

ENGROSSED
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 453

(By Senators Woelfel, Blair, Ferns, Gaunch,
M. Hall, Leonhardt, Mullins, Nohe, Plymale,
Prezioso, Snyder, Takubo, Trump, Walters,
Williams and Karnes)

[Originating in the Committee on
the Judiciary;
reported March 2, 2015.]

A BILL 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

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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, WHOLESALERS AND MANUFACTURERS.

§17A-6A-1. Legislative finding.

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

§17A-6A-3. Definitions.

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

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

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

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

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

22 (5) “Factory branch” means an office maintained by a manufacturer or distributor for the
23 purpose of selling or offering for sale vehicles to a distributor, wholesaler or new motor vehicle
24 dealer, or for directing or supervising, in whole or in part, factory or distributor representatives. The
25 term includes any sales promotion organization maintained by a manufacturer or distributor which

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1 is engaged in promoting the sale of a particular make of new motor vehicles in this state to new
2 motor vehicle dealers.

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

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

9 (8) "Manufacturer" means any person who manufactures or assembles new motor vehicles;
10 or any distributor, factory branch or factory representative and, in the case of a school bus, truck
11 tractor, road tractor or truck as defined in section one, article one of this chapter, also means a person
12 engaged in the business of manufacturing a school bus, truck tractor, road tractor or truck, their
13 engines, power trains or rear axles, including when engines, power trains or rear axles are not
14 warranted by the final manufacturer or assembler, and any distributor, factory branch or
15 representative.

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

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

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

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

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

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

18 **§17A-6A-4. Cancellation of dealer contract; notification.**

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

- 22 (a) Satisfied the notice requirement of section seven of this article;
- 23 (b) Acted in good faith;
- 24 (c) Engaged in full and open communication with franchised dealer; and
- 25 (d) Has good cause for the cancellation, termination, nonrenewal or discontinuance.

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

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

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

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

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

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

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

15 (g) The dealer's overall performance under the reasonable terms of the franchise agreement.

16 This shall include the overall fairness of the agreement terms, the enforceability of the agreement
17 and the relative bargaining power of the parties.

18 (h) Whether the manufacturer made available the appropriate volumes and type of motor
19 vehicles to the dealer, and a reasonable opportunity for sales and service training to the dealer.

20 (3) ~~¶~~ In addition to the requirements of subsection (2) of this section, if the failure by the new
21 motor vehicle dealer to comply with a provision of the dealer agreement relates to the performance
22 of the new motor vehicle dealer in sales or service, good cause exists for the purposes of a
23 termination, cancellation, nonrenewal or discontinuance under subsection (1) of this section when
24 the new motor vehicle dealer failed to effectively carry out the performance provisions of the dealer
25 agreement if all of the following have occurred:

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

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

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

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

9 **§17A-6A-5. Circumstances not constituting good cause.**

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

13 (a) A change in ownership of the new motor vehicle dealer's dealership. This subdivision
14 does not authorize any change in ownership which would 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 which may not be unreasonably or untimely
17 withheld.

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

21 (c) The fact that the new motor vehicle dealer owns, has an investment in, participates in the
22 management of, or holds a dealer agreement for the sale of another make or line of new motor
23 vehicles, or that the new motor vehicle dealer has established another make or line of new motor
24 vehicles in the same dealership facilities as those of the manufacturer or distributor: *Provided*, That
25 the new motor vehicle dealer maintains a reasonable line of credit for each make or line of new

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1 motor vehicles, and that the new motor vehicle dealer remains in substantial compliance with the
2 terms and conditions of the dealer agreement and with any reasonable facilities' requirements of the
3 manufacturer or distributor.

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

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

12 **§17A-6A-6. Burden of proof.**

13 For each termination, cancellation, nonrenewal or discontinuance, the manufacturer or
14 distributor ~~shall have~~ has the burden of proof by a preponderance of the evidence for showing that
15 he or she has acted in good faith, that the notice requirement has been complied with, and that there
16 was good cause by a preponderance of the evidence for the termination, cancellation, nonrenewal
17 or discontinuance.

