

WEST VIRGINIA LEGISLATURE
EIGHTY-SECOND LEGISLATURE
REGULAR SESSION, 2015



ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 453

(SENATORS WOELFEL, BLAIR, FERNS, GAUNCH, M. HALL,
LEONHARDT, MULLINS, NOHE, PLYMALE, PREZIOSO, SNYDER,
TAKUBO, TRUMP, WALTERS, WILLIAMS AND KARNES,
ORIGINAL SPONSORS)

[PASSED MARCH 14, 2015; IN EFFECT NINETY DAYS FROM PASSAGE.]

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[Passed March 14, 2015; in effect ninety days from passage.]

AN ACT to amend and reenact §17A-6A-1, §17A-6A-3, §17A-6A-4, §17A-6A-5, §17A-6A-6, §17A-6A-8, §17A-6A-8a, §17A-6A-9, §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-15 and §17A-6A-18 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto five new sections, designated §17A-6A-12a, §17A-6A-14a, §17A-6A-15a, §17A-6A-15b and §17A-6A-15c, all relating generally to motor vehicle dealers, distributors, wholesalers and manufacturers; adopting legislative findings; defining terms; modifying terms relating to cancellations of dealer agreements; modifying circumstances not constituting good cause to cancel an agreement; clarifying the standard of proof in termination, cancellation and nonrenewal disputes; modifying compensation terms when contract is discontinued; setting interest rate where payments to dealers from manufacturers or distributors are untimely; adding conduct which is considered a prohibited

practice; increasing to one hundred eighty days the notice period afforded dealers should a manufacturer or distributor not approve a successor dealer; clarifying that air miles are used to determine distances between dealerships; restricting manufacturer and distributor use of dealership property; modifying obligations under warranties; and clarifying indemnity practices.

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-8, §17A-6A-8a, §17A-6A-9, §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-15 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 five new sections, designated §17A-6A-12a, §17A-6A-14a, §17A-6A-15a, §17A-6A-15b and §17A-6A-15c, all to read as follows:

ARTICLE 6A. MOTOR VEHICLE DEALERS, DISTRIBUTORS, WHOLESALEERS AND MANUFACTURERS.

§17A-6A-1. Legislative finding.

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

§17A-6A-3. Definitions.

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

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

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

30 (3) “Distributor” means any person, resident or nonresident
31 who, in whole or in part, offers for sale, sells or distributes any
32 new motor vehicle to a new motor vehicle dealer or who

33 maintains a factor representative, resident or nonresident, or
34 who controls any person, resident or nonresident who, in whole
35 or in part, offers for sale, sells or distributes any new motor
36 vehicle to a new motor vehicle dealer.

37 (4) “Established place of business” means a permanent,
38 enclosed commercial building located within this state easily
39 accessible and open to the public at all reasonable times and
40 at which the business of a new motor vehicle dealer,
41 including the display and repair of motor vehicles, may be
42 lawfully carried on in accordance with the terms of all
43 applicable building codes, zoning and other land-use
44 regulatory ordinances and as licensed by the Division of
45 Motor Vehicles.

46 (5) “Factory branch” means an office maintained by a
47 manufacturer or distributor for the purpose of selling or
48 offering for sale vehicles to a distributor, wholesaler or new
49 motor vehicle dealer, or for directing or supervising, in whole
50 or in part, factory or distributor representatives. The term
51 includes any sales promotion organization maintained by a
52 manufacturer or distributor which is engaged in promoting
53 the sale of a particular make of new motor vehicles in this
54 state to new motor vehicle dealers.

55 (6) “Factory representative” means an agent or employee
56 of a manufacturer, distributor or factory branch retained or
57 employed for the purpose of making or promoting the sale of
58 new motor vehicles or for supervising or contracting with
59 new motor vehicle dealers or proposed motor vehicle dealers.

60 (7) “Good faith” means honesty in fact and the
61 observation of reasonable commercial standards of fair
62 dealing in the trade.

63 (8) “Manufacturer” means any person who manufactures
64 or assembles new motor vehicles; or any distributor, factory

65 branch or factory representative and, in the case of a school
66 bus, truck tractor, road tractor or truck as defined in section
67 one, article one of this chapter, also means a person engaged
68 in the business of manufacturing a school bus, truck tractor,
69 road tractor or truck, their engines, power trains or rear axles,
70 including when engines, power trains or rear axles are not
71 warranted by the final manufacturer or assembler, and any
72 distributor, factory branch or representative.

73 (9) “Motor vehicle” means that term as defined in section
74 one, article one of this chapter, including motorcycle, school
75 bus, truck tractor, road tractor, truck, recreational vehicle, all-
76 terrain vehicle and utility terrain vehicle as defined in
77 subsections (c), (d), (f), (h), (l) (nn) and (vv), respectively, of
78 said section, but not including a farm tractor or farm
79 equipment. The term “motor vehicle” also includes a school
80 bus, truck tractor, road tractor, truck, its component parts,
81 including, but not limited to, its engine, transmission or rear
82 axle manufactured for installation in a school bus, truck
83 tractor, road tractor or truck.

84 (10) “New motor vehicle” means a motor vehicle which
85 is in the possession of the manufacturer, distributor or
86 wholesaler, or has been sold only to a new motor vehicle
87 dealer and on which the original title has not been issued
88 from the new motor vehicle dealer.

89 (11) “New motor vehicle dealer” means a person who holds
90 a dealer agreement granted by a manufacturer or distributor for
91 the sale of its motor vehicles, who is engaged in the business of
92 purchasing, selling, leasing, exchanging or dealing in new
93 motor vehicles, service of said vehicles, warranty work and sale
94 of parts who has an established place of business in this state
95 and is licensed by the Division of Motor Vehicles.

96 (12) “Person” means a natural person, partnership,
97 corporation, association, trust, estate or other legal entity.

98 (13) “Proposed new motor vehicle dealer” means a
99 person who has an application pending for a new dealer
100 agreement with a manufacturer or distributor. “Proposed
101 motor vehicle dealer” does not include a person whose dealer
102 agreement is being renewed or continued.

103 (14) “Relevant market area” means the area located
104 within a twenty-air mile radius around an existing same line-
105 make new motor vehicle dealership: *Provided*, That a
106 fifteen-mile relevant market area as it existed prior to the
107 effective date of this statute shall apply to any proposed new
108 motor vehicle dealership as to which a manufacturer or
109 distributor and the proposed new motor vehicle dealer have
110 executed on or before the effective date of this statute a
111 written agreement, including a letter of intent, performance
112 agreement or commitment letter, concerning the
113 establishment of the proposed new motor vehicle dealership.

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

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

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

8 (b) Acted in good faith;

9 (c) Engaged in full and open communication with
10 franchised dealer; and

11 (d) Has good cause for the cancellation, termination,
12 nonrenewal or discontinuance.

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

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

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

25 (c) The effect on the public cancellation of the franchise
26 agreement would cause;

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

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

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

34 (g) The dealer's overall performance under the reasonable
35 terms of the franchise agreement. This shall include the overall
36 fairness of the agreement terms, the enforceability of the
37 agreement and the relative bargaining power of the parties.

