any other  
19 benefits, rights, merchandise or services for which the dealer would otherwise be entitled to obtain  
20 under the franchise or any other contract or agreement, or which is customarily provided to dealers,  
21 is voidable at the option of the dealer, unless all of the following conditions are satisfied: (i) The  
22 customer information requested relates solely to the specific program requirements or goals

1 associated with the manufacturer's or distributor's own vehicle makes and does not require that the  
2 dealer provide general customer information or other information related to the dealer; (ii) the  
3 requirement is lawful and would also not require the dealer to allow any customer the right to opt  
4 out under the federal Gramm-Leach-Bliley Act, 15 U. S.C., Subchapter I, § 1608, et seq.; and (iii)  
5 the dealer is not required to allow the manufacturer or distributor or any third party to have direct  
6 access to the dealer's computer system, but the dealer is instead permitted to provide the same dealer,  
7 consumer or customer data or information specified by the manufacturer or distributor by timely  
8 obtaining and pushing or otherwise furnishing the required data in a widely accepted file format such  
9 as comma delimited in accordance with subsection (j)(1) of this section. Nothing contained in this  
10 section limits the ability of the manufacturer, factory branch, distributor or distributor branch to  
11 require that the dealer provide, or use in accordance with the law, the customer information related  
12 solely to the manufacturer's or distributor's own vehicle makes to the extent necessary to do any of  
13 the following:

14 (1) Satisfy any safety or recall notice obligations;

15 (2) Complete the sale and delivery of a new motor vehicle to a customer;

16 (3) Validate and pay customer or dealer incentives;

17 (4) Submit to the manufacturer, factory branch, distributor or distributor branch claims for  
18 any services supplied by the dealer for any claim for warranty parts or repairs;

19 (b) At the request of a manufacturer or distributor or of a third party acting on behalf of a  
20 manufacturer or distributor, a dealer may only be required to provide customer information related  
21 solely to the manufacturer's or distributor's own vehicle makes for reasonable marketing purposes,  
22 market research, consumer surveys, market analysis and dealership performance analysis, but the



1 dealer is only required to provide the customer information to the extent lawfully permissible; to the  
2 extent the requested information relates solely to specific program requirements or goals associated  
3 with the manufacturer's or distributor's own vehicle makes and does not require the dealer to provide  
4 general customer information or other information related to the dealer; and to the extent the  
5 requested information can be provided without requiring that the dealer allow any customer the right  
6 to opt out under the federal Gramm-Leach-Bliley Act, 15 U. S.C., Subchapter I, § 6801, et seq.

7 (c) A manufacturer, factory branch, distributor or distributor branch may not access or obtain  
8 dealer or customer data from or write dealer or customer data to a dealer management computer  
9 system used by a motor vehicle dealer located in this state, or require or coerce a motor vehicle  
10 dealer located in this state to use a particular dealer management computer system, unless the dealer  
11 management computer system allows the dealer to reasonably maintain the security, integrity and  
12 confidentiality of the data maintained in the system. A manufacturer, factory branch, distributor,  
13 distributor branch, dealer management computer system vendor or any third party acting on behalf  
14 of any manufacturer, factory branch, distributor, distributor branch or dealer management computer  
15 system vendor may not prohibit a dealer from providing a means to regularly and continually monitor  
16 the specific data accessed from or written to the dealer's computer system and from complying with  
17 applicable state and federal laws and any rules or regulations promulgated thereunder. These  
18 provisions do not impose an obligation on a manufacturer, factory branch, distributor, distributor  
19 branch, dealer management computer system vendor or any third party acting on behalf of any  
20 manufacturer, factory branch, distributor, distributor branch or dealer management computer system  
21 vendor to provide that capability.

22 (d) No manufacturer, factory branch, distributor, distributor branch, dealer management

1 computer system vendor or any third party acting on behalf of any manufacturer, factory branch,  
2 distributor, distributor branch or dealer management computer system vendor may access or use  
3 customer or prospect information maintained in a dealer management computer system used by a  
4 motor vehicle dealer located in this state for purposes of soliciting any customer or prospect on  
5 behalf of or directing the customer or prospect to, any other dealer. The limitations in this subsection  
6 do not apply to:

7 (1) A customer that requests a reference to another dealership;

8 (2) A customer that moves more than 60 miles away from the dealer whose data was  
9 accessed;

10 (3) Customer or prospect information that was provided to the dealer by the manufacturer,  
11 factory branch, distributor or distributor branch; or

12 (4) Customer or prospect information obtained by the manufacturer, factory branch,  
13 distributor or distributor branch where the dealer agrees to allow the manufacturer, factory branch,  
14 distributor, distributor branch, dealer management computer system vendor, or any third party acting  
15 on behalf of any manufacturer, factory branch, distributor, distributor branch or dealer management  
16 computer system vendor the right to access and use the customer or prospect information maintained  
17 in the dealer's dealer management computer system for purposes of soliciting any customer or  
18 prospect of the dealer on behalf of, or directing the customer or prospect to, any other dealer in a  
19 separate, stand-alone written instrument dedicated solely to the authorization.