18 **§17A-6A-8. Reasonable compensation to dealer.**

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

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

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1 inventory including motorhomes and travel trailers, regardless of gross vehicle weight, purchased
2 from the manufacturer or distributor, that inventory must not have been materially altered,
3 substantially damaged or driven for more than fifty miles and for motor vehicles with a rating greater
4 than twenty-six thousand one pounds gross vehicle weight driven no more than five thousand miles.
5 For purposes of a school bus, truck tractor, road tractor or truck, materially altered does not include
6 dealer add-ons, such as, but not limited to, racks, mud flaps, fifth wheel assemblies, dump or tank
7 bodies;

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

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

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

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

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1 subsection does not apply to any termination, cancellation, nonrenewal or discontinuance made
2 pursuant to subsection (c), section ~~five~~ seven of this article.

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

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

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

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

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

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

24 **§17A-6A-8a. Compensation to dealers for service rendered.**

25 (1) Every motor vehicle manufacturer, distributor or wholesaler, factory branch or distributor

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1 branch, or officer, agent or representative thereof, shall:

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

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

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

10 (2) In no event may:

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

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

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

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

25 (4) The retail rate charged by the dealer for parts is established by the dealer submitting to

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1 the manufacturer or distributor one hundred sequential nonwarranty customer-paid service repair
2 orders that contain warranty-like parts or ninety consecutive days of nonwarranty customer-paid
3 service repair orders that contain warranty-like parts covering repairs made no more than one
4 hundred eighty days before the submission and declaring the average percentage markup.

5 (5) The retail rate customarily charged by the dealer for labor rate must be established using
6 the same process as provided under subsection (4) of this section and declaring the average labor
7 rate. The average labor rate must be determined by dividing the amount of the dealer's total labor
8 sales by the number of total hours that generated those sales. If a labor rate and parts markup rate
9 simultaneously declared by the dealer, the dealer may use the same repair orders to complete each
10 calculation as provided under subsection (4) of this section. A reasonable allowance for labor for
11 diagnostic time shall be either included in the manufacturer's labor time allowance or listed as a
12 separate compensable item. A dealer may request additional time allowance for either diagnostic
13 or repair time, which request shall not be unreasonable denied by the manufacturer.

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

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

18 (b) Parts sold at wholesale;

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

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

22 (e) Tires;

23 (f) Vehicle reconditioning;

24 (7) The average of the parts markup rates and labor rate is presumed to be reasonable and
25 must go into effect thirty days following the manufacturer's approval. A manufacturer or distributor

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1 may rebut the presumption by a preponderance of the evidence that a rate is unreasonable in light
2 of the practices of all other same line-make franchised motor vehicle dealers in an economically
3 similar area of the state offering the same line-make vehicles, not later than thirty days after
4 submission. If the average parts markup rate or average labor rate is rebutted, or both, the
5 manufacturer or distributor shall propose an adjustment of the average percentage markup based on
6 that rebuttal not later than thirty days after submission.

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

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

19 (10) As it applies to a school bus, truck tractor, road tractor and truck as defined in section
20 one, article one of this chapter, with a gross vehicle weight on excess of twenty-six thousand one
21 pounds the manufacturer, distributor and/or O. E. M. supplier shall pay the dealer its incurred actual
22 time at the retail labor rate for retrieving a motor vehicle and returning a motor vehicle to dealer's
23 designated parking area. Dealer shall be paid \$50 minimum for each operation that requires the use
24 of each electronic tool (i.e. laptop computer). The manufacturer or distributor may not reduce what
25 is paid to a dealer for this retrieval or return time, or for the electronic tool charge. The dealer is

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1 allowed to add to a completed warranty repair order three hours for every twenty-four hours the
2 manufacturer, distributor and/or O. E. M. supplier makes the dealer stop working on a vehicle while
3 the manufacturer, distributor and/or O. E. M. supplier decides how it wants the dealer to proceed
4 with the repairs.