38 (h) Whether the manufacturer made available the
39 appropriate volumes and type of motor vehicles to the dealer
40 and a reasonable opportunity for sales and service training to
41 the dealer.

42 (3) In addition to the requirements of subsection (2) of
43 this section, if the failure by the new motor vehicle dealer to
44 comply with a provision of the dealer agreement relates to the
45 performance of the new motor vehicle dealer in sales or
46 service, good cause exists for the purposes of a termination,
47 cancellation, nonrenewal or discontinuance under subsection
48 (1) of this section when the new motor vehicle dealer failed
49 to effectively carry out the performance provisions of the
50 dealer agreement if all of the following have occurred:

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

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

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

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

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

1 Notwithstanding any agreement, the following alone does
2 not constitute good cause for the termination, cancellation,
3 nonrenewal or discontinuance of a dealer agreement under
4 subdivision (d), subsection (1), section four of this article:

5 (a) A change in ownership of the new motor vehicle
6 dealer's dealership. This subdivision does not authorize any
7 change in ownership which would have the effect of a sale or
8 an assignment of the dealer agreement or a change in the
9 principal management of the dealership without the
10 manufacturer's or distributor's prior written consent which
11 may not be unreasonably or untimely withheld.

12 (b) The refusal of the new motor vehicle dealer to
13 purchase or accept delivery of any new motor vehicle parts,
14 accessories or any other commodity or services not ordered
15 by the new motor vehicle dealer.

16 (c) The fact that the new motor vehicle dealer owns, has
17 an investment in, participates in the management of, or holds
18 a dealer agreement for the sale of another make or line of new
19 motor vehicles, or that the new motor vehicle dealer has
20 established another make or line of new motor vehicles in the
21 same dealership facilities as those of the manufacturer or
22 distributor: *Provided*, That the new motor vehicle dealer
23 maintains a reasonable line of credit for each make or line of
24 new motor vehicles, and that the new motor vehicle dealer
25 remains in substantial compliance with the terms and
26 conditions of the dealer agreement and with any reasonable
27 facilities' requirements of the manufacturer or distributor.

28 (d) The fact that the new motor vehicle dealer sells or
29 transfers ownership of the dealership or sells or transfers
30 capital stock in the dealership to the new motor vehicle
31 dealer's spouse, son or daughter: *Provided*, That the sale or
32 transfer shall not have the effect of a sale or an assignment of
33 the dealer agreement or a change in the principal
34 management of the dealership without the manufacturer's or
35 distributor's prior written consent.

36 (e) This section does not apply to any voluntary
37 agreement entered into after a disagreement or civil action
38 has arisen for which the dealer has accepted separate and
39 valuable consideration. Any prospective agreement is void
40 as a matter of law.

§17A-6A-6. Burden of proof.

1 For each termination, cancellation, nonrenewal or
2 discontinuance, the manufacturer or distributor has the

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

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

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

6 (a) Any new motor vehicle inventory, manufactured for
7 sale in the United States, purchased from the manufacturer,
8 distributor or other dealers, in the ordinary course of
9 business, which has not been materially altered, substantially
10 damaged or driven for more than one thousand miles, except
11 that for any new motorcycle, new all-terrain vehicle or utility
12 terrain vehicle inventory, including motorhomes and travel
13 trailers, regardless of gross vehicle weight, purchased from
14 the manufacturer or distributor, that inventory must not have
15 been materially altered, substantially damaged or driven for
16 more than fifty miles and for motor vehicles with a rating
17 greater than twenty-six thousand one pounds gross vehicle
18 weight driven no more than five thousand miles. For
19 purposes of a school bus, truck tractor, road tractor or truck,
20 materially altered does not include dealer add-ons, such as,
21 but not limited to, racks, mud flaps, fifth wheel assemblies,
22 dump or tank bodies;

23 (b) Supplies and parts inventory purchased at the
24 published list price purchased from, or at the direction of, the
25 manufacturer or distributor. Parts shall be restricted to those
26 listed in the manufacturer's or distributor's current parts
27 catalog;

28 (c) Equipment, special tools, furnishings and signs
29 purchased or leased from, or at the direction of, the
30 manufacturer or distributor; and

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

34 (2) Upon the termination, cancellation, nonrenewal or
35 discontinuance of a dealer agreement by the manufacturer
36 or distributor, the manufacturer or distributor shall also pay
37 to the new motor vehicle dealer a sum equal to the current,
38 fair rental value of his or her established place of business
39 for a period of three years from the effective date of
40 termination, cancellation, nonrenewal or discontinuance, or
41 the remainder of the lease, whichever is less. If the dealer,
42 directly or indirectly, owns the dealership facility, the
43 manufacturer shall pay the dealer a sum equal to the
44 reasonable rental value of the dealership premises for three
45 years. However, the dealer shall have the obligation to
46 mitigate his or her damages, including, but not limited to,
47 listing the facility with a commercial real estate agent and
48 other reasonable steps to sell or lease the property. During
49 this three-year period the manufacturer shall have the right
50 to occupy and use the facilities until such time as the dealer
51 is able to otherwise sell or lease the property to another
52 party. The payment required by this subsection does not
53 apply to any termination, cancellation, nonrenewal or
54 discontinuance made pursuant to subsection (c), section
55 seven of this article.

56 (3) In addition to the items listed in subsections (1) and
57 (2) of this section, the termination, cancellation or
58 nonrenewal where the manufacturer or distributor is
59 discontinuing the sale of a product line, the manufacturer or
60 distributor shall pay or provide to the motor vehicle dealer:

61 (a) Support of the manufacturer's or distributor's
62 warranty obligations by making parts available and
63 compensating dealers for warranty parts and labor for five
64 years: *Provided*, That the motor vehicle dealer has adequate
65 facilities, trained personnel and equipment to perform
66 warranty repairs;

67 (b) Any actual damages that can be proven by a dealer by
68 a preponderance of the evidence;

69 (c) Any costs the dealer incurred for facility upgrades or
70 alternations required by the manufacturer, distributor or
71 factory branch within the previous five years; and

72 (d) Within forty-five days after termination, dealer shall
73 submit evidence of items to the manufacturer in accordance
74 with reasonable manufacturer requirements. The
75 manufacturer shall have thirty days from receipt of this
76 evidence to note any objection. If not objected thereto,
77 payment by the manufacturer to the dealer shall be made
78 within thirty days. Thereafter, interest accumulates at the rate
79 of the Fifth Federal Reserve District's secondary discount
80 rate in effect on January 2 of the year in which payment is
81 due plus five percentage points. If a dispute arises over the
82 sufficiency of any evidence or an amount submitted, when
83 interest begins to accumulate will be determined in
84 accordance with West Virginia common law.

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

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

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

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

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

16 (2) In no event may:

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

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

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

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

38 (4) The retail rate charged by the dealer for parts is
39 established by the dealer submitting to the manufacturer or
40 distributor one hundred sequential nonwarranty customer-
41 paid service repair orders that contain warranty-like parts or
42 ninety consecutive days of nonwarranty customer-paid
43 service repair orders that contain warranty-like parts covering
44 repairs made no more than one hundred eighty days before
45 the submission and declaring the average percentage markup.

