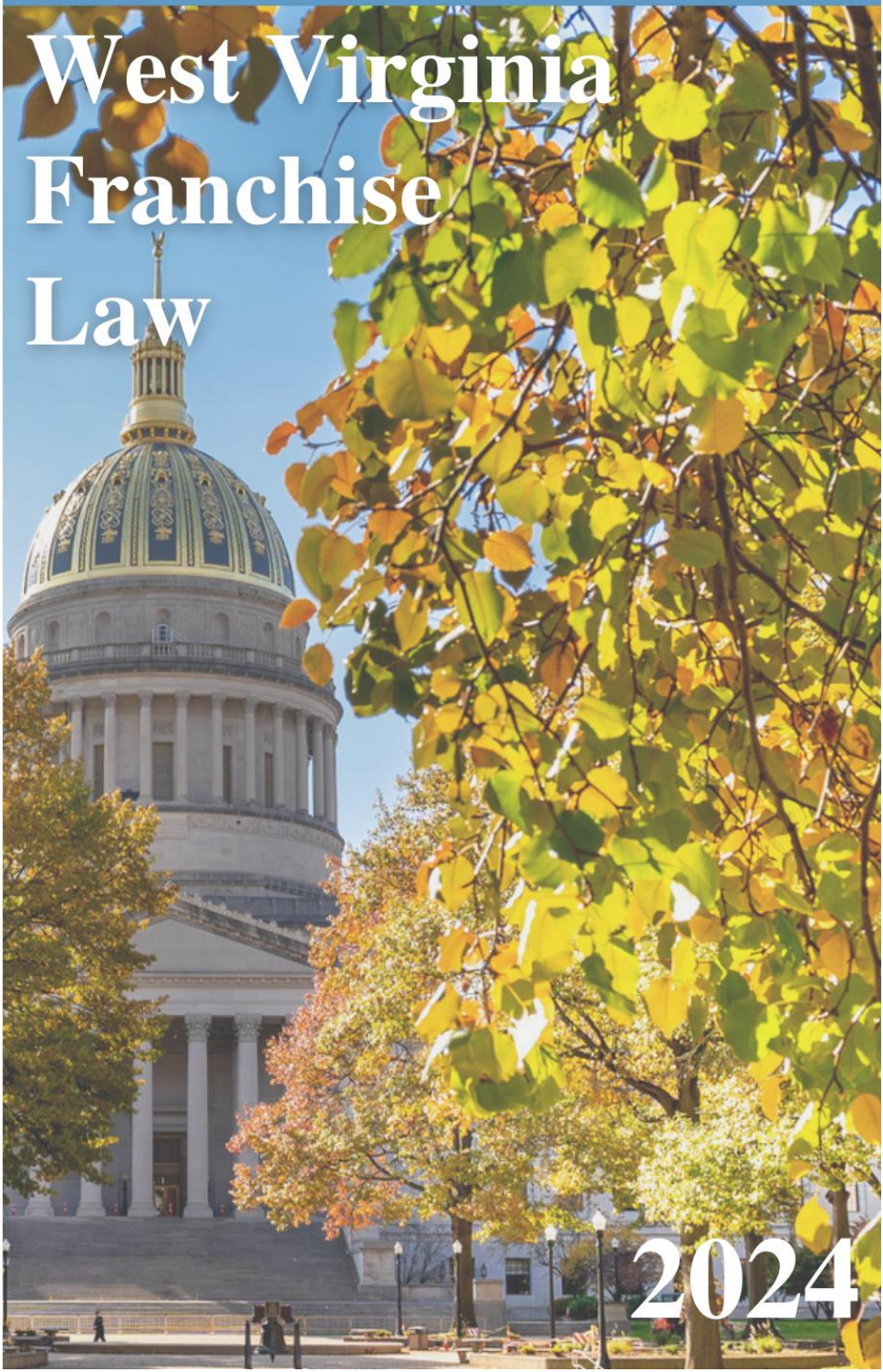
West Virginia Franchise Law



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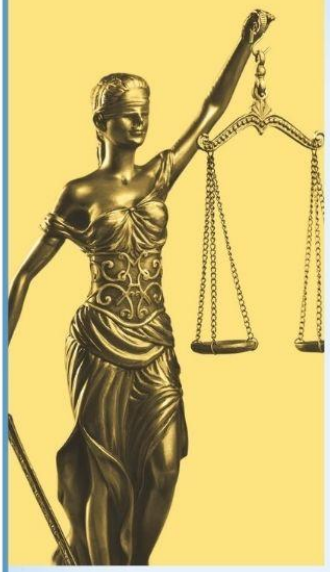

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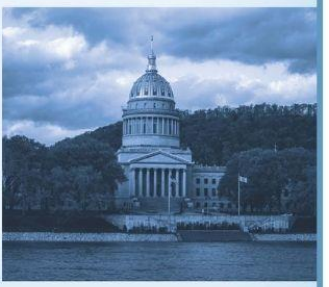

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Mission Statement

The mission of the West Virginia Automobile Dealers Association is to encourage sound business policies, facilitate the exchange of ideas among our members, foster progressive legislation, discourage destructive, retrogressive legislation, cooperate with other motor vehicle trade associations, and promote confidence, respect, and good fellowship among all of those directly or indirectly engaged in the motor vehicle industry.

WEST VIRGINIA AUTOMOBILE DEALERS ASSOCIATION

1618 Kanawha Blvd East
Charleston, WV 25311

304-343-4158

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

§17A-6A-1. Legislative finding.

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

§17A-6A-2. Governing law.

In accord with the settled public policy of this state to protect the rights of its citizens, each franchise or agreement between a manufacturer or distributor and a dealer or dealership which is located in West Virginia, or is to be performed in substantial part in West Virginia, shall be construed and governed by the laws of the State of West Virginia, regardless of the state in which it was made or executed and of any provision in the franchise or agreement to the contrary. The public policy of this state is to protect the rights of its citizens and each new motor vehicle dealer for any agreement governed by this article.

The provisions of this article apply only to any franchises and agreements entered into, continued, modified or renewed subsequent to the effective date of this article.

§17A-6A-3. Definitions.

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

(1) "Dealer agreement" means the franchise, agreement or contract in writing between a manufacturer, distributor and a new

motor vehicle dealer which purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the operation and business of a new motor vehicle dealer, including, but not limited to, the purchase, lease or sale of new motor vehicles, accessories, service and sale of parts for motor vehicles where applicable.

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

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

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

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

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

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

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

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

(9) "Motor vehicle" means that term as defined in §17A-1-1 of this code, including a motorcycle, school bus, truck tractor, road tractor, truck, recreational vehicle, all-terrain vehicle and utility terrain vehicle as defined in subsections (c), (d), (f), (h), (l), (nn) and (vv), respectively, of in said section, but not including a farm tractor or farm equipment. The term "motor vehicle" also includes a school bus, truck tractor, road tractor, truck, its component parts, including, but not limited to, its engine, transmission or rear axle manufactured for installation in a school bus, truck tractor, road tractor or truck.

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

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

(12) “The operation and business of a new motor vehicle dealer or dealership” includes selling, leasing, exchanging or otherwise conveying a new motor vehicle at retail and performing warranty and recall work for a motor vehicle: *Provided,* That the provisions of this subdivision do not apply to over the air updates.

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

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

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

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

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

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

(b) Acted in good faith;

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

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

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

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

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

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

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

(e) Whether the dealer is honoring existing warranties;

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

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

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

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

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

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

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

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

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

Notwithstanding any agreement, the following alone does not constitute good cause for the termination, cancellation, nonrenewal or discontinuance of a dealer agreement under §17A-6A-4 of this code.