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

19 ~~(5)~~(12) Notwithstanding the terms of a franchise agreement or provision of law in conflict
20 with this section, the dealer's delivery, preparation, warranty and recall obligations constitutes the
21 dealer's sole responsibility for product liability as between the dealer and manufacturer and, except
22 for a loss caused by the dealer's failure to adhere to the obligations, a loss caused by the dealer's
23 negligence or intentional misconduct or a loss caused by the dealer's modification of a product
24 without manufacturer authorization, the manufacturer shall reimburse the dealer for all loss incurred
25 by the dealer, including legal fees, court costs and damages, as a result of the dealer having been

1 named a party in a product liability action.

2 **§17A-6A-9. Payment of compensation.**

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

10 (2) Reasonable compensation pursuant to subdivision (a), subsection (1), section eight of this
11 article may not be less than the new motor vehicle dealer's net acquisition cost, including any special
12 promotions ordered by the manufacturer, such as advertising charges, ~~and special tools purchased~~
13 ~~from the manufacturer or distributor within three years of the date of termination, cancellation,~~
14 ~~nonrenewal or discontinuance.~~ Reasonable compensation pursuant to subdivision (b) of said
15 subsection shall be the amount stated in the manufacturer's or distributor's current parts price list.
16 Reasonable compensation pursuant to subdivisions (c) and (d) of said subsection shall be the fair
17 market value of the personal property: determined by a five-year straight line depreciation schedule.

18 (3) In the event payment is not made within ninety days as provided in subsection (1) of this
19 section, interest ~~accrues on all amounts due the new motor vehicle dealer at a rate of twelve percent~~
20 ~~per annum.~~ shall accumulate at the rate of the Fifth Federal Reserve District's secondary discount
21 rate in effect on January 2 of the year in which payment is due plus five percentage points. In
22 determining when interest begins to accumulate, the court may consider whether the dealer
23 reasonably complied with the reasonable manufacturer's submission requirements and the
24 reasonableness of the manufacturer's determinations in refusing or delaying payment to the dealer.

25 **§17A-6A-10. Prohibited practices.**

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

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

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

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

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

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

28 (f) Refrain from participation in the management of, investment in or the acquisition of any

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

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

14 (h) Prospectively assent to a waiver of trial by jury release, arbitration, assignment, novation,
15 waiver or estoppel which would relieve any person from liability imposed by this article or require
16 any controversy between a new motor vehicle dealer and a manufacturer or distributor to be referred
17 to a person other than the duly constituted courts of ~~the~~ this state or the United States District Courts
18 of the Northern or Southern Districts of West Virginia. Nothing in this prevents a motor vehicle
19 dealer, after a civil action is filed, from entering into any agreement of settlement, arbitration,
20 assignment or waiver of a trial by jury; if the referral would be binding upon the new motor vehicle
21 dealer.

22 (i) To coerce or require any dealer, whether by agreement, program, incentive provision or
23 otherwise, to construct improvements to its facilities or to install new signs or other franchisor image
24 elements that replace or substantially alter those improvements, signs or franchisor image elements
25 completed within the proceeding ten years that were required and approved by the manufacturer,
26 factory branch, distributor or distributor branch or one of its affiliates. If a manufacturer, factory
27 branch, distributor or distributor branch offers incentives or other payments to a consumer or dealer
28 paid on individual vehicle sales under a program offered after the effective date of this subdivision

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1 and available to more than one dealer in the state that are premised, wholly or in part, on dealer
2 facility improvements or installation of franchisor image elements required by and approved by the
3 manufacturer, factory branch, distributor or distributor branch and completed within ten years
4 preceding the program shall be deemed to be in compliance with the program requirements
5 pertaining to construction of facilities or installation of signs or other franchisor image elements that
6 would replace or substantially alter those previously constructed or installed with that ten year
7 period. This subdivision shall not apply to a program that is in effect with more than one dealer in
8 the state on the effective date of this subsection, nor to any renewal of such program, nor to a
9 modification that is not a substantial modification of a material term or condition of such program;