46 (5) The retail rate customarily charged by the dealer for
47 labor rate must be established using the same process as
48 provided under subsection (4) of this section and declaring
49 the average labor rate. The average labor rate must be
50 determined by dividing the amount of the dealer's total labor
51 sales by the number of total hours that generated those sales.
52 If a labor rate and parts markup rate simultaneously declared
53 by the dealer, the dealer may use the same repair orders to
54 complete each calculation as provided under subsection (4)
55 of this section. A reasonable allowance for labor for
56 diagnostic time shall be either included in the manufacturer's
57 labor time allowance or listed as a separate compensable
58 item. A dealer may request additional time allowance for
59 either diagnostic or repair time, which request shall not be
60 unreasonable denied by the manufacturer.

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

64 (a) Repairs for manufacturer or distributor special events,
65 specials or promotional discounts for retain customer repairs;

66 (b) Parts sold at wholesale;

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

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

72 (e) Tires;

73 (f) Vehicle reconditioning.

74 (7) The average of the parts markup rates and labor rate
75 is presumed to be reasonable and must go into effect thirty
76 days following the manufacturer's approval. A manufacturer
77 or distributor may rebut the presumption by a preponderance
78 of the evidence that a rate is unreasonable in light of the
79 practices of all other same line-make franchised motor
80 vehicle dealers in an economically similar area of the state
81 offering the same line-make vehicles, not later than thirty
82 days after submission. If the average parts markup rate or
83 average labor rate is rebutted, or both, the manufacturer or
84 distributor shall propose an adjustment of the average
85 percentage markup based on that rebuttal not later than thirty
86 days after submission.

87 (8) Each manufacturer, in establishing a schedule of
88 compensation for warranty work, shall rely on the vehicle
89 dealer's declaration of hourly labor rates and parts as stated
90 in subsections (4), (5) and (6) of this section and may not
91 obligate any vehicle dealer to engage in unduly burdensome
92 or time-consuming documentation of rates or parts, including
93 obligating vehicle dealers to engage in transaction-by-
94 transaction or part-by-part calculations.

95 (9) A dealer or manufacturer may demand that the
96 average parts markup or average labor rate be calculated
97 using the process provided under subsections (4) and (5) of
98 this section; however, the demand for the average parts
99 markup may not be made within twelve months of the last
100 parts markup declaration and the demand for the average
101 labor rate may not be made within twelve months of the last

102 labor rate declaration. If a parts markup or labor rate is
103 demanded by the dealer or manufacturer, the dealer shall
104 determine the repair orders to be included in the calculation
105 under subsections (4) and (5) of this section.

106 (10) As it applies to a school bus, truck tractor, road
107 tractor and truck as defined in section one, article one of this
108 chapter, with a gross vehicle weight on excess of twenty-six
109 thousand one pounds the manufacturer, distributor and/or O.
110 E. M. supplier shall pay the dealer its incurred actual time at
111 the retail labor rate for retrieving a motor vehicle and
112 returning a motor vehicle to dealer's designated parking area.
113 Dealer shall be paid \$50 minimum for each operation that
114 requires the use of each electronic tool (i.e. laptop computer).
115 The manufacturer or distributor may not reduce what is paid
116 to a dealer for this retrieval or return time, or for the
117 electronic tool charge. The dealer is allowed to add to a
118 completed warranty repair order three hours for every
119 twenty-four hours the manufacturer, distributor and/or O. E.
120 M. supplier makes the dealer stop working on a vehicle while
121 the manufacturer, distributor and/or O. E. M. supplier decides
122 how it wants the dealer to proceed with the repairs.

123 (11) All claims made by motor vehicle dealers pursuant
124 to the section for compensation for delivery, preparation,
125 warranty and recall work, including labor, parts and other
126 expenses, shall be paid by the manufacturer within thirty days
127 after approval and shall be approved or disapproved by the
128 manufacturer within thirty days after receipt. When any
129 claim is disapproved, the dealer shall be notified in writing of
130 the grounds for disapproval. No claim which has been
131 approved and paid may be charged back to the dealer unless
132 it can be shown that the claim was false or fraudulent, that the
133 repairs were not properly made or were unnecessary to
134 correct the defective condition or the dealer failed to
135 reasonable substantiate the claim in accordance with the
136 written requirements of the manufacturer or distributor in

137 effect at the time the claim arose. No charge back may be made
138 until the dealer has had notice and an opportunity to support the
139 claim in question. No otherwise valid reimbursement claims
140 may be denied once properly submitted within manufacturers'
141 submission guidelines due to a clerical error or omission or
142 based on a different level of technician technical certification or
143 the dealer's failure to subscribe to any manufacturer's
144 computerized training programs.

145 (12) Notwithstanding the terms of a franchise agreement
146 or provision of law in conflict with this section, the dealer's
147 delivery, preparation, warranty and recall obligations
148 constitutes the dealer's sole responsibility for product liability
149 as between the dealer and manufacturer and, except for a loss
150 caused by the dealer's failure to adhere to the obligations, a
151 loss caused by the dealer's negligence or intentional
152 misconduct or a loss caused by the dealer's modification of
153 a product without manufacturer authorization, the
154 manufacturer shall reimburse the dealer for all loss incurred
155 by the dealer, including legal fees, court costs and damages,
156 as a result of the dealer having been named a party in a
157 product liability action.

§17A-6A-9. Payment of compensation.

1 (1) Compensation for new motor vehicle inventory under
2 subdivision (a), subsection (1), section eight of this article
3 shall be paid within sixty days after the effective date of the
4 termination, cancellation, nonrenewal or discontinuance.
5 Compensation for items of personal property required by
6 subdivisions (b), (c) and (d), subsection (1), section eight of
7 this article shall be paid within sixty days after the effective
8 date of the termination, cancellation, nonrenewal or
9 discontinuance. The new motor vehicle dealer will meet all
10 reasonable requirements of the dealer agreement with respect
11 to the return of the repurchased personal property, including
12 providing clear title.

13 (2) Reasonable compensation pursuant to subdivision (a),
14 subsection (1), section eight of this article may not be less
15 than the new motor vehicle dealer's net acquisition cost,
16 including any special promotions ordered by the
17 manufacturer, such as advertising charges. Reasonable
18 compensation pursuant to subdivision (b) of said subsection
19 shall be the amount stated in the manufacturer's or
20 distributor's current parts price list. Reasonable
21 compensation pursuant to subdivisions (c) and (d) of said
22 subsection shall be the fair market value of the personal
23 property determined by a five-year straight line depreciation
24 schedule.

25 (3) In the event payment is not made within ninety days
26 as provided in subsection (1) of this section, interest shall
27 accumulate at the rate of the Fifth Federal Reserve District's
28 secondary discount rate in effect on January 2 of the year in
29 which payment is due plus five percentage points. In
30 determining when interest begins to accumulate, the court
31 may consider whether the dealer reasonably complied with
32 the reasonable manufacturer's submission requirements and
33 the reasonableness of the manufacturer's determinations in
34 refusing or delaying payment to the dealer.

§17A-6A-10. Prohibited practices.