(a) A change in ownership of the new motor vehicle dealer's dealership. This section does not authorize any change in ownership which would have the effect of a sale or an assignment

of the dealer agreement or a change in the principal management of the dealership without the manufacturer's or distributor's prior written consent which may not be unreasonably or untimely withheld.

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

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

(4) The fact that the new motor vehicle dealer designates as an executive manager or sells or transfers ownership of the dealership or sells or transfers capital stock in the dealership to the new motor vehicle dealer's spouse, son or daughter: *Provided,* That the sale or transfer shall not have the effect of a sale or an assignment of the dealer agreement or a change in the principal management of the dealership without the manufacturer's or distributor's prior written consent, which may not be unreasonably or untimely withheld or refused in a manner inconsistent with §17A-6A-11 of this code.

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

§17A-6A-6. Burden of proof.

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

§17A-6A-7. Notice provisions.

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

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

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

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

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

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

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

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

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

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

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

(5) A fraudulent misrepresentation by the new motor vehicle

dealer to the manufacturer or distributor, which is material to the dealer agreement.

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

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

(1) Not clearly permitted by the dealer agreement;

(2) Not undertaken for good cause; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Within forty-five days after termination, dealer shall submit evidence of items to the manufacturer in accordance with reasonable manufacturer requirements. The manufacturer shall

have thirty days from receipt of this evidence to note any objection. If not objected thereto, payment by the manufacturer to the dealer shall be made within thirty days. Thereafter, interest accumulates at the rate of the Fifth Federal Reserve District's secondary discount rate in effect on January 2 of the year in which payment is due plus five percentage points. If a dispute arises over the sufficiency of any evidence or an amount submitted, when interest begins to accumulate will be determined in accordance with West Virginia common law.

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

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

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

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

(3) Provide the dealer the schedule of compensation, which shall be reasonable, to be paid the dealer for parts, work and service, including reasonable and adequate allowances for diagnostic time, including time communicating with the manufacturer, necessary for a qualified technician to perform the service, in connection with warranty and recall services and the time allowance for the performance of the diagnosis, work, and service. If a disagreement arises between the manufacturer, distributor, or wholesaler, factory branch or distributor branch and the dealer about the time allowance for the performance of the diagnosis, work, or service, the dealer shall submit a written request for modification of the time allowance, which shall be presumed reasonable. A manufacturer, distributor, or wholesaler, factory branch or distributor branch shall not unreasonably deny a written request submitted by a dealer for modification of a time allowance for a specific warranty repair, or a request submitted by a new motor vehicle dealer for an additional time allowance for either diagnostic or repair work on a specific vehicle covered under warranty, provided the request includes any information and documentation reasonably required by the manufacturer, distributor, or wholesaler, factory branch or distributor branch to assess the merits of the

request; and

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

(b) In no event may:

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

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

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

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

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

(e) The retail rate customarily charged by the dealer for labor rate ~~must~~ shall be established using the same process as provided under subsection (d) of this section and declaring the

average labor rate. The average labor rate ~~must~~ shall be determined by dividing the amount of the dealer's total labor sales by the number of total hours that generated those sales. If a labor rate and parts markup rate are simultaneously declared by the dealer, the dealer may use the same repair orders to complete each calculation as provided under subsection (d) of this section. A reasonable allowance for labor for diagnostic time shall be either included in the manufacturer's labor time allowance or listed as a separate compensable item. A dealer may request additional time allowance for either diagnostic or repair time for a specific repair. The request shall not be unreasonably denied by the manufacturer.

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

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

(2) Parts sold at wholesale;

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

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

(5) Tires; and

(6) Vehicle reconditioning.

(g) The average of the parts markup rates and labor rate is presumed to be reasonable and goes into effect 30 days following the manufacturer's approval. A manufacturer or distributor must approve or rebut the presumption by demonstrating that the submitted parts markup rate or labor rate is: (1) fraudulent or inaccurate; (2) not established in accordance with this section; or (3) the submitted parts markup rate or labor rate is unreasonable in light of the practices of all other same line-make franchised motor vehicle dealers in an economically similar area of the state offering the same line-make vehicles, not later than 30 days after the dealer's submission, or the dealer's submission shall be considered approved. If the average parts markup rate or average labor rate is disputed by the manufacturer or distributor, the manufacturer or distributor shall provide written notice to the new motor vehicle dealer stating the specific reasons for the rebuttal, providing a full explanation of the reason for the allegation, and providing a copy of all calculations used by the manufacturer or distributor in determining the manufacturer or distributor's position if the manufacturer's or distributor's objection is based on the accuracy

or reasonableness of the dealer's rate submission, the manufacturer or distributor shall propose an adjustment of the average percentage parts markup or labor rate based on that rebuttal not later than 30 days after the dealer's submission. If the dealer does not agree with the manufacturer's proposed average percentage parts markup or labor rate, the dealer may file a civil action in the circuit court for the county in which it operates not later than 90 days after dealer's receipt of ~~that proposal~~ the written notice of rebuttal or adjustment by the manufacturer or distributor. In the event a civil action is filed, the manufacturer or distributor has the burden of proof to establish by a preponderance of the evidence that the dealer's submitted parts markup rate or labor rate was fraudulent, inaccurate, not established in accordance with this section, or is unreasonable in light of the practices of all other same line-make dealers in an economically similar area of the state offering the same line-make vehicles.

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

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

(j) As it applies to a school bus, truck tractor, road tractor and truck as defined in §17A-1-1 of this code with a gross vehicle weight in excess of 26,001 pounds the manufacturer, distributor and/or original equipment manufacturer supplier shall pay the dealer its incurred actual time at the retail labor rate for retrieving a motor vehicle and returning a motor vehicle to the dealer's designated parking area. The dealer shall be paid $50 minimum for each operation that requires the use of each electronic tool (i.e. laptop computer). The manufacturer or distributor may not reduce what is paid to a dealer for this retrieval or return time, or for the

electronic tool charge. The dealer is allowed to add to a completed warranty repair order three hours for every twenty-four hours the manufacturer, distributor and/or original equipment manufacturer supplier makes the dealer stop working on a vehicle while the manufacturer, distributor and/or original equipment manufacturer supplier decides how it wants the dealer to proceed with the repairs.

(k) All claims made by dealers pursuant to this section for compensation for delivery, preparation, warranty and recall work, including labor, parts and other expenses, shall be paid by the manufacturer within thirty days after approval and shall be approved or disapproved by the manufacturer within thirty days after receipt. When any claim is disapproved, the dealer shall be notified in writing of the grounds for disapproval. A claim which has been approved and paid may not be charged back to the dealer unless it can be shown that the claim was false or fraudulent, that the repairs were not properly made or were unnecessary to correct the defective condition or the dealer failed to reasonable substantiate the claim in accordance with the reasonable written requirements of the manufacturer or distributor in effect at the time the claim arose. ~~No~~ A charge back may not be made until the dealer has had notice and an opportunity to support the claim in question. An otherwise valid reimbursement claims may not be denied once properly submitted within manufacturers' submission guidelines due to a clerical error or omission, a dealer's incidental failure to comply with a specific non-material claim processing requirement or administrative technicality, or based on a different level of technician technical certification or the dealer's failure to subscribe to any manufacturer's computerized training programs. The dealer has 30 days to respond to any audit by a manufacturer or distributor.

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

(m) When calculating the compensation that must be provided to a new motor vehicle dealer for labor and parts used to

fulfill warranty and recall obligations under this section, all of the following apply:

(1) The manufacturer shall use time allowances for the diagnosis and performance of the warranty and recall work and service that are reasonable and adequate for the work or services to be performed by a qualified technician;

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

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

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

§17A-6A-9. Payment of compensation.