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

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

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

22 (ii) It shall be unlawful for any manufacturer, factory branch, captive finance source,
23 distributor or distributor branch, or any field representative, officer, agent or any representative of
24 them, notwithstanding the terms, provisions or conditions of any agreement or franchise, to require
25 any of its franchised dealers located in this state to agree to any terms, conditions or requirements
26 in subdivisions (a) through (j), inclusive, of this subsection in order for any such dealer to sell to any
27 captive finance source any retail installment contract, loan or lease of any motor vehicles purchased
28 or leased by any of the dealer’s customers, or to be able to participate in, or otherwise, directly or

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1 indirectly, obtain the benefits of the consumer transaction incentive program payable to the consumer
2 or the dealer and offered by or through any captive finance source as to that incentive program.

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

5 (iv) It shall be unlawful for a manufacturer or distributor to use any subsidiary corporation,
6 affiliated corporation or any other controlled corporation, partnership, association or person to
7 accomplish what would otherwise be illegal conduct under this section on the part of the
8 manufacturer or distributor.

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

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

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

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

25 (b) Refuse to disclose to a new motor vehicle dealer the method and manner of distribution
26 of new motor vehicles by the manufacturer or distributor, including any numerical calculation or
27 formula used, nationally or within the dealer's market, to make the allocations within thirty days of
28 a request. Any information or documentation provided by the manufacturer may be subject to a

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1 reasonable confidentiality agreement;

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

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

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

27 (f) Release to an outside party, except under subpoena or in an administrative or judicial
28 proceeding to which the new motor vehicle dealer or the manufacturer or distributor are parties, any

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1 business, financial or personal information which has been provided by the dealer to the
2 manufacturer or distributor, unless the new motor vehicle dealer gives his or her written consent;

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

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

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

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

12 (C) Operating a dealership with another person who has made a significant investment in the
13 dealership and who will acquire full ownership of the dealership under reasonable terms and
14 conditions;

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

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

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

21 (C) Act in the capacity of a new motor vehicle dealer. ~~Provided, That a manufacturer may~~
22 ~~own an interest, other than stock in a publicly held company, solely for investment purposes;~~

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

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

28 (ii) The dealership is for sale by the manufacturer or distributor at a reasonable price and on

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1 reasonable terms and conditions;

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

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

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

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

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

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

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

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

28 (p) Audit any motor vehicle dealer in this state for warranty parts or warranty service

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1 compensation, service compensation, service or sales incentives, manufacturer rebates or other forms
2 of sales incentive compensation more than twelve months after the claim for payment or
3 reimbursement has been made by the automobile dealer. No chargeback may be made until the
4 dealer has had notice and an opportunity to support the claim in question within thirty days of
5 receiving notice of the chargeback. No otherwise valid reimbursements claims may be denied once
6 properly submitted in accordance with the manufacturer's submission guidelines due to clerical error
7 or omission. ~~Provided, That the provisions of this~~ This subsection do does not apply where a claim
8 is fraudulent. In addition, the manufacturer or distributor is responsible for reimbursing the audited
9 dealer for all copying, postage and administrative costs incurred by the dealer during the audit. Any
10 charges to a dealer as a result of the audit must be separately billed to the dealer;

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

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

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

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

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

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

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

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

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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
15 fees and expenses may be requested by a manufacturer or distributor before exercising its right of
16 first 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. Upon written request from the dealer, this
23 explanation shall include, but is not limited to, a reasonable and commercially acceptable copy of
24 all information, data, evaluations, and methodology relied on or based its decision on, to propose the
25 change to the dealer's area of responsibility. Any information or documentation provided by the
26 manufacturer or distributor may be produced subject to a reasonable confidentiality agreement. At
27 any time prior to the effective date of an alteration of a new motor vehicle dealer's area of
28 responsibility, and after the completion of any internal appeal process pursuant to the manufacturer's