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

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

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

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

21 (d) Enter into any agreement with the manufacturer or
22 distributor or do any other act prejudicial to the new motor
23 vehicle dealer by threatening to terminate a dealer agreement,
24 limit inventory, invoke sales and service warranty or other
25 types of audits or any contractual agreement or understanding
26 existing between the dealer and the manufacturer or
27 distributor. Notice in good faith to any dealer of the dealer's
28 violation of any terms or provisions of the dealer agreement
29 is not a violation of this article;

30 (e) Change the capital structure or financial requirements
31 of the new motor vehicle dealership without reasonable
32 business justification in light of the dealer's market, historical
33 performance and compliance with prior capital structure or
34 financial requirements and business necessity, or the means
35 by or through which the dealer finances the operation of the
36 dealership if the dealership at all times meets any reasonable
37 capital standards determined by the manufacturer in
38 accordance with uniformly applied criteria. The burden of
39 proof is on the manufacturer to prove business justification
40 by a preponderance of the evidence;

41 (f) Refrain from participation in the management of,
42 investment in or the acquisition of any other line of new
43 motor vehicle or related products, provided that the dealer

44 maintains a reasonable line of credit for each make or line of
45 vehicle, remains in compliance with reasonable facilities
46 requirements and makes no change in the principal
47 management of the dealer. Notwithstanding the terms of any
48 franchise agreement, a manufacturer or distributor may not
49 enforce any requirements, including facility requirements,
50 that a new motor vehicle dealer establish or maintain
51 exclusive facilities, personnel or display space, when the
52 requirements are unreasonable considering current economic
53 conditions and are not otherwise justified by reasonable
54 business considerations. The burden of proving that current
55 economic conditions or reasonable business considerations
56 justify exclusive facilities is on the manufacturer or
57 distributor and must be proven by a preponderance of the
58 evidence;

59 (g) Change the location of the new motor vehicle
60 dealership or make any substantial alterations to the
61 dealership premises, where to do so would be unreasonable.
62 The burden is on the manufacturer or distributor to prove
63 reasonableness by a preponderance of the evidence;

64 (h) Prospectively assent to a waiver of trial by jury
65 release, arbitration, assignment, novation, waiver or estoppel
66 which would relieve any person from liability imposed by
67 this article or require any controversy between a new motor
68 vehicle dealer and a manufacturer or distributor to be referred
69 to a person other than the duly constituted courts of this state
70 or the United States District Courts of the Northern or
71 Southern Districts of West Virginia. Nothing in this prevents
72 a motor vehicle dealer, after a civil action is filed, from
73 entering into any agreement of settlement, arbitration,
74 assignment or waiver of a trial by jury;

75 (i) To coerce or require any dealer, whether by agreement,
76 program, incentive provision or otherwise, to construct
77 improvements to its facilities or to install new signs or other

78 franchisor image elements that replace or substantially alter
79 those improvements, signs or franchisor image elements
80 completed within the proceeding ten years that were required
81 and approved by the manufacturer, factory branch, distributor
82 or distributor branch or one of its affiliates. If a manufacturer,
83 factory branch, distributor or distributor branch offers
84 incentives or other payments to a consumer or dealer paid on
85 individual vehicle sales under a program offered after the
86 effective date of this subdivision and available to more than one
87 dealer in the state that are premised, wholly or in part, on dealer
88 facility improvements or installation of franchiser image
89 elements required by and approved by the manufacturer, factory
90 branch, distributor or distributor branch and completed within
91 ten years preceding the program shall be deemed to be in
92 compliance with the program requirements pertaining to
93 construction of facilities or installation of signs or other
94 franchisor image elements that would replace or substantially
95 alter those previously constructed or installed with that ten year
96 period. This subdivision shall not apply to a program that is in
97 effect with more than one dealer in the state on the effective
98 date of this subsection, nor to any renewal of such program, nor
99 to a modification that is not a substantial modification of a
100 material term or condition of such program;

101 (j) To condition the award, sale, transfer, relocation or
102 renewal of a franchise or dealer agreement or to condition
103 sales, service, parts or finance incentives upon site control or
104 an agreement to renovate or make substantial improvements
105 to a facility: *Provided*, That voluntary and noncoerced
106 acceptance of such conditions by the dealer in writing,
107 including, but not limited to, a written agreement for which
108 the dealer has accepted separate and valuable consideration,
109 does not constitute a violation;

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

113 (i) In this section, “captive finance source” means any
114 financial source that provides automotive-related loans or
115 purchases retail installment contracts or lease contracts for
116 motor vehicles in this state and is, directly or indirectly,
117 owned, operated or controlled by such manufacturer, factory
118 branch, distributor or distributor branch.

119 (ii) It shall be unlawful for any manufacturer, factory
120 branch, captive finance source, distributor or distributor
121 branch, or any field representative, officer, agent or any
122 representative of them, notwithstanding the terms, provisions
123 or conditions of any agreement or franchise, to require any of
124 its franchised dealers located in this state to agree to any
125 terms, conditions or requirements in subdivisions (a) through
126 (j), inclusive, of this subsection in order for any such dealer
127 to sell to any captive finance source any retail installment
128 contract, loan or lease of any motor vehicles purchased or
129 leased by any of the dealer’s customers, or to be able to
130 participate in, or otherwise, directly or indirectly, obtain the
131 benefits of the consumer transaction incentive program
132 payable to the consumer or the dealer and offered by or
133 through any captive finance source as to that incentive
134 program.

135 (iii) The applicability of this section is not affected by a
136 choice of law clause in any agreement, waiver, novation or
137 any other written instrument.

138 (iv) It shall be unlawful for a manufacturer or distributor
139 to use any subsidiary corporation, affiliated corporation or
140 any other controlled corporation, partnership, association or
141 person to accomplish what would otherwise be illegal
142 conduct under this section on the part of the manufacturer or
143 distributor.

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

146 (a) (i) Fail to deliver new motor vehicles or new motor
147 vehicle parts or accessories within a reasonable time and in
148 reasonable quantities relative to the new motor vehicle
149 dealer's market area and facilities, unless the failure is caused
150 by acts or occurrences beyond the control of the manufacturer
151 or distributor, or unless the failure results from an order by
152 the new motor vehicle dealer in excess of quantities
153 reasonably and fairly allocated by the manufacturer or
154 distributor. No manufacturer or distributor may penalize a
155 new motor vehicle dealer for an alleged failure to meet sales
156 quotas where the alleged failure is due to actions of the
157 manufacturer or distributor;

158 (ii) Refuse to offer to its same line-make new motor
159 vehicle dealers all models manufactured for that line-make,
160 including, but not limited to, any model that contains a
161 separate label or badge indicating an upgraded version of the
162 same model. This provision does not apply to motorhome,
163 travel trailer or fold-down camping trailer manufacturers; or

164 (iii) Require as a prerequisite to receiving a model or
165 series of vehicles that a new motor vehicle dealer pay an
166 extra unreasonable acquisition fee or surcharge, or purchase
167 unreasonable advertising displays or other materials, or
168 conduct unreasonable remodeling, renovation or
169 reconditioning of the dealer's facilities, or any other type of
170 unreasonable upgrade requirement;