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

(2) Reasonable compensation pursuant to subdivision (a), subsection (1), section eight of this article may not be less than the new motor vehicle dealer's net acquisition cost, including any special promotions ordered by the manufacturer, such as advertising charges. Reasonable compensation pursuant to

subdivision (b) of said subsection shall be the amount stated in the manufacturer's or distributor's current parts price list. Reasonable compensation pursuant to subdivisions (c) and (d) of said subsection shall be the fair market value of the personal property determined by a five-year straight line depreciation schedule.

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

§17A-6A-10. Prohibited practices.

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

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

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

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

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

(5) Change the capital structure or financial requirements

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

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

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

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

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

franchisor image elements that replace or substantially alter those improvements, signs or franchisor image elements completed within the preceding 15 years that were required and approved by the manufacturer, factory branch, distributor or distributor branch or one of its affiliates. If a manufacturer, factory branch, distributor or distributor branch offers incentives or other payments to a ~~consumer~~ retail buyer or lessee, or dealer paid on individual new motor vehicle sales or leases under a program offered after the effective date of this subdivision that are available to more than one dealer in the state that are premised, wholly or in part, on dealer facility improvements or installation of franchiser image elements required by and approved by the manufacturer, factory branch, distributor or distributor branch and completed within 15 years preceding the program, ~~shall be~~ the dealer is determined to be in compliance with the program requirements pertaining to construction of facilities or installation of signs or other franchisor image elements that would replace or substantially alter those previously constructed or installed within that 15 year period: *Provided,* That the provisions of this subdivision apply to any dealer who obtains ownership, either through a stock purchase, asset purchase or other means, of a new motor vehicle dealership which has met the requirements of this subdivision within the 15-year period set forth in this subdivision, unless the dealer selling the new motor vehicle dealership has signed an agreement with the manufacturer agreeing to dealer facility improvements or the installation of franchiser image elements prior to an agreement to transfer ownership to a subsequent dealer. This subdivision shall not apply to a program that is in effect with more than one dealer in the state on the effective date of this subsection, nor to any renewal of the program, nor to a modification that is not a substantial modification of a material term or condition of the program;

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

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

(A) In this section, "captive finance source" means any financial source that provides automotive-related loans or

purchases retail installment contracts or lease contracts for motor vehicles in this state and is, directly or indirectly, owned, operated or controlled by such manufacturer, factory branch, distributor or distributor branch.

(B) It is unlawful for any manufacturer, factory branch, captive finance source, distributor or distributor branch, or any field representative, officer, agent or any representative of them, notwithstanding the terms, provisions or conditions of any dealer agreement, to require any of its dealers located in this state to agree to any terms, conditions or requirements in subdivisions (1) through (10), inclusive, of this subsection in order for the dealer to sell to any captive finance source any retail installment contract, loan or lease of any new motor vehicles purchased or leased by any of the dealer's customers, or to be able to participate in, or otherwise, directly or indirectly, obtain the benefits of the ~~consumer~~ retail buyer or lessee transaction incentive program payable to the ~~consumer~~ retail buyer, lessee, or the dealer and offered by or through any captive finance source as to that incentive program.

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

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

(12) Agree to any term or provision in the dealer agreement which gives a manufacturer or distributor the right to unilaterally amend the dealer agreement governing the operation and business of a dealer, including but not limited to, the purchase, sale, lease or service of new motor vehicles except as provided for in this article. That term or provision is considered null and void. Any amendment to a dealer agreement governing the purchase, sale, lease, or service of new motor vehicles must be agreed upon by both the manufacturer, factory branch, distributor, or distributor branch and the dealer at the time the dealer agreement is amended.

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

(1) Fail to deliver new motor vehicles or new motor vehicle parts or accessories within a reasonable time and in reasonable quantities relative to the new motor vehicle dealer's market area and facilities, unless the failure is caused by acts or occurrences beyond the control of the manufacturer or distributor, or unless the failure

results from an order by the new motor vehicle dealer in excess of quantities reasonably and fairly allocated by the manufacturer or distributor. A manufacturer or distributor may not penalize a new motor vehicle dealer for an alleged failure to meet sales quotas where the alleged failure is due to actions of the manufacturer or distributor;

(2) Refuse to offer to its same line-make new motor vehicle dealers all models manufactured for that line-make, including, but not limited to, any model that contains a separate label or badge indicating an upgraded version of the same model regardless of the new motor vehicle's means of propulsion: *Provided,* That the dealer meets any reasonable sales, warranty service repair, and recall standards established by the manufacturer or distributor. This prohibition includes a new line make established by a manufacturer with a dealer agreement in this state, or a subsidiary thereof, or a company affiliated through ownership of the manufacturer, factory branch, distributor, or distributor branch of at least 25 percent of the equity of the company. This provision does not apply to motorhome, travel trailer or fold-down camping trailer manufacturers; or

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

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

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

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

(7) Increase prices of new motor vehicles which the dealer had ordered and then eventually delivered to the same retail buyer

or lessee for whom the vehicle was ordered, if the order was made prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a private retail buyer or lessee and binding on the dealer which has been submitted to the vehicle manufacturer is evidence of each order. In the event of manufacturer or distributor price reductions or cash rebates, the amount of any reduction or rebate received by a dealer shall be passed on to the private retail buyer or lessee by the dealer. Any price reduction in excess of $5 shall apply to all new motor vehicles in the dealer's inventory which were subject to the price reduction. A price difference applicable to new model or series motor vehicles at the time of the introduction of the new models or the series is not a price increase or price decrease. This subdivision does not apply to price changes caused by the following:

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

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

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

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

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

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

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

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

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

(C) Operating a dealership with another person who has

made a significant investment in the dealership and who will acquire full ownership of the dealership under reasonable terms and conditions;

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

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

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

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

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

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

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

(14) The 12 month period may be extended for an additional 12 months. Notice of any such extension of the original twelve-month period must be given to any dealer of the same line-make whose dealership is located in the same county, or within 20 air miles of, the dealership owned or controlled by the manufacturer or distributor prior to the expiration of the original 12 month period. Any dealer receiving the notice may protest the proposed extension within thirty days of receiving notice by bringing a declaratory judgment action in the circuit court for the county in which the dealer is located to determine whether good cause exists for the extension;

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

(A) Has made a significant investment in the dealership,

subject to loss;

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

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

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

(17) Fail to respond in writing to a request for consent to a sale, transfer or exchange of a dealership within sixty days after receipt of a written application from the dealer on the forms generally used by the manufacturer or distributor for that purpose and containing the information required ~~therein~~ in the application. Failure to respond to the request within the sixty days is consent;

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

(19) Audit any dealer in this state for warranty parts or warranty service compensation, service compensation, service or sales incentives, manufacturer rebates or other forms of sales incentive compensation more than 12 months after the claim for payment or reimbursement has been made by the dealer. A chargeback may not be made until the dealer has had notice and an opportunity to support the claim in question within thirty days of receiving notice of the chargeback. An otherwise valid reimbursement claim may not be denied once properly submitted in accordance with material and reasonable manufacturer submission guidelines unless the factory can show that the claim was false or fraudulent or that the dealer failed to reasonable substantiate the claim consistent with the manufacturer's written reasonable and material guidelines. due to clerical error or omission. This subsection does not apply where a claim is fraudulent. In addition, the manufacturer or distributor is responsible for reimbursing the audited dealer for all documented copying, postage and administrative and personnel costs reasonably incurred by the dealer during the audit. Any charges to a dealer as a result of the audit must be separately billed to the dealer;

