

**Senate Bill No. 453**

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

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[Introduced February 10, 2015; referred to the Committee on the Judiciary]  
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A BILL to amend and reenact §17A-6A-1, §17A-6A-3, §17A-6A-4, §17A-6A-5, §17A-6A-6, §17A-6A-7, §17A-6A-8, §17A-6A-8a, §17A-6A-9, §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-15, §17A-6A-16, §17A-6A-17 and §17A-6A-18 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto six new sections, designated §17A-6A-12a, §17A-6A-12b, §17A-6A-14a, §17A-6A-19, §17A-6A-20 and §17A-6A-21, all relating to motor vehicle dealers, distributors, wholesalers and manufacturers.

*Be it enacted by the Legislature of West Virginia:*

That §17A-6A-1, §17A-6A-3, §17A-6A-4, §17A-6A-5, §17A-6A-6, §17A-6A-7, §17A-6A-8, §17A-6A-8a, §17A-6A-9, §17A-6A-10, §17A-6A-11, §17A-6A-12, §17A-6A-13, §17A-6A-15, §17A-6A-16, §17A-6A-17 and §17A-6A-18 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto six new sections, designated §17A-6A-12a, §17A-6A-12b, §17A-6A-14a, §17A-6A-19, §17A-6A-20 and

1 §17A-6A-21, all to read as follows:

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

4 **§17A-6A-1. Legislative finding.**

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

14 **§17A-6A-3. Definitions.**

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

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

21 (2) "Designated family member" means the spouse, child, grandchild, parent, brother or sister

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

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

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

21 (5) "Factory branch" means an office maintained by a manufacturer or distributor for the

1 purpose of selling or offering for sale vehicles to a distributor, wholesaler or new motor vehicle  
2 dealer, or for directing or supervising, in whole or in part, factory or distributor representatives. The  
3 term includes any sales promotion organization maintained by a manufacturer or distributor which  
4 is engaged in promoting the sale of a particular make of new motor vehicles in this state to new  
5 motor vehicle dealers.

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

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

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

19 (9) "Motor vehicle" means that term as defined in section one, article one of this chapter,  
20 including motorcycle, school bus, truck tractor, road tractor, truck, and recreational vehicle,  
21 all-terrain vehicle, and utility terrain vehicle as defined in subsections (c), (d), (f), (h), (I), and (ii)

1 (nn) and (vv) respectively, of ~~said~~ that section, but not including a farm tractor or farm equipment.  
2 The term "motor vehicle" also includes, for a school bus, truck tractor, road tractor and truck, its  
3 component parts, including, but not limited to, its engine, transmission or real axle manufactured for  
4 installation in a school bus, truck tractor, road tractor or truck.

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

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

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

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

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

20 **§17A-6A-4. Cancellation of dealer contract; notification.**

21 (1) Notwithstanding any agreement, a manufacturer or distributor ~~shall~~ may not cancel,

1 terminate, fail to renew or refuse to continue any dealer agreement with a new motor vehicle dealer  
2 unless the manufacturer or distributor has complied with all of the following:

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

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

- 12 (a) The relationship of the dealer's sales to the sales in the relevant market;
- 13 (b) The investment and financial obligations of the dealer under the terms of the franchise  
14 agreement;
- 15 (c) The effect on the public cancellation of the franchise agreement would cause;
- 16 (d) The adequacy of the dealer's sales and service facilities, equipment, parts and personnel  
17 in relation to other dealers in the relevant market;
- 18 (e) Whether the dealer is honoring existing warranties;
- 19 (f) Whether the dealer is complying, or can comply within a reasonable time, with reasonable  
20 capitalization requirements; and
- 21 (g) The dealer's overall performance under the reasonable terms of the franchise agreement.

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

3 (h) Whether the manufacturer provided the requested appropriate volumes and type of motor  
4 vehicles to the dealer, and the requested sales and service training to the dealer.

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

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

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

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

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

19 **§17A-6A-5. Circumstances not constituting good cause.**

20 Notwithstanding any agreement, the following alone ~~shall~~ is not constitute good cause for  
21 the termination, cancellation, nonrenewal or discontinuance of a dealer agreement under subdivision

1 (d), subsection (1), section four of this article:

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

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

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

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



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

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

5 **§17A-6A-6. Burden of proof.**

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

11 **§17A-6A-7. Notice provisions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 (2) Not undertaken for good cause; or

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

18 (f) No replacement dealer shall be named for this point or location to engage in business and  
19 the dealer's agreement shall remain in effect until a final judgement is entered after all appeals are  
20 exhausted: *Provided*, That when a motor vehicle dealer appeals a decision upholding a  
21 discontinuation, cancellation or nonrenewal under ~~subdivisions (f) and (g)~~ subsection (c) of this

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

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

1 manufacturer or distributor or mandated by law, the termination proceedings shall be dismissed with  
2 prejudice as moot.