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1 or distributor's policy manual, the motor vehicle dealer may petition the court to enjoin or prohibit
2 the alteration within thirty days of receipt of the manufacturer's internal appeal process decision. The
3 court shall enjoin or prohibit the alteration of a motor vehicle dealer's area of responsibility unless
4 the franchisor shows, by a preponderance of the evidence, that the alteration is reasonable and
5 justifiable in light of market conditions. If a motor vehicle dealer petitions the court, no alteration
6 to a motor vehicle dealer's area of responsibility shall become effective until a final determination
7 by the court. If a new motor vehicle dealer's area of responsibility is altered, the manufacturer shall
8 allow twenty-four months for the motor vehicle dealer to become sales effective prior to taking any
9 action claiming a breach or nonperformance of the motor vehicle dealer's sales performance
10 responsibilities;

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

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

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

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

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

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

28 (ii) By a contract made to the dealer on the condition that the dealer shall sell, offer to sell

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

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

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

9 (v) Nothing in this paragraph prohibits a manufacturer or distributor from providing incentive
10 programs to a new vehicle dealer who makes the voluntary decision to offer to sell, sell or sell
11 exclusively an extended service contract, extended maintenance plan or similar product offered,
12 endorsed or sponsored by the manufacturer or distributor.

13 (y) Require a dealer to purchase goods or services from a vendor selected, identified or
14 designated by a manufacturer, factory branch, distributor, distributor branch or one of its affiliates
15 by agreement, program, incentive provision or otherwise without making available to the dealer the
16 option to obtain the goods or services of substantially similar quality and overall design from a
17 vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor or
18 distributor branch: *Provided*, That such approval may not be unreasonably withheld:
19 *Provided, however*, That the dealer's option to select a vendor is not available if the manufacturer
20 or distributor provides substantial reimbursement for the goods or services offered. Substantial
21 reimbursement is equal to the difference in price of the goods and services from manufacturer's
22 proposed vendor and the motor vehicle dealer's selected vendor: *Provided further*, That the goods
23 are not subject to the manufacturer or distributor's intellectual property or trademark rights, or trade
24 dress usage guidelines.

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

28 (4) Except as may otherwise be provided in this article, no manufacturer or
26

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1 franchisor ~~shall~~ may sell, directly or indirectly, any new motor vehicle to a consumer in this state,
2 except through a new motor vehicle dealer holding a franchise for the line-make covering such new
3 motor vehicle. This subsection ~~shall~~ does not apply to manufacturer or franchisor sales of new motor
4 vehicles to charitable organizations, qualified vendors or employees of the manufacturer or
5 franchisor.

6 (5) Except when prevented by an act of God, labor strike, transportation disruption outside
7 the control of the manufacturer or time of war, a manufacturer or distributor may not refuse or fail
8 to deliver, in reasonable quantities and within a reasonable time, to a dealer having a franchise
9 agreement for the retail sale of any motor vehicle sold or distributed by the manufacturer, any new
10 motor vehicle or parts or accessories to new motor vehicles as are covered by the franchise if the
11 vehicles, parts and accessories are publicly advertised as being available for delivery or are actually
12 being delivered. ~~All models offered for sale by the manufacturer, without any enrollment, surcharge,~~
13 ~~unreasonable facility or building or any other unreasonable type of upgrade requirement or~~
14 ~~acquisition fee, shall be available to the franchised dealer at no additional cost for that particular~~
15 ~~model of vehicle.~~