20 (e) A manufacturer, factory branch, distributor, distributor branch, dealer management  
21 computer system vendor, or any third party acting on behalf of any manufacturer, factory branch,  
22 distributor, distributor branch or dealer management computer system vendor, may not provide

1 access to customer or dealership information maintained in a dealer management computer system  
2 used by a motor vehicle dealer located in this state, without first obtaining the dealer's prior express  
3 written consent, revocable by the dealer upon five business days written notice, to provide the access.  
4 Prior to obtaining the consent and prior to entering into an initial contract or renewal of a contract  
5 with a dealer located in this State, the manufacturer, factory branch, distributor, distributor branch,  
6 dealer management computer system vendor, or any third party acting on behalf of, or through any  
7 manufacturer, factory branch, distributor, distributor branch or dealer management computer system  
8 vendor shall provide to the dealer a written list of all specific third parties to whom any data obtained  
9 from the dealer has actually been provided within the twelve-month period ending November 1 of  
10 the prior year. The list shall further describe the scope and specific fields of the data provided. In  
11 addition to the initial list, a dealer management computer system vendor or any third party acting on  
12 behalf of, or through a dealer management computer system vendor shall provide to the dealer an  
13 annual list of third parties to whom the data is actually being provided on November 1 of each year  
14 and to whom the data has actually been provided in the preceding twelve months and describe the  
15 scope and specific fields of the data provided. The list shall be provided to the dealer by January 1  
16 of each year. Any dealer management computer system vendor's contract that directly relates to the  
17 transfer or accessing of dealer or dealer customer information must conspicuously state, "NOTICE  
18 TO DEALER: THIS AGREEMENT RELATES TO THE TRANSFER AND ACCESSING OF  
19 CONFIDENTIAL INFORMATION AND CONSUMER RELATED DATA". The consent does not  
20 change the person's obligations to comply with the terms of this section and any additional state or  
21 federal laws, and any rules or regulations promulgated thereunder, applicable to them with respect  
22 to the access. In addition, no dealer management computer system vendor may refuse to provide a

1 dealer management computer system to a motor vehicle dealer located in this state if the dealer  
2 refuses to provide any consent under this subsection.

3 (f) A dealer management computer system vendor, or third party acting on behalf of or  
4 through any dealer management computer system vendor, may not access or obtain data from or  
5 write data to a dealer management computer system used by a motor vehicle dealer located in this  
6 State, unless the dealer management computer system allows the dealer to reasonably maintain the  
7 security, integrity, and confidentiality of the customer and dealership information maintained in the  
8 system. A dealer management computer system vendor, or third party acting on behalf of or through  
9 any dealer management computer system vendor, may not prohibit a dealer from providing a means  
10 to regularly and continually monitor the specific data accessed from or written to the dealer's  
11 computer system and from complying with applicable state and federal laws and any rules or  
12 regulations promulgated thereunder. These provisions do not impose an obligation on a  
13 manufacturer, factory branch, distributor, distributor branch, dealer management computer system  
14 vendor or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor  
15 branch or dealer management computer system vendor to provide that capability.

16 (g) A manufacturer, factory branch, distributor, distributor branch, dealer management  
17 computer system vendor or any third party acting on behalf of or through any dealer management  
18 computer system vendor, having electronic access to customer or motor vehicle dealership data in  
19 a dealership management computer system used by a motor vehicle dealer located in this state shall  
20 provide notice to the dealer of any security breach of dealership or customer data obtained through  
21 the access, which at the time of the breach was in the possession or custody of the manufacturer,  
22 factory branch, distributor, distributor branch, dealer management computer system vendor or third

1 party. The disclosure notification shall be made without unreasonable delay by the manufacturer,  
2 factory branch, distributor, distributor branch, dealer management computer system vendor or third  
3 party following discovery by the person, or notification to the person, of the breach. The disclosure  
4 notification shall describe measures reasonably necessary to determine the scope of the breach and  
5 corrective actions which may be taken in an effort to restore the integrity, security and confidentiality  
6 of the data. The measures and corrective actions shall be implemented as soon as practicable by all  
7 persons responsible for the breach.