3 **§17A-6A-8. Reasonable compensation to dealer.**

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

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

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

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

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

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

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

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

20           (b) Support of the manufacturer's or distributor's warranty obligations by making parts  
21 available and compensating dealers for warranty parts and labor for five years: *Provided*, That the

1 motor vehicle dealer has adequate facilities, trained personnel and equipment to perform warranty  
2 repairs;

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

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

12 (e) Payment by the manufacturer to the dealer shall be made within ninety days. Thereafter,  
13 interest accumulates at the rate of the Fifth Federal Reserve District's secondary discount rate in  
14 effect on the second day of January of the year in which payment is due plus five percentage points.

15 **§17A-6A-8a. Compensation to dealers for service rendered.**

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

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

20 (b) Compensate the motor vehicle dealer for warranty and factory recall service required of  
21 the dealer by the manufacturer, distributor or wholesaler, factory branch or distributor branch or

1 officer, agent or representative thereof; and

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

5 (2) In no event may:

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

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

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

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

20 (4) The retail rate charged by the dealer for parts is established by the greater of the  
21 manufacturer's suggested retail price, or dealer submitting to the manufacturer or distributor one



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

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

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

14 (a) Repairs for manufacturer or distributor special events, specials or promotional discounts  
15 for retail customer repairs;

16 (b) Parts sold at wholesale;

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

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

20 (e) Tires;

21 (f) Vehicle reconditioning;

1 (g) Private discount agreements with retail customers;

2 (h) State inspections; and

3 (I) Quick service operations.

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

12 (8) Each manufacturer, in establishing a schedule of compensation for warranty work, shall  
13 rely on the vehicle dealer's written schedule of hourly labor rates and parts as stated in subsections  
14 (4), (5) and (6), of this section, and may not obligate any vehicle dealer to engage in unduly  
15 burdensome or time-consuming documentation of rates or parts, including obligating vehicle dealers  
16 to engage in transaction-by-transaction or part-by-part calculations.

17 (9) A dealer or manufacturer may demand that the average parts markup or average labor rate  
18 be calculated using the process provided under subsections (4) and (5) of this section; however, the  
19 demand for the average parts markup may not be made within twelve months of the last parts  
20 markup declaration and the demand for the average labor rate may not be made within twelve  
21 months of the last labor rate declaration. If a parts markup or labor rate is demanded by the dealer

1 or manufacturer, the dealer shall determine the repair orders to be included in the calculation under  
2 subsections (4) and (5) of this section.

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

13 ~~(4)~~ (11) All claims made by motor vehicle dealers pursuant to this section for compensation  
14 for delivery, preparation, warranty and recall work, including labor, parts and other expenses, shall  
15 be paid by the manufacturer within thirty days after approval and shall be approved or disapproved  
16 by the manufacturer within thirty days after receipt. When any claim is disapproved, the dealer shall  
17 be notified in writing of the grounds for disapproval. No claim which has been approved and paid  
18 may be charged back to the dealer unless it can be shown that the claim was false or fraudulent, that  
19 the repairs were not properly made or were unnecessary to correct the defective condition or the  
20 dealer failed to reasonably substantiate the claim in accordance with the written requirements of the  
21 manufacturer or distributor in effect at the time the claim arose. No charge back may be made until

1 the dealer has had notice and an opportunity to support the claim in question. No otherwise valid  
2 reimbursement claims may be denied once properly submitted within manufacturers' submission  
3 guidelines due to a clerical error or omission or based on a different level of technician technical  
4 certification or the dealer's failure to subscribe to any manufacturer's computerized training  
5 programs.

6 ~~(5)~~ (12) Notwithstanding the terms of a franchise agreement or provision of law in conflict  
7 with this section, the dealer's delivery, preparation, warranty and recall obligations constitutes the  
8 dealer's sole responsibility for product liability as between the dealer and manufacturer, and, except  
9 for a loss caused by the dealer's failure to adhere to these obligations, a loss caused by the dealer's  
10 negligence or intentional misconduct or a loss caused by the dealer's modification of a product  
11 without manufacturer authorization, the manufacturer shall reimburse the dealer for all loss incurred  
12 by the dealer, including legal fees, court costs and damages, as a result of the dealer having been  
13 named a party in a product liability action.