16 **§17A-6A-11. Where motor vehicle dealer deceased or incapacitated.**

17 (1) Any designated family member of a deceased or incapacitated new motor vehicle dealer
18 may succeed the dealer in the ownership or operation of the dealership under the existing dealer
19 agreement if the designated family member gives the manufacturer or distributor written notice of
20 his or her intention to succeed to the dealership within one hundred twenty days after the dealer's
21 death or incapacity, agrees to be bound by all of the terms and conditions of the dealer agreement,
22 and the designated family member meets the current criteria generally applied by the manufacturer
23 or distributor in qualifying new motor vehicle dealers. A manufacturer or distributor may refuse to
24 honor the existing dealer agreement with the designated family member only for good cause. In
25 determining whether good cause exists for refusing to honor the agreement, the manufacturer or
26 distributor has the burden of proving that the designated successor is a person who is not of good
27 moral character or does not meet the manufacturer's existing written, reasonable and uniformly
28 applied standards for business experience and financial qualifications. The designated family

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1 member will have a minimum of one year to satisfy that manufacturer's written and reasonable
2 standards and financial qualifications for appointment as the dealer and principal.

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

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

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

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

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

23 (7) If the manufacturer challenges the succession, it maintains the burden of proof to show
24 good cause by a preponderance of the evidence. If the person seeking succession files a civil action
25 within the one hundred eighty days set forth in subsection (4) of this section, no action may be taken
26 by the manufacturer contrary to the dealer agreement until such time as the civil action and any
27 appeal has been exhausted: *Provided*, That when a motor vehicle dealer appeals a decision upholding
28 a manufacturer's decision to not allow succession based upon the designated person's insolvency,

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

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

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

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

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

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1 vehicle dealer until the circuit court has rendered a decision on the matter. An action brought
2 pursuant to this section shall be given precedence over all other civil matters on the court's docket.
3 The manufacturer has the burden of proving that good cause exists for establishing or relocating a
4 proposed new motor vehicle dealer.

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

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

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

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

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

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

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

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

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

27 **§17A-6A-12a. Restriction on motor vehicle dealer's use of dealership property.**

28 (1) A manufacturer shall not require that a new motor vehicle dealer, a proposed new motor

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1 vehicle dealer, or any owner of an interest in a dealership facility enter into or agree to a property use
2 agreement as a condition to any of the following:

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

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

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

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

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

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

11 (a) Monetary consideration.

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

13 (3) If a manufacturer and new motor vehicle dealer are in parties to a property use agreement,
14 the dealer agreement between the manufacturer and new motor vehicle dealer is terminated by a
15 manufacturer or by a successor manufacturer or by operation of law and the reason for the
16 termination is not a reason described in paragraphs one through five, inclusive, subdivision (c),
17 section seven of this article, the property use agreement terminates and ceases to be effective at the
18 time the dealer agreement is terminated.

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

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

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

26 (b) An agreement that restricts the ability of a new motor vehicle dealer, or the ability of the
27 dealer's lessor if the dealer is leasing the dealership facility, to transfer, sell, lease, or change the use
28 of the place of business of the dealership, whether by sublease, lease, collateral pledge of lease, right

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1 of first refusal to purchase or lease, option to purchase, option to lease, or other similar agreement,
2 regardless of who the parties to that agreement are.

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

5 **§17A-6A-13. Obligations regarding warranties.**

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

13 (2) The schedule of compensation shall include reasonable compensation for diagnostic
14 work, as well as repair service and labor. Time allowances for the diagnosis and performance of
15 warranty work and service shall be reasonable and adequate for the work to be performed. In the
16 determination of what constitutes reasonable compensation under this section, ~~the principal factor~~
17 ~~to be given consideration shall be the prevailing wage rates being paid by dealers in the community~~
18 ~~in which the dealer is doing business, and in no event may the compensation of a dealer for warranty~~
19 ~~labor and parts be less than the rates charged by the dealer for like service to retail customers for~~
20 ~~nonwarranty service and repairs, provided that the rates are reasonable. section eight-a of this article~~
21 ~~shall govern: However, *Provided, That* in the case of a ~~new motor vehicle~~ dealer of new motorcycles~~
22 ~~or recreational vehicles, motorboat trailers, all-terrain vehicles, utility terrain vehicles and~~
23 ~~snowmobiles, in no event may the compensation of a dealer for warranty parts be less than is the~~
24 ~~greater of the dealer's cost of acquiring the part plus twenty forty percent or the manufacturer's~~
25 ~~suggested retail price: *Provided, however, That* in the case of a dealer of travel trailers, fold-down~~
26 ~~camping trailers and motorhomes, the compensation of a dealer's cost for warranty parts is not less~~
27 ~~than the dealer's cost of acquiring the part plus twenty percent.~~