171 (b) Refuse to disclose to a new motor vehicle dealer the
172 method and manner of distribution of new motor vehicles by
173 the manufacturer or distributor, including any numerical
174 calculation or formula used, nationally or within the dealer's
175 market, to make the allocations within thirty days of a
176 request. Any information or documentation provided by the
177 manufacturer may be subject to a reasonable confidentiality
178 agreement;

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

185 (d) Increase prices of new motor vehicles which the new
186 motor vehicle dealer had ordered and then eventually
187 delivered to the same retail consumer for whom the vehicle
188 was ordered, if the order was made prior to the dealer's
189 receipt of the written official price increase notification. A
190 sales contract signed by a private retail consumer and binding
191 on the dealer which has been submitted to the vehicle
192 manufacturer is evidence of each order. In the event of
193 manufacturer or distributor price reductions or cash rebates,
194 the amount of any reduction or rebate received by a dealer
195 shall be passed on to the private retail consumer by the
196 dealer. Any price reduction in excess of \$5 shall apply to all
197 vehicles in the dealer's inventory which were subject to the
198 price reduction. A price difference applicable to new model
199 or series motor vehicles at the time of the introduction of the
200 new models or the series is not a price increase or price
201 decrease. This subdivision does not apply to price changes
202 caused by the following:

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

205 (ii) In the case of foreign-made vehicles or components,
206 revaluation of the United States dollar; or

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

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

216 (f) Release to an outside party, except under subpoena or
217 in an administrative or judicial proceeding to which the new
218 motor vehicle dealer or the manufacturer or distributor are
219 parties, any business, financial or personal information which
220 has been provided by the dealer to the manufacturer or
221 distributor, unless the new motor vehicle dealer gives his or
222 her written consent;

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

226 (h) Establish a new motor vehicle dealership. A
227 manufacturer or distributor is not considered to have
228 established a new motor vehicle dealership if the
229 manufacturer or distributor is:

230 (A) Operating a preexisting dealership temporarily for a
231 reasonable period.

232 (B) Operating a preexisting dealership which is for sale
233 at a reasonable price.

234 (C) Operating a dealership with another person who has
235 made a significant investment in the dealership and who will
236 acquire full ownership of the dealership under reasonable
237 terms and conditions;

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

240 (A) Own an interest in a dealer or dealership: *Provided*,
241 That a manufacturer may own stock in a publicly held
242 company solely for investment purposes;

243 (B) Operate a dealership, including, but not limited to,
244 displaying a motor vehicle intended to facilitate the sale of
245 new motor vehicles other than through franchised dealers,
246 unless the display is part of an automobile trade show that
247 more than two automobile manufacturers participate in; or

248 (C) Act in the capacity of a new motor vehicle dealer;

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

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

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

258 (k) The twelve-month period may be extended for an
259 additional twelve months. Notice of any such extension of
260 the original twelve-month period must be given to any dealer
261 of the same line-make whose dealership is located in the
262 same county, or within twenty air miles of, the dealership
263 owned or controlled by the manufacturer or distributor prior
264 to the expiration of the original twelve-month period. Any
265 dealer receiving the notice may protest the proposed
266 extension within thirty days of receiving notice by bringing
267 a declaratory judgment action in the circuit court for the
268 county in which the new motor vehicle dealer is located to
269 determine whether good cause exists for the extension;

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270 (l) For the purpose of broadening the diversity of its
271 dealer body and enhancing opportunities for qualified persons
272 who are part of a group who have historically been under
273 represented in its dealer body, or other qualified persons who
274 lack the resources to purchase a dealership outright, but for
275 no other purpose, a manufacturer or distributor may
276 temporarily own an interest in a dealership if the
277 manufacturer's or distributor's participation in the dealership
278 is in a bona fide relationship with a franchised dealer who:

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

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

282 (iii) Operates the dealership under a plan to acquire full
283 ownership of the dealership within a reasonable time and
284 under reasonable terms and conditions;

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

288 (n) Fail to respond in writing to a request for consent to
289 a sale, transfer or exchange of a dealership within sixty days
290 after receipt of a written application from the new motor
291 vehicle dealer on the forms generally utilized by the
292 manufacturer or distributor for such purpose and containing
293 the information required therein. Failure to respond to the
294 request within the sixty days is consent;

295 (o) Unfairly prevent a new motor vehicle dealer from
296 receiving reasonable compensation for the value of the new
297 motor vehicle dealership;

298 (p) Audit any motor vehicle dealer in this state for
299 warranty parts or warranty service compensation, service

300 compensation, service or sales incentives, manufacturer rebates
301 or other forms of sales incentive compensation more than
302 twelve months after the claim for payment or reimbursement
303 has been made by the automobile dealer. No chargeback may
304 be made until the dealer has had notice and an opportunity to
305 support the claim in question within thirty days of receiving
306 notice of the chargeback. No otherwise valid reimbursements
307 claims may be denied once properly submitted in accordance
308 with the manufacturer's submission guidelines due to clerical
309 error or omission. This subsection does not apply where a
310 claim is fraudulent. In addition, the manufacturer or distributor
311 is responsible for reimbursing the audited dealer for all copying,
312 postage and administrative costs incurred by the dealer during
313 the audit. Any charges to a dealer as a result of the audit must
314 be separately billed to the dealer;

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

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

326 (ii) The proposed change of the dealership's ownership
327 or the transfer of the new vehicle dealer's assets does not
328 involve the transfer of assets or the transfer or issuance of
329 stock by the dealer or one of the dealer's owners to one of the
330 following:

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

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

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

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

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

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

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

353 (iv) Except as otherwise provided in this subsection, the
354 manufacturer or distributor agrees to pay the reasonable
355 expenses, including reasonable out-of-pocket professional
356 fees which shall include, but not be limited to, accounting,
357 legal or appraisal services fees that are incurred by the
358 proposed owner or transferee before the manufacturer's or
359 distributor's exercise of its right of first refusal. Payment of
360 the expenses and fees for professional services are not
361 required if the dealer fails to submit an accounting of those
362 expenses and fees within twenty days of the dealer's receipt
363 of the manufacturer's or distributor's written request for such

364 an accounting. Such a written account of fees and expenses
365 may be requested by a manufacturer or distributor before
366 exercising its right of first refusal;

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

371 (s) Make any material or unreasonable change in any
372 franchise agreement, including, but not limited to, the
373 dealer's area of responsibility without giving the new motor
374 vehicle dealer written notice by certified mail of the change
375 at least sixty days prior to the effective date of the change and
376 shall include an explanation of the basis for the alteration.
377 Upon written request from the dealer, this explanation shall
378 include, but is not limited to, a reasonable and commercially
379 acceptable copy of all information, data, evaluations, and
380 methodology relied on or based its decision on, to propose
381 the change to the dealer's area of responsibility. Any
382 information or documentation provided by the manufacturer
383 or distributor may be produced subject to a reasonable
384 confidentiality agreement. At any time prior to the effective
385 date of an alteration of a new motor vehicle dealer's area of
386 responsibility and after the completion of any internal appeal
387 process pursuant to the manufacturer's or distributor's policy
388 manual, the motor vehicle dealer may petition the court to
389 enjoin or prohibit the alteration within thirty days of receipt
390 of the manufacturer's internal appeal process decision. The
391 court shall enjoin or prohibit the alteration of a motor vehicle
392 dealer's area of responsibility unless the franchisor shows, by
393 a preponderance of the evidence, that the alteration is
394 reasonable and justifiable in light of market conditions. If a
395 motor vehicle dealer petitions the court, no alteration to a
396 motor vehicle dealer's area of responsibility shall become
397 effective until a final determination by the court. If a new
398 motor vehicle dealer's area of responsibility is altered, the