14 **§17A-6A-9. Payment of compensation.**

15 (1) Compensation for new motor vehicle inventory under subdivision (a), subsection (1),  
16 section eight of this article shall be paid within sixty days after the effective date of the termination,  
17 cancellation, nonrenewal or discontinuance. Compensation for items of personal property required  
18 by subdivisions (b), (c) and (d), subsection (1), section eight of this article shall be paid within sixty  
19 days after the effective date of the termination, cancellation, nonrenewal or discontinuance if the new  
20 motor vehicle dealer has met all reasonable requirements of the dealer agreement with respect to the  
21 return of the repurchased personal property, including providing clear title.

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

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

14 **§17A-6A-10. Prohibited practices.**

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

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

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

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

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

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

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

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. ~~and~~ The burden of  
13 proof is on the manufacturer or distributor to prove the reasonableness by a preponderance of the  
14 evidence: *Provided*, That this section does not apply to any voluntary agreement entered into after  
15 a dispute or civil action has arisen for which the dealer has accepted separate and valuable  
16 consideration. Any prospective agreement is void as a matter of law;

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

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

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



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

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

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

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

1           (A) Require a dealer to grant such captive finance source a power of attorney to do anything  
2 on behalf of the dealer other than sign the dealer's name on any check, draft or other instrument  
3 received in payment or proceeds under any contract for the sale or lease of a motor vehicle that is  
4 made payable to the dealer but which is properly payable to the captive finance source, is for the  
5 purpose of correcting an error in a customer's finance application or title processing document, or  
6 is for the purpose of processing regular titling of the vehicle;

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

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

1 contract, but such warranty may only be enforced if the captive finance source gives the dealer a  
2 reasonable opportunity to cure or correct any errors in the finance contract where cure or correction  
3 is possible. For purposes of this section, any allegation by a third party that would constitute a  
4 breach of the terms of a written agreement between the dealer and a captive finance source shall be  
5 considered a material breach;

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

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

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

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

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

3 (II) A delay or reduction in the payment of dealer's portion of the finance income pursuant  
4 to an agreement between the dealer and a captive finance source under which the dealer agrees to  
5 such delay or reduction in exchange for the limitation, reduction or elimination of the dealer's  
6 responsibility for finance reserve chargebacks; or

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

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

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

21 (iv) Any captive finance source who engages directly or indirectly in purposeful contacts

1 within this state in connection with the offering or advertising the availability of financing for the  
2 sale or lease of motor vehicles within this state, or who has business dealings within this state, shall  
3 be subject to the provisions of this section and shall be subject to the jurisdiction of the courts of this  
4 state.

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

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

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

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

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

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

4           (b) Refuse to disclose to a new motor vehicle dealer the method and manner of distribution  
5 of new motor vehicles by the manufacturer or distributor, including any numerical calculation or  
6 formula used, nationally or within the dealer's market, to make the allocations within thirty days of  
7 a request. Any information or documentation provided by the manufacturer may be subject to a  
8 reasonable confidentiality agreement;

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

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

1 subdivision does not apply to price changes caused by the following:

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

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

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

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

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

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

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

1 manufacturer or distributor is:

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

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

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

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

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

9 (ii) Operate a dealership; or

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

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

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

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

19 (k) The twelve-month period may be extended for an additional twelve months. Notice of  
20 any such extension of the original twelve-month period must be given to any dealer of the same  
21 line-make whose dealership is located in the same county, or within twenty air miles of, the



1 dealership owned or controlled by the manufacturer or distributor prior to the expiration of the  
2 original twelve-month period. Any dealer receiving the notice may protest the proposed extension  
3 within thirty days of receiving notice by bringing a declaratory judgment action in the circuit court  
4 for the county in which the new motor vehicle dealer is located to determine whether good cause  
5 exists for the extension;

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

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

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

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

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

18 (n) Fail to respond in writing to a request for consent to a sale, transfer or exchange of a  
19 dealership within sixty days after receipt of a written application from the new motor vehicle dealer  
20 on the forms generally ~~utilized~~ used by the manufacturer or distributor for ~~such~~ that purpose and  
21 containing the information required therein. Failure to respond to the request within the sixty days

1 is consent;

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

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

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

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

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

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

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

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

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

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

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

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

19          (iv) Except as otherwise provided in this subsection, the manufacturer or distributor agrees  
20 to pay the reasonable expenses, including reasonable out-of-pocket professional fees which shall  
21 include, but not be limited to, accounting, legal or appraisal services fees that are incurred by the