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

~~(A) A manufacturer has a contractual right of first refusal to acquire the new motor vehicle dealer's assets where the dealer~~

~~owner receives consideration, terms and conditions that are either the same as or better than those they have already contracted to receive under the proposed change of more than 50 percent of the dealer's ownership.~~

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

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

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

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

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

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

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

(21) Except for experimental low-volume not-for-retail sale vehicles, cause warranty and recall repair work to be performed by

any entity other than a dealer;

(22) Make any material or unreasonable change to ~~in any franchise agreement, including, but not limited to,~~ the dealer's area of responsibility without giving the dealer written notice by certified mail of the change at least sixty days prior to the effective date of the change which shall include an explanation of the basis for the alteration. Upon written request from the dealer, this explanation shall include, but is not limited to, a reasonable and commercially acceptable copy of all information, data, evaluations, and methodology relied on or based its decision on, to propose the change to the dealer's area of responsibility. Any information or documentation provided by the manufacturer or distributor may be produced subject to a reasonable confidentiality agreement. At any time prior to the effective date of an alteration of a dealer's area of responsibility and after the completion of any internal appeal process pursuant to the manufacturer's or distributor's policy manual, the dealer may petition the court to enjoin or prohibit the alteration within thirty days of receipt of the manufacturer's internal appeal process decision. The court shall enjoin or prohibit the alteration of a dealer's area of responsibility unless the manufacturer shows, by a preponderance of the evidence, that the alteration is reasonable and justifiable in light of market conditions. If a dealer petitions the court, an alteration to a dealer's area of responsibility shall not become effective until a final determination by the court. If a dealer's area of responsibility is altered, the manufacturer shall allow twenty-four months for the dealer to become sales effective prior to taking any action claiming a breach or nonperformance of the dealer's sales performance responsibilities;

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

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

(25) Discriminate directly or indirectly between dealers on vehicles of like grade, line, model, or quantity where the effect of

the discrimination would substantially lessen competition;

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

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

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

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

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

(D) By requiring the dealer to actively promote the sale of extended service contracts, extended maintenance plans or similar products offered, endorsed or sponsored by the manufacturer or distributor; *Provided, That* Nothing in this paragraph prohibits a manufacturer or distributor from providing incentive programs to a dealer who makes the voluntary decision to offer to sell, sell or sell exclusively an extended service contract, extended maintenance plan or similar product offered, endorsed or sponsored by the manufacturer or distributor;

(E) By requiring a dealer to purchase goods or services from a vendor selected, identified or designated by a manufacturer, factory branch, distributor, distributor branch or one of its affiliates by agreement, program, incentive provision or otherwise without making available to the dealer the option to obtain the goods or services of substantially similar quality and overall design from a vendor chosen by the dealer and approved by the manufacturer, factory branch, distributor or distributor branch: *Provided,* That the approval may not be unreasonably withheld: *Provided*, *however*, That the dealer's option to select a vendor is not available if the manufacturer or distributor provides substantial reimbursement for the goods or services offered. Substantial reimbursement is equal to the difference in price of the goods and services from

manufacturer's proposed vendor and the dealer's selected vendor: *Provided further,* That the goods are not subject to the manufacturer or distributor's intellectual property or trademark rights, or trade dress usage guidelines.

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

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

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

(f) It is unlawful for any manufacturer, factory branch, distributor, or distributor branch, when providing a new motor vehicle to a dealer for offer, sale, or lease in this state to the public, to fail to provide to the dealer a written disclosure that may be provided to a potential retail buyer or lessee of the new motor vehicle of each accessory or function of the motor vehicle that may be initiated, updated, changed, or maintained by the manufacturer or distributor through over the air or remote means, and the charge to the retail buyer or lessee for the initiation, update, change, or maintenance that is known at the time of sale. A manufacturer or distributor may comply with this subdivision by notifying the dealer that the information is available on a website or by other digital means.

(g) A manufacturer or distributor shall not attempt to coerce,

threaten, or take any act prejudicial against a dealer arising from the retail price at which a dealer sells a new motor vehicle.

(h) Notwithstanding the terms of any dealer agreement, or the terms of any program or policy, a manufacturer or distributor may not do any of the following if it has a dealer agreement with any dealer in this state and if the manufacturer or distributor permits retail customers the option of reserving the purchase or lease of a vehicle through a manufacturer or distributor reservation system:

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

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

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

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

(5) Prohibit or ~~unreasonably~~ interfere with a dealer directly negotiating the trade-in value the retail buyer or lessee will receive, or prohibit the dealer from conducting an on-site inspection of the

condition of a trade-in vehicle before the dealer becomes contractually obligated to accept the trade-in value to negotiated with a retail buyer or lessee that has reserved to purchase or lease a new motor vehicle through the manufacturer or distributor reservation system;

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

(7) Nothing contained in this subdivision shall:

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

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

(C) Apply to a reservation or request to purchase or lease a new motor vehicle through the manufacturer or distributor received from the retail buyer or lessee that is a resident of this state if the ~~customer~~ retail buyer or lessee's designates a dealer outside of this state to be assigned the reservation or request to purchase or lease or if the dealer in closest proximity to the retail buyer or lessee's location is in another state and the manufacturer or distributor assigns the reservation or request to purchase or lease to that dealer.

(i) Notwithstanding the terms of any dealers agreement, or the terms of any manufacturer or distributor program or policy, a manufacturer or distributor may not, if it has a dealer agreement with any dealer in this state, offer new motor vehicles through a subscription directly to a retail buyer or lessee. However, this subsection is not intended to prevent a manufacturer or distributor from providing or offering new motor vehicles through a subscription program through a dealer for sale or lease to a retail buyer or lessee.

(j) Notwithstanding the terms of any dealer agreement, or the terms of any manufacturer or distributor program or policy, a manufacturer or distributor may not, if it has a dealer agreement with any dealer in this state, offer direct financing for the purchase, lease, or other conveyance of a new motor vehicle to a retail buyer or lessee. However, this subsection is not intended to prevent a

manufacturer or distributor from providing or offering a financing program through a dealer which is available for retail buyers or lessees.

(k) A manufacturer may not coerce or require any dealer, whether by agreement, program, incentive provision, or provision for loss of incentive payments or other benefits, to amend its dealer agreement or to establish a dealer agreement under which the manufacturer:

(1) Maintains a website or other electronic or digital means of communication for negotiating prices or other binding terms of sale or lease of new motor vehicles directly with retail buyers or lessees, including, but not limited to, agreements between the manufacturer, factory branch, distributor, or distributor branch on prices or other substantive terms for the sale or leasing of new motor vehicles directly with retail buyers or lessees;

(2) Retains ownership of new motor vehicles until they are sold or leased to retail buyers or lessees; except that, a manufacturer or distributor may maintain a common supply of new motor vehicles to which it retains ownership until the new motor vehicles are sold to dealers pursuant to the manufacturer's or distributor's allocation policies and procedures, and may maintain a common supply of new motor vehicles from which a dealer may buy vehicles for the dealer's inventory without having reached agreement for sale or lease of any new motor vehicle with a retail buyer or lessee if the manufacturer, factory branch, or distributor, or distributor branch does not otherwise allow its dealers to obtain stock inventory through the new motor vehicle allocation process and pursuant to the manufacturer or distributor's allocation policies and procedures;

(3) Consigns new motor vehicles to dealers for dealer inventory or for sale to a retail buyer or lessee;

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

(5) Designates dealers to be only delivery agents for new motor vehicles, for which the binding terms of sale or lease are negotiated directly between the manufacturer and the retail buyer or lessee or the new motor vehicle.

§17A-6A-11 Motor vehicle dealer successorship or change in executive management.