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

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1 (a) Fail to perform any warranty obligation;

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

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

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

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

22 **§17A-6A-14a. Open account protection.**

23 If there is a dispute between the manufacturer, factory branch, distributor or distributor
24 branch and the dealer with respect to any matter referred to this article, either party may notify, in
25 writing, the other party of its request to challenge, through the manufacturer's appeal process or the
26 circuit courts of the state of West Virginia. A manufacturer, factory branch, distributor, or distributor
27 branch may not collect chargebacks, fully or in part, either through direct payment or by charge to
28 the dealer's account, for warranty parts or service compensation, including service incentives, sales

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1 incentives, other sales compensation, surcharges, fees, penalties or any financial imposition of any
2 type arising from an alleged failure of the dealer to comply with a policy of, directive from or
3 agreement with the manufacturer, factory branch, distributor or distributor branch until thirty days
4 following final notice of the amount charged to the dealer following all internal processes of the
5 manufacturer, factory, factory branch, distributor or distributor branch. Within thirty days following
6 receipt of final notice, the dealer may, in writing, request a hearing or seek civil relief from the
7 manufacturer's appeal process or the circuit courts of the state of West Virginia. If a dealer requests
8 a hearing or files a civil action, the manufacturer, factory branch, distributor or distributor branch
9 may not collect the chargeback, fully or in part, either through direct payment or by charge to the
10 dealer's account, until the completion of the hearing or civil action, and all appeal, civil or otherwise,
11 have been exhausted concerning the validity of the chargeback.

12 **§17A-6A-15. Indemnity.**

13 Notwithstanding the terms of any dealer agreement, a manufacturer or distributor shall
14 indemnify and hold harmless its dealers for any reasonable expenses incurred, including damages,
15 court costs and attorney's fees, arising ~~solely~~ out of complaints, claims or actions to the extent such
16 complaints, claims or actions ~~which~~ relate to the manufacture, assembly, design of a new motor
17 vehicle or other functions by the manufacturer or distributor beyond the control of the dealer,
18 including, without limitation, the selection by the manufacturer or distributor of parts or components
19 for the vehicle, and any damages to merchandise occurring prior to acceptance of the vehicle by the
20 dealer to the dealer if the carrier is designated by the manufacturer or distributor, if the new motor
21 vehicle dealer gives timely notice to the manufacturer or distributor of the complaint, claim or action.

22 **§17A-6A-15a. Dealer data, obligation of manufacturer, vendors, suppliers and others; consent**
23 **to access dealership information; indemnification of dealer.**

24 (a) Except as expressly authorized in this section, a manufacturer or distributor cannot require
25 a motor vehicle dealer to provide it customer information to the manufacturer or distributor unless
26 necessary for the sale and delivery of a new motor vehicle to a consumer, to validate and pay
27 consumer or dealer incentives, for manufacturer's marketing purposes, for evaluation of dealer
28 performance, for analytics, or to support claims submitted by the new motor vehicle dealer for

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1 reimbursement for warranty parts or repairs. Nothing in this section shall limit the manufacturer's
2 ability to require or use customer information to satisfy any safety or recall notice obligation or other
3 legal obligation.

