

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 462

By Senators Phillips, Woelfel, Woodrum, and Barrett

[Introduced January 24, 2023; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §17A-6A-8a, §17A-6A-10, and §17A-6A-18 of the Code of West
 2 Virginia, 1931, as amended, all relating generally to motor vehicle dealers, distributors,
 3 wholesalers and manufacturers; clarifying a manufacturer’s obligations for warranty and
 4 recall reimbursement to a motor vehicle dealer; restricting manufacturer and distributor
 5 right of first refusal; identifying and clarifying unlawful and prohibited practices; and
 6 clarifying statutory authority of dealer data systems vendor agreements.

Be it enacted by the Legislature of West Virginia:

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

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

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

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

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

8 (3) Provide the dealer the schedule of compensation, which shall be reasonable, to be paid
9 the dealer for parts, work, and service, including reasonable and adequate allowances for
10 diagnostic time necessary for a qualified technician to perform the service, in connection with
11 warranty and recall services and the time allowance for the performance of the diagnosis, work,
12 and service. If a disagreement arises between the manufacturer, distributor, or wholesaler, factory
13 branch or distributor branch and the new motor vehicle dealer about the time allowance for the
14 performance of the diagnosis, work, or service, the new motor vehicle dealer shall submit a written
15 request for modification of the time allowance. A manufacturer, distributor, or wholesaler, factory

16 branch or distributor branch shall not unreasonably deny a written request submitted by a new
17 motor vehicle dealer for modification of a time allowance for a specific warranty repair, or a request
18 submitted by a new motor vehicle dealer for an additional time allowance for either diagnostic or
19 repair work on a specific vehicle covered under warranty, provided the request includes any
20 information and documentation reasonably required by the manufacturer, distributor, or
21 wholesaler, factory branch or distributor branch to assess the merits of the request; and

22 (4) Provide compensation to a new motor vehicle dealer for assistance requested by a
23 customer whose vehicle was subjected to an over the air or remote change, repair, or update to
24 any part, system, accessory, or function by the vehicle manufacturer or distributor and performed
25 at the dealership to satisfy the customer.

26 (b) In no event may:

27 (1) The schedule of compensation fail to compensate the dealers for the diagnosis, work,
28 and services they are required to perform in connection with the dealer's delivery and preparation
29 obligations, or fail to adequately and fairly compensate the dealers for labor time or rate, parts, and
30 other expenses incurred by the dealer to perform under and comply with manufacturer's warranty
31 agreements and factory recalls;

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

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

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

42 (d) The retail rate charged by the dealer for parts is established by the dealer submitting to
43 the manufacturer or distributor 100 sequential nonwarranty customer-paid service repair orders
44 that contain warranty-like parts or 90 consecutive days of nonwarranty customer-paid service
45 repair orders that contain warranty-like parts covering repairs made no more than 180 days before
46 the submission and declaring the average percentage markup. A dealer may decide to submit a
47 single set of repair orders for the purpose of calculating both the labor rate and parts mark-up, or
48 submit separate sets of repair orders for a labor rate and parts mark-up calculation.

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

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

61 (1) Repairs for manufacturer or distributor special events, specials, or promotional
62 discounts for customer repairs;

63 (2) Parts sold at wholesale;

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

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

67 (5) Tires; and

68 (6) Vehicle reconditioning.

69 (g) The average of the parts markup rates and labor rate is presumed to be reasonable and
70 must go into effect 30 days following the manufacturer's approval. A manufacturer or distributor
71 must approve or rebut the presumption by demonstrating that the submitted parts markup rate or
72 labor rate is: (1) fraudulent or inaccurate; (2) not established in accordance with this section; or (3)
73 the submitted parts markup rate or labor rate is unreasonable in light of the practices of all other
74 same line-make franchised motor vehicle dealers in an economically similar area of the state
75 offering the same line-make vehicles, not later than 30 days after dealer's submission or the
76 dealer's submission shall become effective immediately. If the average parts markup rate or
77 average labor rate is disputed by the manufacturer or distributor, the manufacturer or distributor
78 shall provide written notice to the new motor vehicle dealer stating the specific reasons for the
79 rebuttal, providing a full explanation of the reasons for the allegation, and providing a copy of all
80 calculations used by the manufacturer or distributor in determining the manufacturer or
81 distributor's position if the manufacturer's or distributor's objection is based on the accuracy or
82 reasonableness of the new motor vehicle dealer's rate submission, propose an adjustment of the
83 average percentage parts markup or labor rate based on that rebuttal not later than 30 days after
84 dealer's submission. If the new motor vehicle dealer does not agree with the manufacturer's
85 proposed average percentage parts markup or labor rate, the new motor vehicle dealer may file a
86 civil action in the circuit court for the county in which it operates not later than 90 days after dealer's
87 receipt of ~~that proposal~~ the written notice of rebuttal or adjustment by the manufacturer or
88 distributor. In the event a civil action is filed, the manufacturer or distributor has the burden of proof
89 to establish by a preponderance of the evidence that the new motor vehicle dealer's submitted
90 parts markup rate or labor rate was fraudulent, inaccurate, not established in accordance with this
91 section, or is unreasonable in light of the practices of all other same line-make franchised motor
92 vehicle dealers in an economically similar area of the state offering the same line-make vehicles.