(1) Any designated family member of a new motor vehicle dealer may succeed the dealer in the ownership or operation, or be

a designated executive manager of the dealership under the existing dealer agreement if the designated family member gives the manufacturer or distributor written notice of his or her intention to succeed to, or be designated as the executive manager of, the dealership within 120 days after the dealer's death or incapacity or designation of a successor or executive manager, and agrees to be bound by all of the terms and conditions of the dealer agreement, and the designated family member meets the current criteria generally applied by the manufacturer or distributor in qualifying new motor vehicle dealers or executive managers. A manufacturer or distributor may refuse to honor the designation or change with the designated family member only for good cause. In determining whether good cause exists for refusing to honor the agreement, the manufacturer or distributor has the burden of proving that the designated successor is a person who is not of good moral character or does not meet the manufacturer's existing written, reasonable and uniformly applied standards for business experience and financial qualifications. The designated family member will have a minimum of one year to satisfy that manufacturer's written and reasonable standards and financial qualifications for appointment as the dealer or executive manager.

(2) The manufacturer or distributor may request from a designated family member any information or application reasonably necessary to determine whether the existing dealer agreement should be honored. The designated family member shall supply the personal and financial data promptly upon the request.

(3) If a manufacturer or distributor believes that good cause exists for refusing to honor the succession or designation, the manufacturer or distributor may, within 45 days after receipt of the notice of the designated family member's intent to succeed the dealer in the ownership or the appointment of an executive manager in the and operation of the dealership, or within forty-five days after the receipt of the requested personal and financial data, serve upon the designated family member notice of its refusal to approve the succession.

(4) The notice of the manufacturer or distributor provided in subdivision (3) of this section shall state the specific factual and legal grounds for the refusal to approve the succession or designation of an executive manager.

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

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

(7) If the manufacturer challenges the succession in ownership or executive manager designation, it maintains the burden of proof to show good cause by a preponderance of the evidence. If the person or new motor vehicle dealer seeking succession of ownership or executive manager designation files a civil action within the 180 days of the manufacturer's refusal to approve or the one year qualifying period set forth in subdivision (1) of this section, whichever is longer, no action may be taken by the manufacturer contrary to the dealer agreement until such time as the civil action and any appeal has been exhausted: *Provided*, That when a motor vehicle dealer appeals a decision upholding a manufacturer's decision to not allow succession based upon the designated person's insolvency, conviction of a crime punishable by imprisonment in excess of one year under the law which the designated person was convicted, the dealer agreement shall remain in effect pending exhaustion of all appeals only if the new motor vehicle dealer establishes a likelihood of success on appeal and the public interest will not be harmed by keeping the dealer agreement in effect pending entry of final judgment after the appeal.

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

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

(2) Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line-make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line-make in the

relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.

(3) Within sixty days after receiving the notice provided in subsection (2) of this section, or within sixty days after the end of any appeal procedure provided by the manufacturer or distributor, a new motor vehicle dealer of the same line-make within the affected relevant market area may bring a declaratory judgment action in the circuit court for the county in which the new motor vehicle dealer is located to determine whether good cause exists for the establishing or relocating of the proposed new motor vehicle dealer. *Provided,* That a new motor vehicle dealer of the same line-make within the affected relevant market area shall not be permitted to bring such an action if the proposed relocation site would be further from the location of the new motor vehicle dealer of the same line-make than the location from which the dealership is being moved. Once an action has been filed, the manufacturer or distributor may not establish or relocate the proposed new motor vehicle dealer until the circuit court has rendered a decision on the matter. An action brought pursuant to this section shall be given precedence over all other civil matters on the court's docket. The manufacturer has the burden of proving that good cause exists for establishing or relocating a proposed new motor vehicle dealer.

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

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

(A) The permanency and amount of the investment, including any obligations incurred by the dealer in making the investment;

(B) The effect on the retail new motor vehicle business and the consuming public in the relevant market area;

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Monetary consideration.

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

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

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

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

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

(b) An agreement that restricts the ability of a new motor vehicle dealer, or the ability of the dealer's lessor if the dealer is leasing the dealership facility, to transfer, sell, lease, or change the use of the place of business of the dealership, whether by sublease, lease, collateral pledge of lease, right of first refusal to purchase or lease, option to purchase, option to lease, or other similar agreement, regardless of who the parties to that agreement are.

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

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

(1) Each new motor vehicle manufacturer or distributor shall specify in writing to each of its new motor vehicle dealers licensed in this state the dealer's obligations for preparation, delivery and warranty service on its products. The manufacturer or distributor shall compensate the new motor vehicle dealer for warranty service required of the dealer by the manufacturer or distributor. The manufacturer or distributor shall provide the new motor vehicle dealer with the schedule of compensation to be paid to the dealer for parts, diagnostic time as applicable, work and service, and the time allowance for the performance of the work, diagnostic time as applicable, and service in a manner in compliance with §17A-6A-8a of this code.

(2) The schedule of compensation shall include reasonable compensation for diagnostic work, as well as repair service and labor. Time allowances for the diagnosis and performance of warranty work and service shall be reasonable and adequate for the work to be performed. In the determination of what constitutes reasonable compensation under this section, §17A-6A-8a of this code shall govern: *Provided,* That in the case of a dealer of new motorcycles, motorboat trailers, all-terrain vehicles, utility terrain vehicles and snowmobiles, the compensation of a dealer for warranty parts is the greater of the dealer's cost of acquiring the part plus thirty percent or the manufacturer's suggested retail price: *Provided, however,* That in the case of a dealer of travel trailers, fold-down camping trailers and motorhomes, the compensation of a dealer's cost for warranty parts is not less than the dealer's cost of acquiring the part plus twenty percent.

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

(A) Fail to perform any warranty obligation;

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

(C) Fail to compensate any of the new motor vehicle dealers licensed in this state for repairs effected by the recall or the manufacturer's or distributor's warranty obligation as provided under §17A-6A-8a of this code.

(4) All claims made by a new motor vehicle dealer pursuant to this section for labor and parts shall be paid within thirty days after their approval. All claims shall be either approved or disapproved by the manufacturer or distributor within thirty days after their receipt on a proper form generally used by the manufacturer or distributor and containing the usually required information therein. Any claim not specifically disapproved in writing within thirty days after the receipt of the form is considered to be approved and payment shall be made within thirty days. The manufacturer has the right to initiate an audit of a claim within twelve months after payment and to charge back to the new motor vehicle dealer the amount of any false, fraudulent or unsubstantiated claim, subject to the requirements of §17A-6A-8a of this code.

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

§17A-6A-14. Acceptance of vehicles; risk of loss or damage.

(1) Notwithstanding the terms, provisions or conditions of any agreement, a new motor vehicle dealer is solely liable for damages to new motor vehicles after acceptance from the carrier, after a three-day period for proper inspection of the vehicle and before delivery to the ultimate purchaser. Acceptance by the new motor vehicle dealer shall occur when the new motor vehicle dealer signs a delivery receipt for any motor vehicle.

(2) Notwithstanding the terms, provisions or conditions of any agreement, the manufacturer or distributor is liable for all damages or repairs to motor vehicles before delivery to a carrier or transporter and shall indemnify the new motor vehicle dealer for any such damages or repairs.

(3) The new motor vehicle dealer is liable for damages to new motor vehicles after delivery to the carrier only if the dealer selects the method of transportation, mode of transportation and the carrier. In all other instances, the manufacturer or distributor is liable for new motor vehicle damage.

(4) If the new motor vehicle dealer rejects a new motor vehicle pursuant to this section, the manufacturer or distributor shall credit the dealer's account within ten business days after receipt of the notice of rejection.