1 proposed owner or transferee before the manufacturer's or distributor's exercise of its right of first  
2 refusal. Payment of the expenses and fees for professional services are not required if the dealer fails  
3 to submit an accounting of those expenses and fees within twenty days of the dealer's receipt of the  
4 manufacturer's or distributor's written request for such an accounting. Such a written account of fees  
5 and expenses may be requested by a manufacturer or distributor before exercising its right of first  
6 refusal;

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

9 (s) Make any material or unreasonable change in any franchise agreement, including, but not  
10 limited to, the dealer's area of responsibility, without giving the new motor vehicle dealer written  
11 notice by certified mail of the change at least sixty days prior to the effective date of the change, and  
12 shall include an explanation of the basis for the alteration. This explanation shall include, but is not  
13 limited to, a reasonable and commercially acceptable copy of all information, data, evaluations, and  
14 methodology considered, reviewed or relied on or based its decision on, to propose the change to the  
15 dealer's area of responsibility. Any information or documentation provided by the manufacturer or  
16 distributor may be produced subject to a reasonable confidentiality agreement. At any time prior to  
17 the effective date of an alteration of a new motor vehicle dealer's area of responsibility, and after the  
18 completion of any internal appeal process pursuant to the manufacturer's or distributor's policy  
19 manual, the motor vehicle dealer may petition the court to enjoin or prohibit the alteration. The court  
20 shall enjoin or prohibit the alteration of a motor vehicle dealer's area of responsibility unless the  
21 franchisor shows, by a preponderance of the evidence, that the alteration is reasonable and justifiable

1 in light of market conditions. If a motor vehicle dealer petitions the court, no alteration to a motor  
2 vehicle dealer's area of responsibility shall become effective until a final determination by the court.  
3 If a new motor vehicle dealer's area of responsibility is altered, the manufacturer shall allow  
4 twenty-four months for the motor vehicle dealer to become sales effective prior to taking any action  
5 claiming a breach or nonperformance of the motor vehicle dealer's sales performance  
6 responsibilities;

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

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

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

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

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

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

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

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

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

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

17 (y) (i) Require a dealer to purchase goods or services from a vendor selected, identified, or  
18 designated by a manufacturer, factory branch, distributor, distributor branch or one of its affiliates  
19 by agreement, program, incentive provision or otherwise without making available to the dealer the  
20 option to obtain the goods or services of substantially similar quality and overall design from a  
21 vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor or

1 distributor branch: *Provided*, That such approval may not be unreasonably withheld, and: *Provided*,  
2 *however*, That the dealer's option to select a vendor is not available if the manufacturer or distributor  
3 provides substantial reimbursement for the goods or services offered. Substantial reimbursement is  
4 equal to or greater than sixty-five percent of the cost, which may not be greater than the cost of  
5 reasonably available similar goods and services in close proximity to the dealer's market: *Provided*,  
6 further, That the goods are not subject to the manufacturer or distributor's intellectual property or  
7 trademark rights, or trade dress usage guidelines. This section does not apply to any voluntary  
8 agreement entered into after a dispute or civil action has arisen for which the dealer has accepted  
9 separate and valuable consideration. Any prospective agreement is void as a matter of law.

10 (ii) To fail to provide to a dealer, when the manufacturer, factory branch, distributor or  
11 distributor branch claims that a vendor chosen by the dealer cannot supply goods and services of  
12 substantially similar quality, a disclosure concerning the vendor selected, identified or designated  
13 by the franchisor stating: (I) Whether the manufacturer, factory branch, distributor, distributor  
14 branch or one of its affiliates, or any officer, director or supervisory employee of the same, has an  
15 ownership interest, actual or beneficial, in the vendor and, if so, the percentage of the ownership  
16 interest; and (II) whether the manufacturer, factory branch, distributor, distributor branch or one of  
17 its affiliates has an agreement or arrangement by which the vendor pays to the manufacturer, factory  
18 branch, distributor, distributor branch, or one of its affiliates, or any officer, director or supervisory  
19 employee of the same, any compensation and, if so, the basis and amount of the compensation to be  
20 paid as a result of any purchases by the dealer, whether it is to be paid by direct payment by the  
21 vendor or by credit from the vendor for the benefit of the recipient.