399 manufacturer shall allow twenty-four months for the motor
400 vehicle dealer to become sales effective prior to taking any
401 action claiming a breach or nonperformance of the motor
402 vehicle dealer's sales performance responsibilities;

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

408 (u) Compel a new motor vehicle dealer through its
409 finance subsidiaries to agree to unreasonable operating
410 requirements or to directly or indirectly terminate a franchise
411 through the actions of a finance subsidiary of the franchisor.
412 This subsection does not limit the right of a finance
413 subsidiary to engage in business practices in accordance with
414 the usage of trade in retail or wholesale vehicle financing;

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

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

421 (x) To require or coerce any new motor vehicle dealer to
422 sell, offer to sell or sell exclusively extended service contract,
423 maintenance plan or similar product, including gap or other
424 products, offered, endorsed or sponsored by the manufacturer
425 or distributor by the following means:

426 (i) By an act of statement that the manufacturer or
427 distributor will adversely impact the dealer, whether it is
428 express or implied;

429 (ii) By a contract made to the dealer on the condition that
430 the dealer shall sell, offer to sell or sell exclusively an
431 extended service contract, extended maintenance plan or
432 similar product offered, endorsed or sponsored by the
433 manufacturer or distributor;

434 (iii) By measuring the dealer's performance under the
435 franchise agreement based on the sale of extended service
436 contracts, extended maintenance plans or similar products
437 offered, endorsed or sponsored by the manufacturer or
438 distributor;

439 (iv) By requiring the dealer to actively promote the sale
440 of extended service contracts, extended maintenance plans or
441 similar products offered, endorsed or sponsored by the
442 manufacturer or distributor;

443 (v) Nothing in this paragraph prohibits a manufacturer or
444 distributor from providing incentive programs to a new
445 vehicle dealer who makes the voluntary decision to offer to
446 sell, sell or sell exclusively an extended service contract,
447 extended maintenance plan or similar product offered,
448 endorsed or sponsored by the manufacturer or distributor;

449 (y) Require a dealer to purchase goods or services from
450 a vendor selected, identified or designated by a manufacturer,
451 factory branch, distributor, distributor branch or one of its
452 affiliates by agreement, program, incentive provision or
453 otherwise without making available to the dealer the option
454 to obtain the goods or services of substantially similar quality
455 and overall design from a vendor chosen by the dealer and
456 approved by the manufacturer, factory branch, distributor or
457 distributor branch: *Provided*, That such approval may not be
458 unreasonably withheld: *Provided, however*, That the dealer's
459 option to select a vendor is not available if the manufacturer
460 or distributor provides substantial reimbursement for the
461 goods or services offered. Substantial reimbursement is equal

462 to the difference in price of the goods and services from
463 manufacturer's proposed vendor and the motor vehicle
464 dealer's selected vendor: *Provided further*, That the goods
465 are not subject to the manufacturer or distributor's intellectual
466 property or trademark rights, or trade dress usage guidelines.

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

472 (4) Except as may otherwise be provided in this article,
473 no manufacturer or franchisor may sell, directly or indirectly,
474 any new motor vehicle to a consumer in this state, except
475 through a new motor vehicle dealer holding a franchise for
476 the line-make covering such new motor vehicle. This
477 subsection does not apply to manufacturer or franchisor sales
478 of new motor vehicles to charitable organizations, qualified
479 vendors or employees of the manufacturer or franchisor.

480 (5) Except when prevented by an act of God, labor strike,
481 transportation disruption outside the control of the
482 manufacturer or time of war, a manufacturer or distributor
483 may not refuse or fail to deliver, in reasonable quantities and
484 within a reasonable time, to a dealer having a franchise
485 agreement for the retail sale of any motor vehicle sold or
486 distributed by the manufacturer, any new motor vehicle or
487 parts or accessories to new motor vehicles as are covered by
488 the franchise if the vehicles, parts and accessories are
489 publicly advertised as being available for delivery or are
490 actually being delivered.

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

1 (1) Any designated family member of a deceased or
2 incapacitated new motor vehicle dealer may succeed the

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

24 (2) The manufacturer or distributor may request from a
25 designated family member such personal and financial data
26 as is reasonably necessary to determine whether the existing
27 dealer agreement should be honored. The designated family
28 member shall supply the personal and financial data promptly
29 upon the request.

30 (3) If a manufacturer or distributor believes that good cause
31 exists for refusing to honor the succession, the manufacturer or
32 distributor may, within forty-five days after receipt of the notice
33 of the designated family member's intent to succeed the dealer
34 in the ownership and operation of the dealership, or within
35 forty-five days after the receipt of the requested personal and
36 financial data, serve upon the designated family member notice
37 of its refusal to approve the succession.

38 (4) The notice of the manufacturer or distributor provided
39 in subsection (3) of this section shall state the specific
40 grounds for the refusal to approve the succession and that
41 discontinuance of the agreement shall take effect not less than
42 one hundred-eighty days after the date the notice is served.

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

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

53 (7) If the manufacturer challenges the succession, it
54 maintains the burden of proof to show good cause by a
55 preponderance of the evidence. If the person seeking
56 succession files a civil action within the one hundred eighty
57 days set forth in subsection (4) of this section, no action may
58 be taken by the manufacturer contrary to the dealer
59 agreement until such time as the civil action and any appeal
60 has been exhausted: *Provided*, That when a motor vehicle
61 dealer appeals a decision upholding a manufacturer's
62 decision to not allow succession based upon the designated
63 person's insolvency, conviction of a crime punishable by
64 imprisonment in excess of one year under the law which the
65 designated person was convicted, the dealer agreement shall
66 remain in effect pending exhaustion of all appeals only if the
67 motor vehicle dealer establishes a likelihood of success on
68 appeal and the public interest will not be harmed by keeping
69 the dealer agreement in effect pending entry of final
70 judgment after the appeal.

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

1 (1) As used in this section, “relocate” and “relocation” do
2 not include the relocation of a new motor vehicle dealer
3 within four miles of its established place of business or an
4 existing new motor vehicle dealer sells or transfers the
5 dealership to a new owner and the successor new motor
6 vehicle dealership owner relocates to a location within four
7 miles of the seller’s last open new motor vehicle dealership
8 location. The relocation of a new motor vehicle dealer to a
9 site within the area of sales responsibility assigned to that
10 dealer by the manufacturing branch or distributor may not be
11 within six air miles of another dealer of the same line-make.