§17A-6A-14a. Open account protection.

If there is a dispute between the manufacturer, factory branch, distributor or distributor branch and the dealer with respect to any matter referred to this article, either party may notify, in writing, the other party of its request to challenge, through the manufacturer's appeal process or the circuit courts of the state of West Virginia. A manufacturer, factory branch, distributor, or distributor branch may not collect chargebacks, fully or in part, either through direct payment or by charge to the dealer's account, for warranty parts or service compensation, including service incentives, sales incentives, other sales compensation, surcharges, fees, penalties or any financial imposition of any type arising from an alleged failure of the dealer to comply with a policy of, directive from or agreement with the manufacturer, factory branch, distributor or distributor branch until thirty days following final notice of the amount charged to the dealer following all internal processes of the manufacturer, factory, factory branch, distributor or distributor branch. Within thirty days following receipt of final notice, the dealer may, in writing, request a hearing or seek civil relief from the manufacturer's appeal process or the circuit courts of the state of West Virginia. If a dealer requests a hearing or files a civil action, the manufacturer, factory branch, distributor or distributor branch may not collect the chargeback, fully or in part, either through direct payment or by charge to the dealer's account, until the completion of the hearing or civil action, and all appeal, civil or otherwise, have

been exhausted concerning the validity of the chargeback.

§17A-6A-15. Indemnity.

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

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

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

(b) The dealer is only required to provide the customer information to the extent lawfully permissible; and to the extent the requested information relates solely to specific program requirements or goals associated with the manufacturer's or distributor's own vehicle makes. A manufacturer, factory branch, distributor, distributor branch, dealer data systems vendor, or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor branch or dealer data systems vendor may not prohibit a dealer from providing a means to regularly and

continually monitor the specific data accessed from or written to the dealer's data systems and from complying with applicable state and federal laws and any rules or regulations promulgated thereunder. These provisions do not impose an obligation on a manufacturer, factory branch, distributor, distributor branch, dealer, vendor or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor branch, dealer, or data systems vendor to provide that capability.

(c) A manufacturer, factory branch, distributor, distributor branch, dealer data systems vendor, or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor branch or dealer data systems vendor, may not provide access to customer or dealership information maintained in a dealer management computer system used by a motor vehicle dealer located in this state, other than a subsidiary or affiliate of the manufacturer factory branch, distributor or distributor branch without first obtaining the dealer's prior express written consent and agreement, revocable by the dealer upon ten business days written notice, to provide the access.

(d) Upon a written request from a motor vehicle dealer, the manufacturer, factory branch, distributor, distributor branch, dealer or data systems vendor, or any third party acting on behalf of or through any manufacturer, factory branch, distributor, distributor branch or dealer management computer system vendor shall provide to the dealer a written list of all specific third parties other than a subsidiary or affiliate of the manufacturer, factory branch, distributor or distributor branch to whom any data obtained from the dealer has actually been provided within the twelve-month period prior to date of dealer's written request. If requested by the dealer, the list shall further describe the scope and specific fields of the data provided. The consent does not change the person's obligations to comply with the terms of this section and any additional state or federal laws, and any rules or regulations promulgated thereunder, applicable to them with respect to the access.

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

(f) A manufacturer or distributor or a third party acting on

behalf of a manufacturer or distributor may not require a dealer to provide any customer information: Any individual who is not a customer of such manufacturer's or distributor's own vehicle makes; for any purpose other than for reasonable marketing purposes on behalf of that dealer, market research, consumer surveys, market analysis, or dealership performance analysis; if sharing that information would not be permissible under local, state, or federal law; except to the extent the requested information relates solely to specific program requirements or goals associated with such manufacturer's or distributor's own vehicle makes; that is general customer information or other information related to the dealer, unless the requested information can be provided in a manner consistent with dealer's current privacy policies and Gramm-Leach-Bliley Act privacy notice, a dealer may not be required to amend that notice to accommodate data sharing with the manufacturer or distributor.

(g) As used in this section:

(1) "Authorized Integrator" means any third party with whom a dealer has entered into a written contract to perform a specific function for a dealer that permits the third party to access protected dealer data and/or to write data to a dealer data system to carry out the specified function (the "authorized integrator contract").

(2) "Dealer" means a new motor vehicle dealer as defined by §17A-6A-3(11) of this code and any authorized dealer personnel.

(3) "Dealer data system" means any software, hardware, or firmware used by a dealer in its business operations to store, process, or maintain protected dealer data.

(4) "Dealer data systems vendor" means any dealer management system provider, customer relationship management system provider, or other vendor that permissibly stores protected dealer data pursuant to a written contract with the dealer ("dealer data systems vendor contract").

(5) "Data access overcharge" means any charge to a dealer or authorized integrator for integration beyond reimbursement for any direct costs incurred by the dealer data systems vendor for such Integration. If a dealer data systems vendor chooses to seek reimbursement from any dealer or authorized integrator for such direct costs, the direct costs must be disclosed to the dealer, and justified by documentary evidence of the costs associated with such Integration or it will be considered a data access overcharge.

(6) "Integration" means access to protected dealer data in a dealer's dealer data system by an authorized integrator, or an authorized integrator writing data to a dealer's dealer data system.

Integration does not require access to any copyrighted material but must allow for access to all protected dealer data. Integration may be accomplished by any commercially reasonable means that do not violate this section, but all dealer data vendors must include an option to integrate via a secure open application programming interface (API), which must be made available to dealers and authorized integrators. In the event that APIs are no longer the reasonable commercial or technical standard for secure data integration, a similar open access integration method may be provided, to the extent it provides the same or better secure access to dealers and authorized Integrators as an API.

(7) "Prior express written consent" means written consent provided by the dealer that is contained in a document separate from any other consent, contract, franchise agreement, or other writing that specifically outlines the dealer's consent for the authorized Integrator to obtain the dealer data, as well as the scope and duration of that consent. This consent may be unilaterally revoked by the dealer: (A) without cause, upon 30 days' notice, and (B) immediately for cause.

(8) "Protected dealer data" means any of the following data that is stored in a dealer data system:

(A) Personal, financial, or other data pertaining to a consumer, or a consumer's vehicle that is provided to a dealer by a consumer or otherwise obtained by a dealer: *Provided,* That this subdivision does not give a new motor vehicle dealer any ownership or rights to share or use the motor vehicle diagnostic data beyond what is necessary to fulfill a dealer's obligation to provide warranty, repair, or service work to its customers; or

(B) Any other data regarding a dealer's business operations in that dealer's dealer data system:

(9) "Secure open API" means an application programming interface that allows authorized integrators to integrate with dealer data systems remotely and securely. The APIs must be "open" in that all required information to Integrate via the API (software development toolkit and any other necessary technical or other information) must be made available by a dealer data systems vendor to any authorized integrator upon request by a dealer. The secure open API must include all relevant endpoints to allow for access to all protected dealer data, or as are needed to integrate with protected dealer data, and must provide granularity and control necessary for dealers and authorized integrators to Integrate the data necessary under the authorized integrator contract. "Open" does not mean that the API must be available publicly or at no cost

to an authorized integrator, however no data access overcharge may be assessed in connection with a secure open API.

(10) "Third party" includes service providers, vendors, including dealer data systems vendors and authorized integrators, and any other individual or entity other than the dealer. Third party does not include any manufacturer, factory branch, distributor, distributor branch or governmental entity acting pursuant to federal, state, or local law, or any third party acting pursuant to a valid court order.