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

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

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

19 **§17A-6A-11. Where motor vehicle dealer deceased or incapacitated.**

20 (1) Any designated family member of a deceased or incapacitated new motor vehicle dealer  
21 may succeed the dealer in the ownership or operation of the dealership under the existing dealer



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

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

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

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

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

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

12           (7) If the manufacturer challenges the succession, it maintains the burden of proof to show  
13 good cause by a preponderance of the evidence. If the person seeking succession files a civil action  
14 within the one hundred eighty days set forth in subsection (4), no action may be taken by the  
15 manufacturer contrary to the dealer agreement until such time as the civil action and any appeal has  
16 been exhausted: *Provided, That when a motor vehicle dealer appeals a decision upholding a*  
17 manufacturer's decision to not allow succession based upon the designated person's insolvency,  
18 conviction of a crime punishable by imprisonment in excess of one year under the law which the  
19 designated person was convicted, the dealer agreement shall remain in effect pending exhaustion of  
20 all appeals only if the motor vehicle dealer establishes a likelihood of success on appeal and the  
21 public interest will not be harmed by keeping the dealer agreement in effect pending entry of final

1 judgment after the appeal.

2 **§17A-6A-12. Relocation.**

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

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

17 (3) Within sixty days after receiving the notice provided in subsection (2) of this section, or  
18 within sixty days after the end of any appeal procedure provided by the manufacturer or distributor,  
19 a new motor vehicle dealer of the same line-make within the affected ~~relevant~~ relative market area  
20 may bring a declaratory judgment action in the circuit court for the county in which the new motor  
21 vehicle dealer is located to determine whether good cause exists for the establishing or relocating

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

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

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

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

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

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

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

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

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

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

11 **§17A-6A-12a. Restriction on motor vehicle dealer's use of dealership property.**

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

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

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

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

19 **§17A-6A-12b. Property use agreement.**

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

- 1 (1) Entering into a franchise;
- 2 (2) Approving a franchised dealer's application to add a line-make;
- 3 (3) Approving a franchised dealer's application to relocate a franchise;
- 4 (4) Approving a sale or transfer of a dealer, dealership or franchise; or
- 5 (5) Entering into a sales or service incentive, rebate or other agreement with the dealer or any
- 6 agreement impacting dealers right to retail reimbursement for parts and labor rates.

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

- 8 (1) A limitation on the franchised dealer's ability to add a line-make; or
- 9 (2) A provision that binds a franchised dealer's successor.

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

- 11 (1) The date provided by the property use agreement; or
- 12 (2) The termination of the franchise between the parties to the property use agreement.

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

14 distributor or representative.

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

16 (1) Each new motor vehicle manufacturer or distributor shall specify in writing to each of its

17 new motor vehicle dealers licensed in this state the dealer's obligations for preparation, delivery and

18 warranty service on its products. The manufacturer or distributor shall compensate the new motor

19 vehicle dealer for warranty service required of the dealer by the manufacturer or distributor. The

20 manufacturer or distributor shall provide the new motor vehicle dealer with the schedule of

21 compensation to be paid to the dealer for parts, work and service, and the time allowance for the

1 performance of the work and service in a manner in compliance with section eight-a of this article.

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

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

15 (a) Fail to perform any warranty obligation;

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

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

21 (4) All claims made by a new motor vehicle dealer pursuant to this section for labor and parts

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

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

15 **§17A-6A-14a. Open account protection.**

16 If there is a dispute between the manufacturer, factory branch, distributor or distributor  
17 branch and the dealer with respect to any matter referred to this article, either party may notify, in  
18 writing, the other party of its request to challenge, through the manufacturer's appeal process or the  
19 circuit courts of the State of West Virginia. A manufacturer, factory branch, distributor, or  
20 distributor branch may not collect chargebacks, fully or in part, either through direct payment or by  
21 charge to the dealer's account, for warranty parts or service compensation, including service



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

12 **§17A-6A-15. Dealer data, obligation of manufacturer, vendors, suppliers and others; consent**  
13 **to access dealership information; indemnification of dealer.**

14 (a) Except as expressly authorized in this section, no manufacturer, factory branch, distributor  
15 or distributor branch may require a new motor vehicle dealer to provide its customer lists, customer  
16 information, consumer contact information, transaction data or service files. Any requirement by a  
17 manufacturer, factory branch, distributor or distributor branch that a new motor vehicle dealer  
18 provide its customer lists, customer information, consumer contact information, transaction data or  
19 service files as a condition to the dealer's participation in any incentive program or contest for a  
20 customer or dealer to receive any incentive payments otherwise earned under an incentive program  
21 or contest, for the dealer to obtain consumer or customer leads, or for the dealer to receive any other