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

20 (3) Within sixty days after receiving the notice provided
21 in subsection (2) of this section, or within sixty days after the
22 end of any appeal procedure provided by the manufacturer or
23 distributor, a new motor vehicle dealer of the same line-make
24 within the affected relevant market area may bring a
25 declaratory judgment action in the circuit court for the county
26 in which the new motor vehicle dealer is located to determine
27 whether good cause exists for the establishing or relocating
28 of the proposed new motor vehicle dealer: *Provided*, That a
29 new motor vehicle dealer of the same line-make within the
30 affected relevant market area shall not be permitted to bring
31 such an action if the proposed relocation site would be further
32 from the location of the new motor vehicle dealer of the same

33 line-make than the location from which the dealership is
34 being moved. Once an action has been filed, the
35 manufacturer or distributor may not establish or relocate the
36 proposed new motor vehicle dealer until the circuit court has
37 rendered a decision on the matter. An action brought
38 pursuant to this section shall be given precedence over all
39 other civil matters on the court's docket. The manufacturer
40 has the burden of proving that good cause exists for
41 establishing or relocating a proposed new motor vehicle
42 dealer.

43 (4) This section does not apply to the reopening in a
44 relevant market area of a new motor vehicle dealer that has
45 been closed within the preceding two years if the established
46 place of business of the new motor vehicle dealer is within
47 four air miles of the established place of business of the
48 closed or sold new motor vehicle dealer.

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

54 (a) Permanency and amount of the investment, including
55 any obligations incurred by the dealer in making the
56 investment;

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

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

61 (d) Whether the new motor vehicle dealers of the same
62 line-make in the relevant market area are providing adequate
63 competition and convenient consumer care for the motor

64 vehicles of that line-make in the market area, including the
65 adequacy of motor vehicle sales and qualified service
66 personnel;

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

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

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

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

1 (1) A manufacturer shall not require that a new motor
2 vehicle dealer, a proposed new motor vehicle dealer, or any
3 owner of an interest in a dealership facility enter into or agree
4 to a property use agreement as a condition to any of the
5 following:

6 (a) Awarding a dealer agreement to a prospective new
7 motor vehicle dealer.

8 (b) Adding a line make or dealer agreement to an existing
9 new motor vehicle dealer.

10 (c) Renewing a dealer agreement with an existing new
11 motor vehicle dealer.

12 (d) Approving a relocation of a new motor vehicle
13 dealer's place of business.

14 (e) Approving a sale or transfer of the ownership of a
15 dealership or a transfer of a dealer agreement to another person.

16 (2) Subsection (1) of this section does not apply to a
17 property use agreement if any of the following are offered
18 and accepted for that agreement:

19 (a) Monetary consideration.

20 (b) Separate and valuable consideration that can be
21 calculated to a sum certain.

22 (3) If a manufacturer and new motor vehicle dealer are in
23 parties to a property use agreement, the dealer agreement
24 between the manufacturer and new motor vehicle dealer is
25 terminated by a manufacturer or by a successor manufacturer
26 or by operation of law and the reason for the termination is
27 not a reason described in paragraphs (1) through (5),
28 inclusive, subdivision (c), section seven of this article, the
29 property use agreement terminates and ceases to be effective
30 at the time the dealer agreement is terminated.

31 (4) If any provision contained in a property use
32 agreement entered into on or after the effective date of the
33 amendatory act that added this subsection is inconsistent with
34 this section, the provision is voidable at the election of the
35 affected new motor vehicle dealer, proposed new motor
36 vehicle dealer, or owner of an interest in the dealership
37 facility.

38 (5) As used in this section, "property use agreement"
39 means any of the following:

40 (a) An agreement that requires that a new motor vehicle
41 dealer establish or maintain exclusive dealership facilities.

42 (b) An agreement that restricts the ability of a new motor
43 vehicle dealer, or the ability of the dealer's lessor if the dealer
44 is leasing the dealership facility, to transfer, sell, lease, or
45 change the use of the place of business of the dealership,

46 whether by sublease, lease, collateral pledge of lease, right of
47 first refusal to purchase or lease, option to purchase, option
48 to lease, or other similar agreement, regardless of who the
49 parties to that agreement are.

50 (c) Any similar agreement between a manufacturer and a
51 new motor vehicle dealer and commonly known as a site
52 control agreement or exclusive use agreement.

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

1 (1) Each new motor vehicle manufacturer or distributor
2 shall specify in writing to each of its new motor vehicle
3 dealers licensed in this state the dealer's obligations for
4 preparation, delivery and warranty service on its products.
5 The manufacturer or distributor shall compensate the new
6 motor vehicle dealer for warranty service required of the
7 dealer by the manufacturer or distributor. The manufacturer
8 or distributor shall provide the new motor vehicle dealer with
9 the schedule of compensation to be paid to the dealer for
10 parts, work and service, and the time allowance for the
11 performance of the work and service in a manner in
12 compliance with section eight-a of this article.

13 (2) The schedule of compensation shall include
14 reasonable compensation for diagnostic work, as well as
15 repair service and labor. Time allowances for the diagnosis
16 and performance of warranty work and service shall be
17 reasonable and adequate for the work to be performed. In the
18 determination of what constitutes reasonable compensation
19 under this section, section eight-a of this article shall govern:
20 *Provided*, That in the case of a dealer of new motorcycles,
21 motorboat trailers, all-terrain vehicles, utility terrain vehicles
22 and snowmobiles, the compensation of a dealer for warranty
23 parts is the greater of the dealer's cost of acquiring the part
24 plus thirty percent or the manufacturer's suggested retail
25 price: *Provided, however*, That in the case of a dealer of

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26 travel trailers, fold-down camping trailers and motorhomes,
27 the compensation of a dealer's cost for warranty parts is not
28 less than the dealer's cost of acquiring the part plus twenty
29 percent.

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

32 (a) Fail to perform any warranty obligation;

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

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

39 (4) All claims made by a new motor vehicle dealer
40 pursuant to this section for labor and parts shall be paid
41 within thirty days after their approval. All claims shall be
42 either approved or disapproved by the manufacturer or
43 distributor within thirty days after their receipt on a proper
44 form generally used by the manufacturer or distributor and
45 containing the usually required information therein. Any
46 claim not specifically disapproved in writing within thirty
47 days after the receipt of the form is considered to be approved
48 and payment shall be made within thirty days. The
49 manufacturer has the right to initiate an audit of a claim
50 within twelve months after payment and to charge back to the
51 new motor vehicle dealer the amount of any false, fraudulent
52 or unsubstantiated claim, subject to the requirements of
53 section eight-a of this article.

54 (5) The manufacturer shall accept the return of any new and
55 unused part, component or accessory that was ordered by the
56 dealer, and shall reimburse the dealer for the full cost charged

57 to the dealer for the part, component or accessory if the dealer
58 returns the part and makes a claim for the return of the part
59 within one year of the dealer's receipt of the part, component or
60 accessory and provides reasonable documentation, to include
61 any changed part numbers to match new part numbers, provided
62 that the part was ordered for a warranty repair.

§17A-6A-14a. Open account protection.

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

§17A-6A-15. Indemnity.