8 (h) This section does not preclude, prohibit or deny the right of the manufacturer, factory  
9 branch, distributor or distributor branch to receive customer or dealership information from a motor  
10 vehicle dealer located in this state for the purposes of complying with federal or state safety  
11 requirements or implementing steps related to manufacturer recalls at times necessary in order to  
12 comply with federal and state requirements or manufacturer recalls provided that receiving this  
13 information from the dealer does not impair, alter or reduce the security, integrity, and confidentiality  
14 of the customer and dealership information collected or generated by the dealer.

15 (i) As used in this section:

16 (1) "Dealer management computer system" means a computer hardware and software system  
17 that is owned or leased by the dealer, including a dealer's use of web applications, software or  
18 hardware, whether located at the dealership or provided at a remote location and that provides access  
19 to customer records and transactions by a motor vehicle dealer located in this state and that allows  
20 the motor vehicle dealer timely information in order to sell vehicles, parts or services through the  
21 motor vehicle dealership.

22 (2) "Dealer management computer system vendor" means a seller or reseller of dealer

1 management computer systems, a person that sells computer software for use on dealer management  
2 computer systems or a person who services or maintains dealer management computer systems, but  
3 only to the extent that each of the sellers, resellers or other persons listed in this subdivision are  
4 engaged in those activities.

5 (3) "Security breach" means an incident of unauthorized access to and acquisition of records  
6 or data containing dealership or dealership customer information where unauthorized use of the  
7 dealership or dealership customer information has occurred or is reasonably likely to occur or that  
8 creates a material risk of harm to a dealership or a dealership's customer. Any incident of  
9 unauthorized access to and acquisition of records or data containing dealership or dealership  
10 customer information, or any incident of disclosure of dealership customer information to one or  
11 more third parties which has not been specifically authorized by the dealer or customer, is a security  
12 breach.

13 (j) The provisions of subsection (4), section nineteen of this article does not apply to an  
14 action brought under this section against a dealer management computer system vendor.

15 (k)(1) Notwithstanding any of the terms or provisions contained in this section or in any  
16 consent, authorization, release, novation, franchise or other contract or agreement, whenever a  
17 manufacturer, factory branch, distributor, distributor branch, dealer management computer system  
18 vendor or any third party acting on behalf of or through, or approved, referred, endorsed, authorized,  
19 certified, granted preferred status or recommended by, a manufacturer, factory branch, distributor,  
20 distributor branch or dealer management computer system vendor requires that a new motor vehicle  
21 dealer provide any dealer, consumer or customer data or information through direct access to a  
22 dealer's computer system, the dealer is not required to provide, and may not be required to consent

1 to provide in any written agreement, direct access to its computer system. The dealer may instead  
2 provide the same dealer, consumer or customer data or information specified by the requesting party  
3 by timely obtaining and pushing or otherwise furnishing the requested data to the requesting party  
4 in a widely accepted file format, such as comma delimited: *Provided*, That when a dealer would  
5 otherwise be required to provide direct access to its computer system under the terms of a consent,  
6 authorization, release, novation, franchise or other contract or agreement, a dealer that elects to  
7 provide data or information through other means may be charged a reasonable initial set-up fee and  
8 a reasonable processing fee based on the actual incremental costs incurred by the party requesting  
9 the data for establishing and implementing the process for the dealer. A term or provision contained  
10 in any consent, authorization, release, novation, franchise or other contract or agreement which is  
11 inconsistent with any term or provision contained in this subsection is voidable at the option of the  
12 dealer.

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

1 behalf of these entities includes, but is not limited to, judgments, settlements, fines, penalties,  
2 litigation costs, defense costs, court costs, costs related to the disclosure of security breaches and  
3 attorneys' fees arising out of complaints, claims, civil or administrative actions, and, to the fullest  
4 extent allowable under the law, governmental investigations and prosecutions to the extent caused  
5 by a security breach or the access, storage, maintenance, use, sharing, disclosure or retention of the  
6 dealer's consumer or customer data or other information or maintenance or services provided to any  
7 computer system used by a new motor vehicle dealer.

8 (l) This section applies to contracts entered into and effective at the time of the effective date  
9 of this section and any contracts entered into after that.