1 benefits, rights, merchandise or services for which the dealer would otherwise be entitled to obtain  
2 under the franchise or any other contract or agreement, or which is customarily provided to dealers,  
3 is voidable at the option of the dealer, unless all of the following conditions are satisfied: (i) The  
4 customer information requested relates solely to the specific program requirements or goals  
5 associated with the manufacturer's or distributor's own vehicle makes and does not require that the  
6 dealer provide general customer information or other information related to the dealer; (ii) the  
7 requirement is lawful and would also not require the dealer to allow any customer the right to opt  
8 out under the federal Gramm-Leach-Bliley Act, 15 U. S.C., Subchapter I, § 1608, et seq.; and (iii)  
9 the dealer is not required to allow the manufacturer or distributor or any third party to have direct  
10 access to the dealer's computer system, but the dealer is instead permitted to provide the same dealer,  
11 consumer or customer data or information specified by the manufacturer or distributor by timely  
12 obtaining and pushing or otherwise furnishing the required data in a widely accepted file format such  
13 as comma delimited in accordance with subsection (j)(1) of this section. Nothing contained in this  
14 section limits the ability of the manufacturer, factory branch, distributor or distributor branch to  
15 require that the dealer provide, or use in accordance with the law, the customer information related  
16 solely to the manufacturer's or distributor's own vehicle makes to the extent necessary to do any of  
17 the following:

- 18 (1) Satisfy any safety or recall notice obligations;
- 19 (2) Complete the sale and delivery of a new motor vehicle to a customer;
- 20 (3) Validate and pay customer or dealer incentives;
- 21 (4) Submit to the manufacturer, factory branch, distributor or distributor branch claims for

1 any services supplied by the dealer for any claim for warranty parts or repairs;

2 (b) At the request of a manufacturer or distributor or of a third party acting on behalf of a  
3 manufacturer or distributor, a dealer may only be required to provide customer information related  
4 solely to the manufacturer's or distributor's own vehicle makes for reasonable marketing purposes,  
5 market research, consumer surveys, market analysis and dealership performance analysis, but the  
6 dealer is only required to provide the customer information to the extent lawfully permissible; to the  
7 extent the requested information relates solely to specific program requirements or goals associated  
8 with the manufacturer's or distributor's own vehicle makes and does not require the dealer to provide  
9 general customer information or other information related to the dealer; and to the extent the  
10 requested information can be provided without requiring that the dealer allow any customer the right  
11 to opt out under the federal Gramm-Leach-Bliley Act, 15 U. S.C., Subchapter I, § 6801, et seq.

12 (c) A manufacturer, factory branch, distributor or distributor branch may not access or obtain  
13 dealer or customer data from or write dealer or customer data to a dealer management computer  
14 system used by a motor vehicle dealer located in this state, or require or coerce a motor vehicle  
15 dealer located in this state to use a particular dealer management computer system, unless the dealer  
16 management computer system allows the dealer to reasonably maintain the security, integrity and  
17 confidentiality of the data maintained in the system. A manufacturer, factory branch, distributor,  
18 distributor branch, dealer management computer system vendor or any third party acting on behalf  
19 of any manufacturer, factory branch, distributor, distributor branch or dealer management computer  
20 system vendor may not prohibit a dealer from providing a means to regularly and continually monitor  
21 the specific data accessed from or written to the dealer's computer system and from complying with

1 applicable state and federal laws and any rules or regulations promulgated thereunder. These  
2 provisions do not impose an obligation on a manufacturer, factory branch, distributor, distributor  
3 branch, dealer management computer system vendor or any third party acting on behalf of any  
4 manufacturer, factory branch, distributor, distributor branch or dealer management computer system  
5 vendor to provide that capability.

6 (d) No manufacturer, factory branch, distributor, distributor branch, dealer management  
7 computer system vendor or any third party acting on behalf of any manufacturer, factory branch,  
8 distributor, distributor branch or dealer management computer system vendor may access or use  
9 customer or prospect information maintained in a dealer management computer system used by a  
10 motor vehicle dealer located in this state for purposes of soliciting any customer or prospect on  
11 behalf of or directing the customer or prospect to, any other dealer. The limitations in this subsection  
12 do not apply to:

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

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

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

18 (4) Customer or prospect information obtained by the manufacturer, factory branch,  
19 distributor or distributor branch where the dealer agrees to allow the manufacturer, factory branch,  
20 distributor, distributor branch, dealer management computer system vendor, or any third party acting  
21 on behalf of any manufacturer, factory branch, distributor, distributor branch or dealer management

1 computer system vendor the right to access and use the customer or prospect information maintained  
2 in the dealer's dealer management computer system for purposes of soliciting any customer or  
3 prospect of the dealer on behalf of, or directing the customer or prospect to, any other dealer in a  
4 separate, stand-alone written instrument dedicated solely to the authorization.