(h) Prohibited Action

1. A third party may not:

(A) Access, share, sell, copy, use, or transmit protected dealer data from a dealer data system without the express written consent of a dealer;

(B) Take any action, by contract, by technical means, or otherwise, that would prohibit or limit a dealer's ability to protect, store, copy, share, or use any protected dealer data. This includes, but is not limited to:

(i) Imposing any data access overcharges or other restrictions of any kind on the dealer or any authorized integrator for integration;

(ii) Prohibiting any third party that the dealer has identified as one of its authorized integrators from integrating with that dealer's dealer data system;

(iii) Place unreasonable restrictions on integration by any authorized integrator or other third party that the dealer wishes to be an authorized integrator. Examples of unreasonable restrictions include, but are not limited to:

(I) Unreasonable restrictions on the scope or nature of the data shared with an authorized integrator;

(II) Unreasonable restrictions on the ability of the authorized integrator to write data to a dealer data system;

(III) Unreasonable restrictions or conditions on a third party accessing or sharing protected dealer data, or writing data to a dealer data system; and

(IV) Requiring unreasonable access to sensitive, competitive, or other confidential business information of a third party as a condition for access to protected dealer data or sharing protected dealer data with an authorized integrator;

(iv) Prohibiting or limiting a dealer's ability to store, copy, securely share or use protected dealer data outside the dealer data system in any manner and for any reason; or

(v) Permitting access to or accessing protected dealer data

without express written consent by the dealer.

(i) Nothing in this section shall be interpreted to prevent any dealer or third party from discharging its obligations as a service provider under an agreement or otherwise under federal, state, or local law to protect and secure protected dealer data, or to otherwise limit those responsibilities.

(j) A dealer data systems vendor or authorized integrator is not responsible for any action taken directly by the dealer, or for any action it takes in appropriately following the written instructions of the dealer, to the extent that such action prevents it from meeting any legal obligation regarding the protection of protected dealer data or results in any liability as a consequence of such actions by the dealer.

(k) A dealer is not responsible for any action taken directly by any of its dealer data systems vendors or authorized integrators, or for any action it takes in appropriately following the written instructions of any of its dealer data systems vendors or authorized integrators, to the extent that such action prevents it from meeting any legal obligation regarding the protection of protected dealer data or results in any liability as a consequence of such actions by the dealer data systems vendor or authorized integrator.

(l) Additional responsibilities and restrictions

(1) All dealer data systems vendors must adopt and make available a standardized Integration framework (use of the STAR Standards or a standard compatible with the STAR standards shall be deemed to be in compliance with this requirement) and allow for integration via secure open APIs to authorized integrators. In the event that APIs are no longer the reasonable commercial or technical standard for secure data integration, a similar open access integration method may be provided, to the extent it provides the same or better secure Integration to dealers and authorized integrators as a secure open API.

(2) All dealer data systems vendors and authorized integrators:

(A) May Integrate, or otherwise access, use, store, or share protected dealer data, only as outlined in, and to the extent permitted by their dealer data systems vendor contract or authorized integrator contract;

(B) Must make any dealer data systems vendor contract or authorized integrator contract terminable upon no more than 90 days notice from the dealer;

(C) Must, upon notice of the dealer's intent to terminate its dealer data systems vendor contract or authorized integrator

contract, in order to prevent any risk of consumer harm or inconvenience, work to ensure a secure transition of all protected dealer data to a successor dealer data systems vendor or authorized integrator. This includes, but is not limited to:

(i) Providing unrestricted access to all protected dealer data and all other data stored in the dealer data system in a commercially reasonable time and format that a successor dealer data systems vendor or authorized integrator can access and use; and

(ii) Deleting or returning to the dealer all protected dealer data prior to termination of the contract pursuant to any written directions of the dealer;

(iii) Providing a dealer, upon request, with a listing of all entities with whom it is sharing or has shared protected dealer data, or with whom it has allowed access to protected dealer data; and

(iv) Allowing a dealer to audit the dealer data systems vendor or authorized integrator's access to and use of any protected dealer data.

(m) Notwithstanding the terms or conditions of any consent, authorization, release, novation, franchise, or other contract or agreement, every manufacturer, factory branch, distributor, distributor branch, dealer, data systems vendor, or any third party acting on behalf of or through a manufacturer, factory branch, distributor, distributor branch or dealer, data systems vendor shall fully indemnify, defend, and hold harmless any dealer or manufacturer, factory branch, distributor or distributor branch from all damages, attorney fees, and costs, other costs and expenses incurred by the dealer from complaints, claims, or actions arising out of manufacturer's, factory's branch, distributor's, distributor's branch, dealer data systems vendors, or any third party for its willful, negligent, or impermissible use or disclosure of dealer data or customer data or other sensitive information in the dealer's data system. The indemnification includes, but is not limited to, judgments, settlements, fines, penalties, litigation costs, defense costs, court costs, costs related to the disclosure of security breaches, and attorneys' fees arising out of complaints, claims, civil, or administrative actions.

(n) The rights conferred on motor vehicle dealers in this section are not waivable and may not be reduced or otherwise modified by any contract or agreement.

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

(p) If any provision of this section or its application to any person or circumstance is held invalid, the invalidity does not affect

other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(q) A manufacturer, factory branch, distributor, distributor branch, dealer, data management computer systems vendor, or any third party acting on behalf of itself, or through a manufacturer, factory branch, distributor, distributor branch, or dealer data management computer system vendor shall not take an act prejudicial against a new motor vehicle dealer because of a new motor vehicle dealer exercising its rights under this section.

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

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

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

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

(1) A performance standard, sales objective or program for measuring dealer performance by a manufacturer, distributor or factory branch in determining a dealer’s compliance with the agreement shall be reasonable and based on accurate information, including but not limited to, the dealer’s specific local market circumstances and geographical characteristics. A manufacturer, distributor, or factor branch may not impose unreasonable restrictions on a dealer relative to compliance with a sales

performance standard or sales objective.

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

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

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

§17A-6A-16. Actions at law; damages.

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

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

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

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

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

§17A-6A-17. Injunctive relief.

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

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

Notwithstanding the terms, provisions or requirements of any dealer agreement, contract or other agreement of any kind between a dealer and a manufacturer or distributor captive finance source, dealer data systems vendor, or any subsidiary, affiliate or partner of a manufacturer or distributor, or captive finance source or dealer data systems vendor, the provisions of this code apply to all such agreements and contracts listed in this section or governed by this article. Any provisions in the agreements and contracts which violate the terms of this section are null and void.

Summary of 2024 Legislative Franchise Bill
SB 173
(effective June 5, 2024)

- Clarifies timeline for manufacturer to dispute the motor vehicle dealers request for adjustment to parts and labor rates. *W. Va. Code 17A-6A-8a(g)*

- Clarifies that the 15-year period on dealer facilities apply to any subsequent dealer who obtains ownership.

- Prohibits a manufacturer from amending the dealer agreement without the motor vehicle dealer's consent. *W. Va. Code 17A-6A-10(a)(12)*

- Clarifies a manufacturer obligation to provide a dealer with all of its makes and models, regardless of whether the model is electric, hybrid, gas or other means of propulsion. *W. Va. Code 17A-6A-10(b)(2)*

- Prohibits a manufacturer from exercising a right of first refusal when a motor vehicle dealer enters into a transaction to sell. W. Va. Code *17A-6A-10(b)(20).*

- Clarifies that a manufacturer may not interfere or prejudice a dealer to set his own prices, trade-in values, financing terms and the price of voluntary protection products. *W. Va. Code 17A-6A-10(h)(2) to (5)*.

- Prohibits a manufacturer from treating a franchised motor vehicle dealer as simply an agent for the manufacturer as it relates to the sale and lease of motor vehicles. W. Va. Code 17A-6A-10(j).