93 (h) Each manufacturer, in establishing a schedule of compensation for warranty work, shall

94 rely on the vehicle dealer's declaration of hourly labor rates and parts as stated in subsections (d),
95 (e) and (f) of this section and may not obligate any vehicle dealer to engage in unduly burdensome
96 or time-consuming documentation of rates or parts, including obligating vehicle dealers to engage
97 in transaction-by-transaction or part-by-part calculations.

98 (i) A dealer or manufacturer may demand that the average parts markup or average labor
99 rate be calculated using the process provided under subsections (d) and (e) of this section;
100 however, the demand for the average parts markup may not be made within 12 months of the last
101 parts markup declaration and the demand for the average labor rate may not be made within 12
102 months of the last labor rate declaration. If a parts markup or labor rate is demanded by the dealer
103 or manufacturer, the dealer shall determine the repair orders to be included in the calculation
104 under subsections (d) and (e) of this section.

105 (j) As it applies to a school bus, truck tractor, road tractor, and truck as defined in, § 17A-1-1
106 of this code with a gross vehicle weight in excess of 26,001 pounds the manufacturer, distributor
107 and/or O. E. M. supplier shall pay the dealer its incurred actual time at the retail labor rate for
108 retrieving a motor vehicle and returning a motor vehicle to the dealer's designated parking area.
109 The dealer shall be paid \$50 minimum for each operation that requires the use of each electronic
110 tool (i.e. laptop computer). The manufacturer or distributor may not reduce what is paid to a dealer
111 for this retrieval or return time, or for the electronic tool charge. The dealer is allowed to add to a
112 completed warranty repair order three hours for every 24 hours the manufacturer, distributor,
113 and/or O. E. M. supplier makes the dealer stop working on a vehicle while the manufacturer,
114 distributor, and/or O. E. M. supplier decides how it wants the dealer to proceed with the repairs.

115 (k) All claims made by motor vehicle dealers pursuant to this section for compensation for
116 delivery, preparation, warranty, and recall work, including labor, parts, and other expenses, shall
117 be paid by the manufacturer within 30 days after approval and shall be approved or disapproved
118 by the manufacturer within 30 days after receipt. When any claim is disapproved, the dealer shall
119 be notified in writing of the grounds for disapproval. A claim which has been approved and paid

120 may not be charged back to the dealer unless it can be shown that the claim was false or
121 fraudulent, that the repairs were not properly made or were unnecessary to correct the defective
122 condition or the dealer failed to reasonable substantiate the claim in accordance with the
123 reasonable written requirements of the manufacturer or distributor in effect at the time the claim
124 arose. No charge back may be made until the dealer has had notice and an opportunity to support
125 the claim in question. An otherwise valid reimbursement claims may not be denied once properly
126 submitted within manufacturers' submission guidelines due to a clerical error or omission, a
127 dealer's incidental failure to comply with a specific non-material claim processing requirement or
128 administrative technicality, or based on a different level of technician technical certification or the
129 dealer's failure to subscribe to any manufacturer's computerized training programs. The dealer
130 shall have 30 days to respond to any audit by a manufacturer or distributor.

131 (l) Notwithstanding the terms of a franchise agreement or provision of law in conflict with
132 this section, the dealer's delivery, preparation, warranty, and recall obligations constitutes the
133 dealer's sole responsibility for product liability as between the dealer and manufacturer and,
134 except for a loss caused by the dealer's failure to adhere to the obligations, a loss caused by the
135 dealer's negligence or intentional misconduct or a loss caused by the dealer's modification of a
136 product without manufacturer authorization, the manufacturer shall reimburse the dealer for all
137 loss incurred by the dealer, including legal fees, court costs, and damages, as a result of the dealer
138 having been named a party in a product liability action.