1 Notwithstanding the terms of any dealer agreement, a
2 manufacturer or distributor shall indemnify and hold harmless
3 its dealers for any reasonable expenses incurred, including
4 damages, court costs and attorney's fees, arising out of
5 complaints, claims or actions to the extent such complaints,
6 claims or actions relate to the manufacture, assembly, design
7 of a new motor vehicle or other functions by the
8 manufacturer or distributor beyond the control of the dealer,
9 including, without limitation, the selection by the
10 manufacturer or distributor of parts or components for the
11 vehicle, and any damages to merchandise occurring prior to
12 acceptance of the vehicle by the dealer to the dealer if the
13 carrier is designated by the manufacturer or distributor, if the
14 new motor vehicle dealer gives timely notice to the
15 manufacturer or distributor of the complaint, claim or action.

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

1 (a) Except as expressly authorized in this section, a
2 manufacturer or distributor cannot require a motor vehicle
3 dealer to provide it customer information to the manufacturer
4 or distributor unless necessary for the sale and delivery of a
5 new motor vehicle to a consumer, to validate and pay
6 consumer or dealer incentives, for manufacturer's marketing
7 purposes, for evaluation of dealer performance, for analytics
8 or to support claims submitted by the new motor vehicle
9 dealer for reimbursement for warranty parts or repairs.
10 Nothing in this section shall limit the manufacturer's ability
11 to require or use customer information to satisfy any safety or
12 recall notice obligation or other legal obligation.

13 (b) The dealer is only required to provide the customer
14 information to the extent lawfully permissible; and to the
15 extent the requested information relates solely to specific

16 program requirements or goals associated with the
17 manufacturer's or distributor's own vehicle makes. A
18 manufacturer, factory branch, distributor, distributor branch,
19 dealer management computer system vendor or any third
20 party acting on behalf of any manufacturer, factory branch,
21 distributor, distributor branch or dealer management
22 computer system vendor may not prohibit a dealer from
23 providing a means to regularly and continually monitor the
24 specific data accessed from or written to the dealer's
25 computer system and from complying with applicable state
26 and federal laws and any rules or regulations promulgated
27 thereunder. These provisions do not impose an obligation on
28 a manufacturer, factory branch, distributor, distributor
29 branch, dealer management computer system vendor or any
30 third party acting on behalf of any manufacturer, factory
31 branch, distributor, distributor branch or dealer management
32 computer system vendor to provide that capability.

33 (c) A manufacturer, factory branch, distributor,
34 distributor branch, dealer management computer system
35 vendor, or any third party acting on behalf of any
36 manufacturer, factory branch, distributor, distributor branch
37 or dealer management computer system vendor, may not
38 provide access to customer or dealership information
39 maintained in a dealer management computer system used by
40 a motor vehicle dealer located in this state, other than a
41 subsidiary or affiliate of the manufacturer factory branch,
42 distributor or distributor branch without first obtaining the
43 dealer's prior express written consent, revocable by the dealer
44 upon ten business days written notice, to provide the access.

45 Upon a written request from a motor vehicle dealer, the
46 manufacturer, factory branch, distributor, distributor branch,
47 dealer management computer system vendor, or any third
48 party acting on behalf of or through any manufacturer,
49 factory branch, distributor, distributor branch or dealer
50 management computer system vendor shall provide to the

51 dealer a written list of all specific third parties other than a
52 subsidiary or affiliate of the manufacturer, factory branch,
53 distributor or distributor branch to whom any data obtained
54 from the dealer has actually been provided within the twelve-
55 month period prior to date of dealer's written request. If
56 requested by the dealer, the list shall further describe the
57 scope and specific fields of the data provided. The consent
58 does not change the person's obligations to comply with the
59 terms of this section and any additional state or federal laws,
60 and any rules or regulations promulgated thereunder,
61 applicable to them with respect to the access.

62 (d) A manufacturer, factory branch, distributor,
63 distributor branch, dealer management computer system
64 vendor or any third party acting on behalf of or through any
65 dealer management computer system vendor, having
66 electronic access to customer or motor vehicle dealership data
67 in a dealership management computer system used by a
68 motor vehicle dealer located in this state shall provide notice
69 in a reasonable timely manner to the dealer of any security
70 breach of dealership or customer data obtained through the
71 access.

72 (e) As used in this section:

73 (1) "Dealer management computer system" means a
74 computer hardware and software system that is owned or
75 leased by the dealer, including a dealer's use of web
76 applications, excluding a web application operated by a
77 manufacturer, software or hardware, whether located at the
78 dealership or provided at a remote location and that
79 provides access to customer records and transactions by a
80 motor vehicle dealer located in this state and that allows the
81 motor vehicle dealer timely information in order to sell
82 vehicles, parts or services through the motor vehicle
83 dealership.

84 (2) “Dealer management computer system vendor” means
85 a seller or reseller of dealer management computer systems,
86 a person that sells computer software for use on dealer
87 management computer systems or a person who services or
88 maintains dealer management computer systems.

89 (3) “Security breach” means an incident of unauthorized
90 access to and acquisition of records or data containing
91 dealership or dealership customer information where
92 unauthorized use of the dealership or dealership customer
93 information has occurred.

94 (4) “Customer information” means “nonpublic personal”
95 as defined in 16 C. F. R. §313.

96 (f) Notwithstanding the terms or conditions of any
97 consent, authorization, release, novation, franchise or other
98 contract or agreement, every manufacturer, factory branch,
99 distributor, distributor branch, dealer management computer
100 system vendor or any third party acting on behalf of or
101 through a manufacturer, factory branch, distributor,
102 distributor branch or dealer management computer system
103 vendor shall fully indemnify, defend and hold harmless any
104 dealer or manufacturer, factory branch, distributor or
105 distributor branch from all damages, attorney fees and costs,
106 other costs and expenses incurred by the dealer from
107 complaints, claims or actions arising out of manufacturer’s,
108 factory’s branch, distributor’s, distributor’s branch, dealer
109 management computer system vendor’s or any third party for
110 its willful, negligent or illegal use or disclosure of dealers
111 consumer or customer data or other information in dealer’s
112 computer system. The indemnification includes, but is not
113 limited to, judgments, settlements, fines, penalties, litigation
114 costs, defense costs, court costs, costs related to the
115 disclosure of security breaches and attorneys’ fees arising out
116 of complaints, claims, civil or administrative actions.

117 (g) This section applies to contracts entered into after the
118 effective date of this section.

§17A-6A-15b. Exports; rebuttable presumption on behalf of dealer.

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

**§17A-6A-15c. Manufacturer performance standards; uniform
application, prohibited practices.**

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

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

12 (2) Upon written request from a dealer participating in the
13 program, the manufacturer shall provide in writing the
14 dealer's performance requirement or sales goal or objective,
15 which shall include a reasonable and general explanation of
16 the methodology, criteria and calculations used.

17 (3) A manufacturer shall allocate a reasonable and
18 appropriate supply of vehicles to assist the dealer in
19 achieving any performance standards established by the
20 manufacturer and distributor.

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

§17A-6A-18. West Virginia law to apply.

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

.....
Clerk of the Senate

.....
Clerk of the House of Delegates

.....
President of the Senate

.....
Speaker of the House of Delegates

The within this the

Day of, 2015.

.....
Governor