10 **§17A-6A-16. Exports; rebuttable presumption on behalf of dealer.**

11 It is unlawful for a manufacturer or distributor to take or threaten to take any adverse action  
12 against a dealer pursuant to an export or sale-for-resale prohibition because the dealer sold or leased  
13 a vehicle to a customer who either exported the vehicle to a foreign country or resold the vehicle in  
14 violation of the prohibition, unless the export or sale-for-resale prohibition policy was provided to  
15 the dealer in writing prior to the sale or lease, and the dealer knew or reasonably should have known  
16 of the customer's intent to export or resell the vehicle in violation of the prohibition at the time of  
17 sale or lease. If the dealer causes the vehicle to be registered in this state or any other state, a  
18 rebuttable presumption is established that the dealer did not have reason to know of the customer's  
19 intent to export or resell the vehicle.

20 **§17A-6A-17. Manufacturer performance standards; uniform application, prohibited**  
21 **practices.**

22 A manufacturer may not require dealer adherence to a performance standard or standards



1 which are not applied uniformly to other similarly situated dealers. In addition to any other  
2 requirements of the law, the following shall apply:

3 (1) A performance standard, sales objective, or program for measuring dealer performance  
4 that may have a material effect on a dealer, including the dealer's right to payment under any  
5 incentive or reimbursement program, and the application of the standard, sales objective or program  
6 by a manufacturer, distributor or factory branch, shall be reasonable and based on accurate  
7 information.

8 (2) Prior to beginning any incentive or reimbursement program, the manufacturer shall  
9 provide in writing to each dealer of the same line-make that chooses to participate in the program  
10 the dealer's performance requirement or sales goal or objective, which shall include a reasonable and  
11 general explanation of the methodology, criteria, and calculations used.

12 (3) A manufacturer shall allocate an adequate supply of vehicles, appropriate to the market  
13 and season, to its dealers by series, product line and model to assist the dealer in achieving any  
14 performance standards established by the manufacturer and distributor.

15 (4) The manufacturer or distributor has the burden of proving by a preponderance of the  
16 evidence that the performance standard, sales objective or program for measuring dealership  
17 performance complies with this article.

18 **§17A-6A-18. Indemnity.**

19 Notwithstanding the terms of any dealer agreement, a manufacturer or distributor shall  
20 indemnify and hold harmless its dealers for any reasonable expenses incurred, including damages,  
21 court costs and attorney's fees, arising ~~sotely~~ solely out of complaints, claims or actions which relate to the  
22 manufacture, assembly, design of a new motor vehicle or other functions by the manufacturer or

1 distributor beyond the control of the dealer, including, without limitation, the selection by the  
2 manufacturer or distributor of parts or components for the vehicle, and any damages to merchandise  
3 occurring prior to acceptance of the vehicle by the dealer to the dealer if the carrier is designated by  
4 the manufacturer or distributor, if the new motor vehicle dealer gives timely notice to the  
5 manufacturer or distributor of the complaint, claim or action.

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

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

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

18 (3) A manufacturer or distributor or new motor vehicle dealer may bring an action for  
19 declaratory judgment for determination of any controversy arising pursuant to this article.

20 (4) Any corporation or association which is primarily owned by or composed of dealers and  
21 which primarily represents the interests of dealers has standing to file a petition or cause of action  
22 with the court of competent jurisdiction for itself or by, for or on behalf of any, or a group of, new

1 motor vehicle dealers for any violation of this article or for the determination of any rights created  
2 by this article.

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

8 **§17A-6A-20. Injunctive relief.**

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

13 **§17A-6A-21. West Virginia law to apply.**

14 Notwithstanding the terms, provisions or requirements of any franchise agreement, contract  
15 or other agreement of any kind between a new motor vehicle dealer and a manufacturer or  
16 distributor, captive finance source, or any subsidiary, affiliate or partner of a manufacturer or  
17 distributor, the provisions of the Code of West Virginia apply to all such agreements and contracts.  
18 Any provisions in the agreements and contracts which violate the terms of this section are null and  
19 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, §17A-6A-12b, §17A-6A-14a, are new; therefore, they have been completely underscored.

The contents of §17A-6A-15, §17A-6A-16 and §17A-6A-17 are new; they have been completely underscored.

Sections §17A-6A-18, 19 and 20 and 21 have been renumbered as indicated below.

<b>Current code section</b>	<b>Renumbered in bill</b>
§17A-6A-15	§17A-6A-18
§17A-6A-16	§17A-6A-19
§17A-6A-17	§17A-6A-20
§17A-6A-18	§17A-6A-21