139 (m) When calculating the compensation that must be provided to a new motor vehicle
140 dealer for labor and parts used to fulfill warranty and recall obligations under this section, all of the
141 following apply:

142 (1) The manufacturer shall use time allowances for the diagnosis and performance of the
143 warranty and recall work and service that are reasonable and adequate for the work or services to
144 be performed by a qualified technician. If a disagreement should arise between the manufacturer,
145 distributor, wholesaler, factory branch or distributor branch and the new motor vehicle dealer about

146 the time allowance for the performance of the diagnosis, work, and or service, the dealer and
 147 manufacturer shall use the average of three most used nationally accepted independent manuals
 148 or guidelines which address time allocation of diagnosis, repair time and service;

149 (2) At the request of the new motor vehicle dealer, the manufacturer shall use any retail
 150 labor rate and any retail parts markup percentage established in accordance with this section in
 151 calculating the compensation;

152 (3) If the manufacturer provided a part or component to the new motor vehicle dealer at no
 153 cost to use in performing repairs under a recall, campaign service action, or warranty repair, the
 154 manufacturer shall provide to the new motor vehicle dealer an amount equal to the retail parts
 155 markup for that part or component, which shall be calculated by multiplying the dealer cost for the
 156 part or component as listed in the manufacturer’s price schedule by the retail parts markup
 157 percentage; and

158 (4) A manufacturer shall not assess penalties, surcharges, or similar costs to a new motor
 159 vehicle dealer, transfer or shift any costs to a franchisee, limit allocation of vehicles or parts to a
 160 new motor vehicle dealer, or otherwise take retaliatory action against a new motor vehicle dealer
 161 based on any new motor vehicle dealer’s exercise of its rights under this section. This section does
 162 not prohibit a manufacturer or distributor from increasing the price of a vehicle or part in the
 163 ordinary course of business.

§17A-6A-10. Prohibited practices.

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

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

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

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

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

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

29 (6) Refrain from participation in the management of, investment in, or the acquisition of any
30 other line of new motor vehicle or related products, provided that the dealer maintains a
31 reasonable line of credit for each make or line of vehicle, remains in compliance with reasonable
32 facilities requirements, and makes no change in the principal management of the dealer.
33 Notwithstanding the terms of any franchise agreement, a manufacturer or distributor may not

34 enforce any requirements, including facility or image requirements, that a new motor vehicle
35 dealer establish or maintain exclusive facilities, personnel, or display space, when the
36 requirements are unreasonable considering current economic conditions and are not otherwise
37 justified by reasonable business considerations. The burden of proving that current economic
38 conditions or reasonable business considerations justify such actions is on the manufacturer or
39 distributor and must be proven by a preponderance of the evidence;

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

43 (8) Prospectively assent to a waiver of trial by jury release, arbitration, assignment,
44 novation, waiver, or estoppel which would relieve any person from liability imposed by this article
45 or require any controversy between a new motor vehicle dealer and a manufacturer or distributor
46 to be referred to a person other than the duly constituted courts of this state or the United States
47 District Courts of the Northern or Southern Districts of West Virginia. Nothing in this article
48 prevents a motor vehicle dealer, after a civil action is filed, from entering into any agreement of
49 settlement, arbitration, assignment, or waiver of a trial by jury;

50 (9) Coerce or require any dealer, whether by agreement, program, incentive provision, or
51 otherwise, to construct improvements to its facilities or to install new signs, or other franchisor
52 image elements that replace or substantially alter those improvements, signs or franchisor image
53 elements completed within the preceding 15 years that were required and approved by the
54 manufacturer, factory branch, distributor or distributor branch, or one of its affiliates. If a
55 manufacturer, factory branch, distributor or distributor branch offers incentives or other payments
56 to a consumer or dealer paid on individual vehicle sales under a program offered after the effective
57 date of this subdivision and available to more than one dealer in the state that are premised, wholly
58 or in part, on dealer facility improvements or installation of franchisor image elements required by
59 and approved by the manufacturer, factory branch, distributor or distributor branch and completed

60 within 15 years preceding the program shall be determined to be in compliance with the program
61 requirements pertaining to construction of facilities or installation of signs or other franchisor
62 image elements that would replace or substantially alter those previously constructed or installed
63 within that 15 year period. This subdivision shall apply to and benefit any subsequent dealer who
64 obtains ownership, either through a stock purchase, asset or other means, of a motor vehicle
65 dealership which has met the requirements of this subdivision within the 15 year period set forth in
66 this subdivision. This subdivision shall not apply to a program that is in effect with more than one
67 dealer in the state on the effective date of this subsection, nor to any renewal of such program, nor
68 to a modification that is not a modification of a material term or condition of such program;

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

75 (11) Enter into a contractual requirement imposed by the manufacturer, distributor, or a
76 captive finance source as follows:

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

81 (B) It is unlawful for any manufacturer, factory branch, captive finance source, distributor or
82 distributor branch, or any field representative, officer, agent, or any representative of them,
83 notwithstanding the terms, provisions, or conditions of any agreement or franchise, to require any
84 of its franchised dealers located in this state to agree to any terms, conditions, or requirements in
85 subdivisions (1) through (10), inclusive, of this subsection in order for any such dealer to sell to any

86 captive finance source any retail installment contract, loan, or lease of any motor vehicles
87 purchased or leased by any of the dealer's customers, or to be able to participate in, or otherwise,
88 directly or indirectly, obtain the benefits of the consumer transaction incentive program payable to
89 the consumer or the dealer and offered by or through any captive finance source as to that
90 incentive program.