5 (e) A manufacturer, factory branch, distributor, distributor branch, dealer management  
6 computer system vendor, or any third party acting on behalf of any manufacturer, factory branch,  
7 distributor, distributor branch or dealer management computer system vendor, may not provide  
8 access to customer or dealership information maintained in a dealer management computer system  
9 used by a motor vehicle dealer located in this state, without first obtaining the dealer's prior express  
10 written consent, revocable by the dealer upon five business days written notice, to provide the access.  
11 Prior to obtaining the consent and prior to entering into an initial contract or renewal of a contract  
12 with a dealer located in this State, the manufacturer, factory branch, distributor, distributor branch,  
13 dealer management computer system vendor, or any third party acting on behalf of, or through any  
14 manufacturer, factory branch, distributor, distributor branch or dealer management computer system  
15 vendor shall provide to the dealer a written list of all specific third parties to whom any data obtained  
16 from the dealer has actually been provided within the twelve-month period ending November 1 of  
17 the prior year. The list shall further describe the scope and specific fields of the data provided. In  
18 addition to the initial list, a dealer management computer system vendor or any third party acting on  
19 behalf of, or through a dealer management computer system vendor shall provide to the dealer an  
20 annual list of third parties to whom the data is actually being provided on November 1 of each year  
21 and to whom the data has actually been provided in the preceding twelve months and describe the

1 scope and specific fields of the data provided. The list shall be provided to the dealer by January 1  
2 of each year. Any dealer management computer system vendor's contract that directly relates to the  
3 transfer or accessing of dealer or dealer customer information must conspicuously state, "NOTICE  
4 TO DEALER: THIS AGREEMENT RELATES TO THE TRANSFER AND ACCESSING OF  
5 CONFIDENTIAL INFORMATION AND CONSUMER RELATED DATA". The consent does not  
6 change the person's obligations to comply with the terms of this section and any additional state or  
7 federal laws, and any rules or regulations promulgated thereunder, applicable to them with respect  
8 to the access. In addition, no dealer management computer system vendor may refuse to provide a  
9 dealer management computer system to a motor vehicle dealer located in this state if the dealer  
10 refuses to provide any consent under this subsection.

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

1 vendor or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor  
2 branch or dealer management computer system vendor to provide that capability.

3 (g) A manufacturer, factory branch, distributor, distributor branch, dealer management  
4 computer system vendor or any third party acting on behalf of or through any dealer management  
5 computer system vendor, having electronic access to customer or motor vehicle dealership data in  
6 a dealership management computer system used by a motor vehicle dealer located in this state shall  
7 provide notice to the dealer of any security breach of dealership or customer data obtained through  
8 the access, which at the time of the breach was in the possession or custody of the manufacturer,  
9 factory branch, distributor, distributor branch, dealer management computer system vendor or third  
10 party. The disclosure notification shall be made without unreasonable delay by the manufacturer,  
11 factory branch, distributor, distributor branch, dealer management computer system vendor or third  
12 party following discovery by the person, or notification to the person, of the breach. The disclosure  
13 notification shall describe measures reasonably necessary to determine the scope of the breach and  
14 corrective actions which may be taken in an effort to restore the integrity, security and confidentiality  
15 of the data. The measures and corrective actions shall be implemented as soon as practicable by all  
16 persons responsible for the breach.

17 (h) This section does not preclude, prohibit or deny the right of the manufacturer, factory  
18 branch, distributor or distributor branch to receive customer or dealership information from a motor  
19 vehicle dealer located in this state for the purposes of complying with federal or state safety  
20 requirements or implementing steps related to manufacturer recalls at times necessary in order to  
21 comply with federal and state requirements or manufacturer recalls provided that receiving this

1 information from the dealer does not impair, alter or reduce the security, integrity, and confidentiality  
2 of the customer and dealership information collected or generated by the dealer.

3 (i) As used in this section:

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

10 (2) "Dealer management computer system vendor" means a seller or reseller of dealer  
11 management computer systems, a person that sells computer software for use on dealer management  
12 computer systems or a person who services or maintains dealer management computer systems, but  
13 only to the extent that each of the sellers, resellers or other persons listed in this subdivision are  
14 engaged in those activities.

15 (3) "Security breach" means an incident of unauthorized access to and acquisition of records  
16 or data containing dealership or dealership customer information where unauthorized use of the  
17 dealership or dealership customer information has occurred or is reasonably likely to occur or that  
18 creates a material risk of harm to a dealership or a dealership's customer. Any incident of  
19 unauthorized access to and acquisition of records or data containing dealership or dealership  
20 customer information, or any incident of disclosure of dealership customer information to one or  
21 more third parties which has not been specifically authorized by the dealer or customer, is a security



1 breach.