4 (b) The dealer is only required to provide the customer information to the extent lawfully
5 permissible; and to the extent the requested information relates solely to specific program
6 requirements or goals associated with the manufacturer's or distributor's own vehicle makes. A
7 manufacturer, factory branch, distributor, distributor branch, dealer management computer system
8 vendor or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor
9 branch or dealer management computer system vendor may not prohibit a dealer from providing a
10 means 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 (c) A manufacturer, factory branch, distributor, distributor branch, dealer management
17 computer system vendor, or any third party acting on behalf of any manufacturer, factory branch,
18 distributor, distributor branch or dealer management computer system vendor, may not provide
19 access to customer or dealership information maintained in a dealer management computer system
20 used by a motor vehicle dealer located in this state, other than a subsidiary or affiliate of the
21 manufacturer factory branch, distributor or distributor branch without first obtaining the dealer's
22 prior express written consent, revocable by the dealer upon ten business days written notice, to
23 provide the access.

24 Upon a written request from a motor vehicle dealer, the manufacturer, factory branch,
25 distributor, distributor branch, dealer management computer system vendor, or any third party acting
26 on behalf of, or through any manufacturer, factory branch, distributor, distributor branch or dealer
27 management computer system vendor shall provide to the dealer a written list of all specific third
28 parties other than a subsidiary or affiliate of the manufacturer, factory branch, distributor or

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1 distributor branch to whom any data obtained from the dealer has actually been provided within the
2 twelve-month period prior to date of dealer's written request. If requested by the dealer, the list shall
3 further describe the scope and specific fields of the data provided. The consent does not change the
4 person's obligations to comply with the terms of this section and any additional state or federal laws,
5 and any rules or regulations promulgated thereunder, applicable to them with respect to the access.

6 (d) A manufacturer, factory branch, distributor, distributor branch, dealer management
7 computer system vendor or any third party acting on behalf of or through any dealer management
8 computer system vendor, having electronic access to customer or motor vehicle dealership data in
9 a dealership management computer system used by a motor vehicle dealer located in this state shall
10 provide notice in a reasonable timely manner to the dealer of any security breach of dealership or
11 customer data obtained through the access.

12 (e) As used in this section:

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

19 (2) "Dealer management computer system vendor" means a seller or reseller of dealer
20 management computer systems, a person that sells computer software for use on dealer management
21 computer systems or a person who services or maintains dealer management computer systems.

22 (3) "Security breach" means an incident of unauthorized access to and acquisition of records
23 or data containing dealership or dealership customer information where unauthorized use of the
24 dealership or dealership customer information has occurred.

25 (4) "Customer information" means "nonpublic personal" as defined in 16 C. F. R. §313.

26 (f) Notwithstanding the terms or conditions of any consent, authorization, release, novation,
27 franchise or other contract or agreement, every manufacturer, factory branch, distributor, distributor
28 branch, dealer management computer system vendor or any third party acting on behalf of or through

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1 a manufacturer, factory branch, distributor, distributor branch or dealer management computer
2 system vendor shall fully indemnify, defend and hold harmless any dealer or manufacturer, factory
3 branch, distributor or distributor branch from all damages, attorney fees and costs, other costs and
4 expenses incurred by the dealer from complaints, claims or actions arising out of manufacturer's,
5 factory's branch, distributor's, distributor's branch, dealer management computer system vendor's
6 or any third party for its willful, negligent or illegal use or disclosure of dealers consumer or
7 customer data or other information in dealer's computer system. The indemnification includes, but
8 is not limited to, judgments, settlements, fines, penalties, litigation costs, defense costs, court costs,
9 costs related to the disclosure of security breaches and attorneys' fees arising out of complaints,
10 claims, civil or administrative actions.

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

12 **§17A-6A-15b. Exports; rebuttable presumption on behalf of dealer.**

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

23 **§17A-6A-15c. Manufacturer performance standards; uniform application, prohibited**
24 **practices.**

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

28 (1) A performance standard, sales objective or program for measuring dealer performance

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

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

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

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

13 **§17A-6A-18. 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 distributor
16 captive finance source or any subsidiary, affiliate or partner of a manufacturer or distributor, the
17 provisions of this code apply to all such agreements and contracts. Any provisions in the agreements
18 and contracts which violate the terms of this section are null and void.