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

93 (D) It is unlawful for a manufacturer or distributor to use any subsidiary corporation,
94 affiliated corporation, or any other controlled corporation, partnership, association, or person to
95 accomplish what would otherwise be illegal conduct under this section on the part of the
96 manufacturer or distributor.

97 (12) To include in any dealer agreement governing the operation and business of a new
98 motor vehicle dealer, including, but not limited to, the purchase, sale, lease, or service of new
99 motor vehicles, or to enforce or seek to enforce, a right in any dealer agreement for the
100 manufacturer, factory branch, distributor, or distributor branch to unilaterally amend the dealer
101 agreement. Any amendment to a dealer agreement governing the purchase, sale, lease, or
102 service of new vehicles, must be agreed by both the manufacturer, factory branch, distributor, or
103 distributor branch and the dealer at the time the dealer agreement is to be amended.

104 (b) A manufacturer or distributor may not do any of the following:

105 (1) Fail to deliver new motor vehicles or new motor vehicle parts or accessories within a
106 reasonable time and in reasonable quantities relative to the new motor vehicle dealer's market
107 area and facilities, unless the failure is caused by acts or occurrences beyond the control of the
108 manufacturer or distributor, or unless the failure results from an order by the new motor vehicle
109 dealer in excess of quantities reasonably and fairly allocated by the manufacturer or distributor. A
110 manufacturer or distributor may not penalize a new motor vehicle dealer for an alleged failure to
111 meet sales quotas where the alleged failure is due to actions of the manufacturer or distributor;

112 (2) Refuse to offer to its same line-make new motor vehicle dealers all models
113 manufactured for that line-make, including, but not limited to, any model that contains a separate
114 label or badge indicating an upgraded version of the same model regardless of fact that the motor
115 vehicle contains an internal combustion engine or is considered a hybrid, electric vehicle or other
116 means of propulsion. This prohibition shall include any dealership of a new line make established
117 by a manufacturer, factory branch, distributor, or distributor branch, with a dealer agreement in this
118 state as on or before July 1, 2023, or a subsidiary thereof or a company affiliated through
119 ownership of the manufacturer, factory branch, distributor, or distributor branch of at least twenty
120 five percent (25%) of the equity of the company. This provision does not apply to motorhome,
121 travel trailer, or fold-down camping trailer manufacturers;

122 (3) Require as a prerequisite to receiving a model or series of vehicles that a new motor
123 vehicle dealer pay an extra unreasonable acquisition fee or surcharge, or purchase unreasonable
124 advertising displays or other materials, or conduct unreasonable facility or image remodeling,
125 renovation, or reconditioning of the dealer's facilities, or any other type of unreasonable upgrade
126 requirement;

127 (4) Use motor vehicles in transit but not yet in the new motor vehicle dealer's physical
128 possession in any sales effective or efficiency formula to the detriment of the new motor vehicle
129 dealer;

130 (5) Refuse to disclose to a new motor vehicle dealer the method and manner of distribution
131 of new motor vehicles by the manufacturer or distributor, including any numerical calculation or
132 formula used, nationally or within the dealer's market, to make the allocations within 30 days of a
133 request. Any information or documentation provided by the manufacturer may be subject to a
134 reasonable confidentiality agreement;

135 (6) Refuse to disclose to a new motor vehicle dealer the total number of new motor
136 vehicles of a given model, which the manufacturer or distributor has sold during the current model
137 year within the dealer's marketing district, zone, or region, whichever geographical area is the

138 smallest within 30 days of a request;

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

150 (A) The addition to a motor vehicle required or optional equipment pursuant to state or
151 federal law;

152 (B) In the case of foreign-made vehicles or components, revaluation of the United States
153 dollar; or

154 (C) Any increase in transportation charges due to an increase in rates charged by a
155 common carrier and transporters;

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

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

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

166 (11) Establish, operate, or engage in the business of a new motor vehicle dealership. A
167 manufacturer or distributor is not considered to have established, operated, or engaged in the
168 business of a new motor vehicle dealership if the manufacturer or distributor is:

169 (A) Operating a preexisting dealership temporarily for a reasonable period;

170 (B) Operating a preexisting dealership which is for sale at a reasonable price; and

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

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

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

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

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

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

185 (A) The person from whom the manufacturer or distributor acquired the dealership was a
186 franchised dealer; and

187 (B) The dealership is for sale by the manufacturer or distributor at a reasonable price and
188 on reasonable terms and conditions;