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

4 (k)(1) Notwithstanding any of the terms or provisions contained in this section or in any  
5 consent, authorization, release, novation, franchise or other contract or agreement, whenever a  
6 manufacturer, factory branch, distributor, distributor branch, dealer management computer system  
7 vendor or any third party acting on behalf of or through, or approved, referred, endorsed, authorized,  
8 certified, granted preferred status or recommended by, a manufacturer, factory branch, distributor,  
9 distributor branch or dealer management computer system vendor requires that a new motor vehicle  
10 dealer provide any dealer, consumer or customer data or information through direct access to a  
11 dealer's computer system, the dealer is not required to provide, and may not be required to consent  
12 to provide in any written agreement, direct access to its computer system. The dealer may instead  
13 provide the same dealer, consumer or customer data or information specified by the requesting party  
14 by timely obtaining and pushing or otherwise furnishing the requested data to the requesting party  
15 in a widely accepted file format, such as comma delimited: *Provided*, That when a dealer would  
16 otherwise be required to provide direct access to its computer system under the terms of a consent,  
17 authorization, release, novation, franchise or other contract or agreement, a dealer that elects to  
18 provide data or information through other means may be charged a reasonable initial set-up fee and  
19 a reasonable processing fee based on the actual incremental costs incurred by the party requesting  
20 the data for establishing and implementing the process for the dealer. A term or provision contained  
21 in any consent, authorization, release, novation, franchise or other contract or agreement which is

1 inconsistent with any term or provision contained in this subsection is voidable at the option of the  
2 dealer.

3           (2) Notwithstanding the terms or conditions of any consent, authorization, release, novation,  
4 franchise or other contract or agreement, every manufacturer, factory branch, distributor, distributor  
5 branch, dealer management computer system vendor or any third party acting on behalf of or through  
6 a manufacturer, factory branch, distributor, distributor branch or dealer management computer  
7 system vendor, having electronic access to consumer or customer data or other information in a  
8 computer system used by a new motor vehicle dealer, or who has otherwise been provided consumer  
9 or customer data or information by the dealer, shall fully indemnify and hold harmless any dealer  
10 from whom it has acquired the consumer or customer data or other information from all damages,  
11 costs and expenses incurred by the dealer. The indemnification by the manufacturer, factory branch,  
12 distributor, distributor branch, dealer management computer system vendor or third party acting on  
13 behalf of these entities includes, but is not limited to, judgments, settlements, fines, penalties,  
14 litigation costs, defense costs, court costs, costs related to the disclosure of security breaches and  
15 attorneys' fees arising out of complaints, claims, civil or administrative actions, and, to the fullest  
16 extent allowable under the law, governmental investigations and prosecutions to the extent caused  
17 by a security breach or the access, storage, maintenance, use, sharing, disclosure or retention of the  
18 dealer's consumer or customer data or other information or maintenance or services provided to any  
19 computer system used by a new motor vehicle dealer.

20           (1) This section applies to contracts entered into and effective at the time of the effective date  
21 of this section and any contracts entered into after that.

1 **§17A-6A-16. Exports; rebuttable presumption on behalf of dealer.**

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

11 **§17A-6A-17. Manufacturer performance standards; uniform application, prohibited**  
12 **practices.**

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

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

21           (2) Prior to beginning any incentive or reimbursement program, the manufacturer shall

1 provide in writing to each dealer of the same line-make that chooses to participate in the program  
2 the dealer's performance requirement or sales goal or objective, which shall include a reasonable and  
3 general explanation of the methodology, criteria, and calculations used.

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

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

10 **§17A-6A-18. Indemnity.**

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

20 **§17A-6A-19. Actions at law; damages.**

21 (1) If a manufacturer or distributor terminates, cancels, fails to renew or discontinues a dealer

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

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

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

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

18           (5) In addition to any county in which venue is proper in accordance with the Constitution  
19 and laws of this state, in any cause of action brought by a new motor vehicle dealer against a  
20 manufacturer or distributor for any violation of this article or for the determination of any rights  
21 created by the dealer's franchise agreement, venue is proper in the county in which the dealer is

1 engaged in the business of selling the products or services of the manufacturer or distributor.

2 **§17A-6A-20. Injunctive relief.**

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

7 **§17A-6A-21. West Virginia law to apply.**

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

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

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

Sections §17A-6A-12a, §17A-6A-12b, §17A-6A-14a, are new; therefore, underscoring has been omitted.

The contents of §17A-6A-15, §17A-6A-16 and §17A-6A-17 are new; therefore, strike-throughs and underscoring have been omitted.

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

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