- Clarifies several technical corrections throughout the article to make consistent with bill drafting protocols.

Summary of 2022 Legislative Franchise Bill

HB 4560

(effective June 10, 2022)

- Clarifies that this article of West Virginia Code governs all agreements addressed in the article to modernize and acknowledge that dealers now sign numerous more agreements than just a single Sales and Service Agreement.

- Further clarifies what it means to engage in the operation and business of a new motor vehicle dealership.

- Clarifies that a dealership is entitled to be reimbursed by a manufacturer for diagnostic time on warranty and recall work, in light of the complexity of the modern motor vehicle, including any assistance with over the air updates.
- Allows a new motor vehicle dealer to submit a single set or repair orders for the purpose of calculating both the labor and parts mark-up, or a dealer may submit separate sets of repair orders for a labor rate and parts mark-up calculation.

- Given the increase in manufacturer sales and service audits, sets forth a procedure clarifying the procedure to be used by the manufacturer and motor vehicle dealer.

- Provides additional protections for motor vehicle dealers for too frequent unreasonable imagine and facility mandates from manufacturers. Increases their rights to such mandates from 10 to 15 years.

- Prohibits a manufacture from using motor vehicles in transit to count against a dealer's sales effective or efficiency formula. The vehicle must be in the dealer's physical possession.
- Prohibits a manufacturer from threating or taking any prejudicial action against a new motor vehicle dealer arising from the retail price at which a dealer sells a new motor vehicle.

- Clarifies the duties and responsibilities of the Manufacturer and motor vehicle dealer for vehicles sold pursuant to a reservation or subscription service and clarifies that the financing of motor vehicles occurs at the dealership.

- Allows a Motor Vehicle Dealer to implement a succession plan while the dealer is still living, sets for a procedure for any disagreements that may arise between the manufacturer and motor vehicle dealer, and allows any designated family member of the dealer be a designated executive manager of the dealership under the existing dealer agreement.

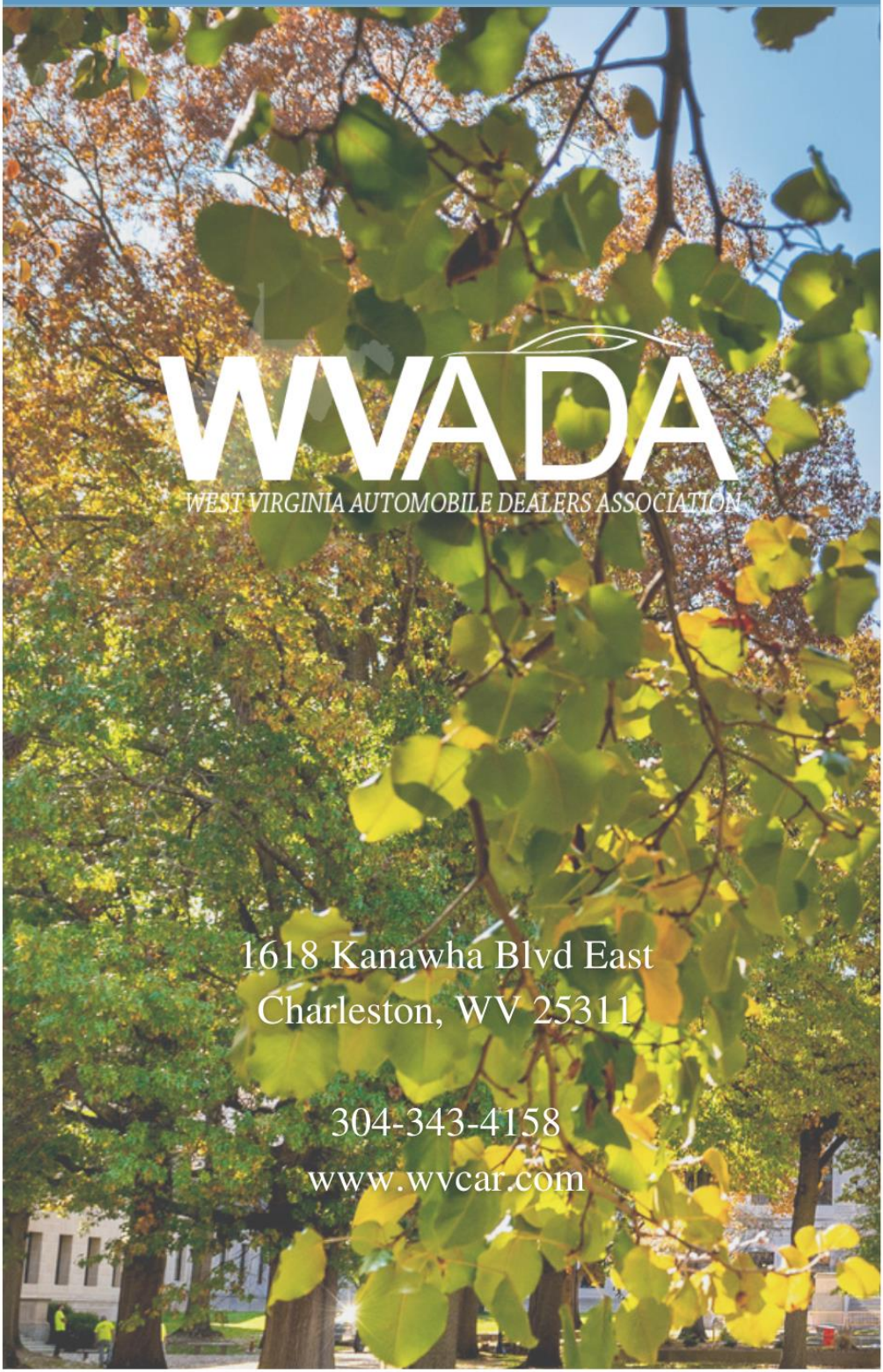
- Increases the protection of a consumer's data that they provide to a motor vehicle dealer when purchasing a motor vehicle. Also clarifies different duties for a manufacturer, W. Va Code 17A-6A-15a (a) to (f), and for other Third-Parties -15a(g)-(l) such a dealer management system providers. Provides definition of what is "dealer data", and the following:
    - Limits a manufacturer ability to share a dealer's consumer data to a third-party to the consumer data on its same line vehicles sold by the dealer as opposed to access to all consumer data of a motor vehicle dealer.
    - Prevents a data systems provider from limiting how a dealer shares it consumer data with other required vendors and third-parties or charging an unreasonable fee to a dealer or third party for a dealer sharing its own consumer data.
    - Requires a data systems provider to cooperate in transferring back the motor vehicle dealer's consumer data and use a commercially reasonable format to allow reasonable transmission back to a dealer upon termination of the agreement. Also prohibits the charging of unreasonable fees for returning this data in a commercially usable format.
    - Requires a data systems provider to inform a motor vehicle dealer of any third party the dealer management system provider that it is sharing a

motor vehicle dealers customer's data and requires a dealer management system to obtain permission from the dealer to share a dealer's customer data.

- Clarifies that the data a customer provides to a motor vehicle dealer is the dealer's data and allows the dealer to protect that information more securely.
- Allows a dealer to obtain information from data systems provider or other third-party that it is protecting the dealer's consumer data it provided to them.
- Gives dealers more control over its customer data by limiting what a third party can access.
- Provides a severability clause and continues to provide the motor vehicle dealer indemnity from any manufacturer or third-party who engages in willful or negligent actions or allows an impermissible permissible use of protected consumer data.

Notes

WVADA


WVADA
WEST VIRGINIA AUTOMOBILE DEALERS ASSOCIATION
1618 Kanawha Blvd East
Charleston, WV 25311
304-343-4158
www.wvcar.com