189 (14) The 12 month period may be extended for an additional 12 months. Notice of any such

190 extension of the original twelve-month period must be given to any dealer of the same line-make
191 whose dealership is located in the same county, or within 20 air miles of, the dealership owned or
192 controlled by the manufacturer or distributor prior to the expiration of the original 12 month period.
193 Any dealer receiving the notice may protest the proposed extension within 30 days of receiving
194 notice by bringing a declaratory judgment action in the circuit court for the county in which the new
195 motor vehicle dealer is located to determine whether good cause exists for the extension;

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

202 (A) Has made a significant investment in the dealership, subject to loss;

203 (B) Has an ownership interest in the dealership; and

204 (C) Operates the dealership under a plan to acquire full ownership of the dealership within
205 a reasonable time and under reasonable terms and conditions;

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

208 (17) Fail to respond in writing to a request for consent to a sale, transfer, or exchange of a
209 dealership within 60 days after receipt of a written application from the new motor vehicle dealer
210 on the forms generally utilized by the manufacturer or distributor for such purpose and containing
211 the information required therein. Failure to respond to the request within the 60 days is consent;

212 (18) Unfairly prevent a new motor vehicle dealer from receiving reasonable compensation
213 for the value of the new motor vehicle dealership;

214 (19) Audit any motor vehicle dealer in this state for warranty parts or warranty service
215 compensation, service compensation, service or sales incentives, manufacturer rebates, or other

216 forms of sales incentive compensation more than 12 months after the claim for payment or
217 reimbursement has been made by the automobile dealer. A chargeback not be made until the
218 dealer has had notice and an opportunity to support the claim in question within 30 days of
219 receiving notice of the chargeback. An otherwise valid reimbursement claims may not be denied
220 once properly submitted in accordance with material and reasonable manufacturer guidelines
221 unless the factory can show that the claim was false or fraudulent or that the new motor vehicle
222 dealer failed to reasonably substantiate the claim consistent with the manufacturer's written
223 reasonable and material guidelines. This subsection does not apply where a claim is fraudulent. In
224 addition, the manufacturer or distributor is responsible for reimbursing the audited dealer for all
225 documented copying, postage, and administrative and personnel costs reasonably incurred by the
226 dealer during the audit. Any charges to a dealer as a result of the audit must be separately billed to
227 the dealer;

228 (20) ~~Unreasonably restrict~~ Restrict or attempt to restrict a dealer's ownership of a
229 dealership through noncompetition covenants, site control, sublease, collateral pledge of lease,
230 right of first refusal, or option to purchase, ~~or otherwise. A right of first refusal is created when:~~

231 (A) ~~A manufacturer has a contractual right of first refusal to acquire the new motor vehicle~~
232 ~~dealer's assets where the dealer owner receives consideration, terms and conditions that are~~
233 ~~either the same as or better than those they have already contracted to receive under the~~
234 ~~proposed change of more than 50 percent of the dealer's ownership;~~

235 (B) ~~The proposed change of the dealership's ownership or the transfer of the new vehicle~~
236 ~~dealer's assets does not involve the transfer of assets or the transfer or issuance of stock by the~~
237 ~~dealer or one of the dealer's owners to one of the following:~~

238 ~~(i) A designated family member of one or more of the dealer owners;~~

239 ~~(ii) A manager employed by the dealer in the dealership during the previous five years and~~
240 ~~who is otherwise qualified as a dealer operator;~~

241 ~~(iii) A partnership or corporation controlled by a designated family member of one of the~~

242 dealers; or

243 ~~(iv) A trust established or to be established for the purpose of allowing the new vehicle~~
244 ~~dealer to continue to qualify as such under the manufacturer's or distributor's standards, or to~~
245 ~~provide for the succession of the franchise agreement to designated family members or qualified~~
246 ~~management in the event of the death or incapacity of the dealer or its principle owner or owners;~~

247 ~~(C) Upon exercising the right of first refusal by a manufacturer, it eliminates any~~
248 ~~requirement under its dealer agreement or other applicable provision of this statute that the~~
249 ~~manufacturer evaluate, process, or respond to the underlying proposed transfer by approving or~~
250 ~~rejecting the proposal, is not subject to challenge as a rejection or denial of the proposed transfer~~
251 ~~by any party;~~

252 ~~(D) Except as otherwise provided in this section, the manufacturer or distributor agrees to~~
253 ~~pay the reasonable expenses, including reasonable out-of-pocket professional fees which shall~~
254 ~~include, but not be limited to, accounting, legal, or appraisal services fees that are incurred by the~~
255 ~~proposed owner or transferee before the manufacturer's or distributor's exercise of its right of first~~
256 ~~refusal. Payment of the expenses and fees for professional services are not required if the dealer~~
257 ~~fails to submit an accounting of those expenses and fees within 20 days of the dealer's receipt of~~
258 ~~the manufacturer's or distributor's written request for such an accounting. Such a written account~~
259 ~~of fees and expenses may be requested by a manufacturer or distributor before exercising its right~~
260 ~~of first refusal;~~

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

263 (22) Make any material or unreasonable change in any franchise agreement, including, but
264 not limited to, the dealer's area of responsibility without giving the new motor vehicle dealer written
265 notice by certified mail of the change at least 60 days prior to the effective date of the change, and
266 shall include an explanation of the basis for the alteration. Upon written request from the dealer,
267 this explanation shall include, but is not limited to, a reasonable and commercially acceptable copy

268 of all information, data, evaluations, and methodology relied on or based its decision on, to
269 propose the change to the dealer's area of responsibility. Any information or documentation
270 provided by the manufacturer or distributor may be produced subject to a reasonable
271 confidentiality agreement. At any time prior to the effective date of an alteration of a new motor
272 vehicle dealer's area of responsibility and after the completion of any internal appeal process
273 pursuant to the manufacturer's or distributor's policy manual, the motor vehicle dealer may petition
274 the court to enjoin or prohibit the alteration within 30 days of receipt of the manufacturer's internal
275 appeal process decision. The court shall enjoin or prohibit the alteration of a motor vehicle dealer's
276 area of responsibility unless the franchisor shows, by a preponderance of the evidence, that the
277 alteration is reasonable and justifiable in light of market conditions. If a motor vehicle dealer
278 petitions the court, no alteration to a motor vehicle dealer's area of responsibility shall become
279 effective until a final determination by the court. If a new motor vehicle dealer's area of
280 responsibility is altered, the manufacturer shall allow 24 months for the motor vehicle dealer to
281 become sales effective prior to taking any action claiming a breach or nonperformance of the
282 motor vehicle dealer's sales performance responsibilities;

283 (23) Fail to reimburse a new motor vehicle dealer, at the dealer's regular rate, or the full and
284 actual cost of providing a loaner vehicle to any customer who is having a vehicle serviced at the
285 dealership if the provision of the loaner vehicle is required by the manufacturer;

286 (24) Compel a new motor vehicle dealer through its finance subsidiaries to agree to
287 unreasonable operating requirements or to directly or indirectly terminate a franchise through the
288 actions of a finance subsidiary of the franchisor. This subsection does not limit the right of a
289 finance subsidiary to engage in business practices in accordance with the usage of trade in retail
290 or wholesale vehicle financing;

291 (25) Discriminate directly or indirectly between dealers on vehicles of like grade, line,
292 model, or quantity where the effect of the discrimination would substantially lessen competition;

293 (26) Use or employ any performance standard that is not fair and reasonable and based

294 upon accurate and verifiable data made available to the dealer;

295 (27) Require or coerce any new motor vehicle dealer to sell, offer to sell, or sell exclusively
296 extended service contract, maintenance plan, or similar product, including gap or other products,
297 offered, endorsed, or sponsored by the manufacturer or distributor by the following means:

298 (A) By an act of statement that the manufacturer or distributor will adversely impact the
299 dealer, whether it is express or implied;

300 (B) By a contract made to the dealer on the condition that the dealer shall sell, offer to sell,
301 or sell exclusively an extended service contract, extended maintenance plan, or similar product
302 offered, endorsed, or sponsored by the manufacturer or distributor;

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

306 (D) By requiring the dealer to actively promote the sale of extended service contracts,
307 extended maintenance plans or similar products offered, endorsed, or sponsored by the
308 manufacturer or distributor;

309 (E) Nothing in this paragraph prohibits a manufacturer or distributor from providing
310 incentive programs to a new vehicle dealer who makes the voluntary decision to offer to sell, sell,
311 or sell exclusively an extended service contract, extended maintenance plan, or similar product
312 offered, endorsed, or sponsored by the manufacturer or distributor;

313 (F) Require a dealer to purchase goods or services from a vendor selected, identified, or
314 designated by a manufacturer, factory branch, distributor, distributor branch, or one of its affiliates
315 by agreement, program, incentive provision, or otherwise without making available to the dealer
316 the option to obtain the goods or services of substantially similar quality and overall design from a
317 vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor, or
318 distributor branch: *Provided*, That such approval may not be unreasonably withheld: *Provided*,
319 however, That the dealer's option to select a vendor is not available if the manufacturer or

320 distributor provides substantial reimbursement for the goods or services offered. Substantial
321 reimbursement is equal to the difference in price of the goods and services from manufacturer's
322 proposed vendor and the motor vehicle dealer's selected vendor: Provided further, That the goods
323 are not subject to the manufacturer or distributor's intellectual property or trademark rights, or
324 trade dress usage guidelines.

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

328 (d) Except as may otherwise be provided in this article, a manufacturer or franchisor may
329 not directly or indirectly, sell, lease, exchange, or convey a new motor vehicle to a retail customer,
330 offer for retail sale, lease, exchange, or other conveyance a new motor vehicle; or directly finance
331 the retail sale, lease, exchange, or other conveyance of a new motor vehicle to a retail customer or
332 consumer in this state, except through a new motor vehicle dealer holding a franchise for the line-
333 make covering such new motor vehicle. This subsection does not apply to manufacturer or
334 franchisor sales of new motor vehicles to charitable organizations, qualified vendors, or
335 employees of the manufacturer or franchisor.

336 (e) Except when prevented by an act of God, labor strike, transportation disruption outside
337 the control of the manufacturer or time of war, a manufacturer or distributor may not refuse or fail to
338 deliver, in reasonable quantities and within a reasonable time, to a dealer having a franchise
339 agreement for the retail sale of any motor vehicle sold or distributed by the manufacturer, any new
340 motor vehicle or parts or accessories to new motor vehicles as are covered by the franchise if the
341 vehicles, parts and accessories are publicly advertised as being available for delivery or are
342 actually being delivered.

343 (f) It is be unlawful for any manufacturer, factory branch, distributor, or distributor branch,
344 when providing a new motor vehicle to a new motor vehicle dealer for offer, sale, or lease in this
345 State to the public, to fail to provide to the dealer a written disclosure that may be provided to a

346 ~~potential buyer or lessor of the new motor vehicle of each accessory or function of the vehicle that~~
347 ~~may be initiated, updated, changed, or maintained by the manufacturer or distributor through over~~
348 ~~the air or remote means, and the charge to the customer for the initiation, update change, or~~
349 ~~maintenance that is known at the time of sale. A manufacturer or distributor may comply with this~~
350 ~~subdivision by notifying the new motor vehicle dealer that the information is available on a website~~
351 ~~or by other digital means. To offer to a consumer a subscription service or to charge a consumer a~~
352 ~~post-purchase fee for any motor vehicle feature that:~~

353 (1) Utilizes components and hardware already installed on the motor vehicle at the time of
354 purchase or lease by the consumer; and

355 (2) Would function after activation without ongoing expense to the dealer, manufacturer, or
356 any third-party service provider.

357 (3) For purposes of this subsection, a "motor vehicle feature" means any convenience or
358 safety function included on the motor vehicle, such as heated seats or driver assistance that
359 typically is offered to a consumer as an upgrade at the time of purchase or lease of the motor
360 vehicle.

361 (4) For purposes of the sub-section, a "subscription service" means a service provided on
362 a subscription basis in exchange for a recurring payment, including, but not limited to, a weekly,
363 monthly, or annual payment charged to and made by a consumer.

364 (5) Provided however, a motor vehicle feature or a subscription service shall not include
365 any infotainment services for motor vehicle such as wi-fi, satellite radio, navigation or crash or
366 emergency detection or assistance.

367 (g) A manufacturer or distributor shall not attempt to coerce, threaten, or take any act
368 prejudicial against a new motor vehicle dealer arising from the retail price at which a new motor
369 vehicle dealer sells a new motor vehicle.

370 (h) Notwithstanding the terms of any franchise or agreement, or the terms of any program
371 or policy, a manufacturer or distributor may not do any of the following if it has a dealer agreement

372 with any new motor vehicle dealer in this state and if the manufacturer or distributor permits retail
373 customers the option of reserving the purchase or lease of a vehicle through a manufacturer or
374 distributor reservation system:

375 (1) Fail to assign any retail vehicle reservation or request to purchase or lease received by
376 the manufacturer or distributor from a resident of this state to the franchised dealer authorized to
377 sell that make and model which is designated by the customer, or if none is designated, to its
378 franchised dealer authorized to sell that make and model located in closest proximity to the
379 customer's location: *Provided*, That if the customer does not purchase or lease the vehicle from
380 that dealer within 10 days of the vehicle being received by the dealer, or if the customer requests
381 that the transaction be assigned to another dealer, then the manufacturer or distributor may assign
382 the transaction to another franchised dealer authorized to sell that make and model;

383 (2) Prohibit or prejudice ~~unreasonably interfere with~~ a new motor vehicle dealer negotiating
384 the final purchase price of the vehicle with a retail customer that has reserved the purchase or
385 lease through a manufacturer or distributor reservation system;

386 (3) Prohibit or prejudice ~~unreasonably interfere with~~ a new motor vehicle dealer offering
387 and negotiating directly with the customer the terms of vehicle financing or leasing through all
388 sources available to the dealer for the retail customer that has reserved the purchase or lease of a
389 vehicle through a manufacturer or distributor reservation system;

390 (4) Prohibit or prejudice ~~unreasonably interfere with~~ a new motor vehicle dealer's ability to
391 offer to sell or sell any service contract, extended warranty, vehicle maintenance contract, or
392 guaranteed asset protection (GAP) agreement, or any other vehicle-related products and services
393 offered by the dealer with a retail customer that has reserved to purchase or lease through a
394 manufacturer or distributor reservation system: *Provided*, That a manufacturer, distributor, or
395 captive finance source shall not be required to finance the product or service;

396 (5) Prohibit or prejudice ~~unreasonably interfere with~~ a new motor vehicle dealer directly
397 negotiating the trade-in value the customer will receive, or prohibit the dealer from conducting an

398 on-site inspection of the condition of a trade-in vehicle before the dealer becomes contractually
399 obligated to accept the trade-in value to negotiated with a retail customer that has reserved to
400 purchase or lease a vehicle through the manufacturer or distributor reservation system;

401 (6) Use a third party to accomplish what would otherwise be prohibited by this subdivision;

402 (7) Nothing contained in this subdivision shall:

403 (A) Require that a manufacturer or distributor allocate or supply additional or supplemental
404 inventory to a franchised dealer located in this state in order to satisfy a retail customer's vehicle
405 reservation or request submitted directly to the manufacturer or distributor as provided in this
406 section;

407 (B) Apply to the generation of sales leads: Provided, That for purposes of this subdivision
408 the term "sales leads" shall not include any reservation or request to purchase or lease a vehicle
409 submitted directly by a customer or potential customer to a manufacturer or distributor reservation
410 system; or

411 (C) Apply to a reservation or request to purchase or lease a vehicle through the
412 manufacturer or distributor received from the customer that is a resident of this state if the
413 customer designates a dealer outside of this state to be assigned the reservation or request to
414 purchase or lease or if the dealer in closest proximity to the customer's location is in another state
415 and the manufacturer or distributor assigns the reservation or request to purchase or lease to that
416 dealer.

417 (8) Notwithstanding the terms of any dealer agreement, or the terms of any manufacturer
418 or distributor program or policy, a manufacturer or distributor may not, if it has a dealer agreement
419 with any new motor vehicle dealer in this state, offer new motor vehicles through a subscription
420 directly to a retail customer or consumer. However, this subsection is not intended to prevent a
421 manufacturer or distributor from providing or offering new motor vehicles through a subscription
422 program through a new motor vehicle dealer for retail sales to a customer.

423 (i) Notwithstanding the terms of any dealer agreement, or the terms of any manufacturer or

424 distributor program or policy, a manufacturer or distributor may not, if it has a dealer agreement
 425 with any new motor vehicle dealer in this state, offer direct financing for the purchase, lease, or
 426 other conveyance of a motor vehicle to a retail customer. However, this subsection is not intended
 427 to prevent a manufacturer or distributor from providing or offering a financing program through a
 428 new motor vehicle dealer which is available for retail customers.

429 (j) To coerce or require any dealer, whether by agreement, program, incentive provision, or
 430 provision for loss of incentive payments or other benefits, to amend its dealer agreement or to
 431 establish a dealer agreement under which the manufacturer:

432 (1) Maintains a website or other electronic or digital means of communication for
 433 negotiating prices or other binding terms of sale of new vehicles directly with end users, including,
 434 but not limited to agreements between the manufacturer, factory branch, distributor, or distributor
 435 branch on prices or other substantive terms of sale or leasing of new vehicles, directly with end
 436 users ;

437 (2) Retains ownership of new motor vehicles until they are sold to the end users thereof;

438 (3) Cosigns new motor vehicles to dealers for dealer inventory or for sale to end user;

439 (4) Reserves the right to negotiate binding terms of sale directly with buyers of new motor
 440 vehicles; or

441 (5) Designates dealers to be only delivery agents for new motor vehicles, the binding terms
 442 of sale of which are negotiated directly between the manufacturer and the end users of the new
 443 motor vehicles, or for a manufacturer to engage in any such activities.

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

1 Notwithstanding the terms, provisions, or requirements of any franchise agreement,
 2 contract, or other agreement of any kind between a new motor vehicle dealer and a manufacturer
 3 or distributor captive finance source, Dealer data systems vendor ~~dealer management system~~, or
 4 any subsidiary, affiliate, or partner of a manufacturer or distributor, or captive finance source or
 5 Dealer data systems vendor ~~dealer management system~~, the provisions of this code apply to all

- 6 such agreements and contracts listed in this section or governed by the article. Any provisions in
7 the agreements and contracts which violate the terms of this section are null and void.

NOTE: The purpose of this bill to modify certain guidelines for motor vehicle dealers, distributors, wholesalers and manufacturers.

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