

SENATE No. 129

The Commonwealth of Massachusetts

PRESENTED BY:

Marc R. Pacheco

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act further regulating business practices between motor vehicle dealers, manufacturers, and distributors.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Marc R. Pacheco</i>	<i>First Plymouth and Bristol</i>
<i>Stephen L. DiNatale</i>	<i>3rd Worcester</i>
<i>Dennis A. Rosa</i>	<i>4th Worcester</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>
<i>Theodore C. Speliotis</i>	<i>13th Essex</i>
<i>Michael F. Rush</i>	<i>Norfolk and Suffolk</i>
<i>Barry R. Finegold</i>	<i>Second Essex and Middlesex</i>

SENATE No. 129

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 129) of Marc R. Pacheco, Stephen L. DiNatale, Dennis A. Rosa, Michael O. Moore and other members of the General Court for legislation to further regulate business practices between motor vehicle dealers, manufacturers, and distributors. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act further regulating business practices between motor vehicle dealers, manufacturers, and distributors.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Subsection (c) of section 4 of chapter 93B, as appearing in the 2010
2 Official Edition, is hereby amended by striking out paragraph (5) and inserting in place thereof
3 the following paragraph:-

4 (5) to offer to sell or to sell any new motor vehicle to any person located in the
5 commonwealth at a lower actual price therefor than the actual price offered contemporaneously
6 to any other motor vehicle dealer located in the commonwealth for the same model vehicle
7 similarly equipped or to utilize any device including, but not limited to, sales promotion plans or
8 programs, facility compliance or any form of incentive program, which result in the lesser actual
9 price unless available on equal terms to all dealers located in the commonwealth; provided,
10 however, that, for the purposes of this paragraph, "equal terms" shall not include the opportunity
11 to participate in any program that requires facility investment; provided, further, that this
12 paragraph shall not apply to sales to a motor vehicle dealer for resale to any unit of the federal
13 government or any agency thereof or to the commonwealth or any of its political subdivisions;
14 provided, further, that this paragraph shall not apply to sales to a motor vehicle dealer of any
15 motor vehicle ultimately sold, donated or used by the dealer in a driver education program. In
16 addition, a manufacturer, distributor, or franchisor representative shall not unreasonably
17 withhold participation in any sales promotion, incentive or bonus program, or otherwise dictate
18 terms of participation in such programs, including, but not limited to, requiring any dealer to
19 adjust or alter the costs or fees it charges to consumers. In connection with a sale of a motor
20 vehicle or vehicles to a motor vehicle dealer for resale to any unit of the federal government or

21 any agency thereof or to the commonwealth or to any political subdivision thereof, no
22 manufacturer or distributor shall offer any discounts, refunds or any other similar type of
23 inducement to any dealer without making the same offer available to all other of its dealers
24 within the state, and if the inducements are made, the manufacturer or distributor shall give
25 simultaneous notice thereof to all of its dealers within the state. In addition, a manufacturer,
26 distributor, or franchisor representative shall not unreasonably withhold participation in any lead
27 generation marketing programs or warranty policy adjustments and shall distribute leads from
28 direct internet-based inquiries in an equitable manner to dealers based only on geographic
29 proximity and vehicle availability.

30 (i) In order to prove a violation of the price discrimination prohibitions in this paragraph,
31 it shall be the dealer's burden to demonstrate a price, discount or incentive was not reasonably
32 available; provided, however, that proof of a price discrepancy alone shall be presumptive
33 evidence of discrimination and a violation of this paragraph without further necessary proof of
34 lost sales or lost opportunities; provided, further, that the use intended by any customer shall not
35 serve as a means for any manufacturer or distributor to justify a price discrepancy.

36 (ii) Damages for a violation of this paragraph may be calculated by applying the
37 percentage of any discrepancy to each new vehicle sold by the affected dealer during the
38 applicable program period. This manner of calculating damages shall not prevent a dealer from
39 demonstrating additional damages that were incurred or may be due to lost sales resulting from
40 any discrepancy.

41 SECTION 2. Paragraph (10) of said subsection (c) of said section 4 of said chapter 93B,
42 as most recently amended by section 4 of chapter 152 of the acts of 2012, is hereby amended by
43 inserting before the first full sentence the following sentence:- This blanket prohibition on
44 manufacturer ownership applies notwithstanding whether a manufacturer or distributor has
45 previously used independently owned or operated dealerships to distribute its vehicles.

46 SECTION 3. Said subsection (c) of said section 4 of said chapter 93B, as so appearing, is
47 hereby further amended by inserting after paragraph (12) the following five paragraphs:-

48 (13) to require a motor vehicle dealer, by agreement, program, policy, standard, or
49 otherwise, to relocate, to make substantial changes, operational modifications, alterations, or
50 remodeling to, or to replace a motor vehicle dealer's sales or service facilities, or to deny or
51 threaten to deny a motor vehicle dealer any benefit, unless the manufacturer's or distributor's
52 requirements are reasonable and justifiable in light of the current and reasonably foreseeable
53 projections of economic conditions, financial expectations, the motor vehicle dealer's market for
54 the manufacturer or distributor's motor vehicles, and the motor vehicle dealer will be able, in the
55 ordinary course of business as conducted by such motor vehicle dealer, to earn a reasonable
56 return on his total investment in such facility or from such operational modifications; provided,
57 however, that a manufacturer or distributor may provide to a motor vehicle dealer a commitment

58 to allocate additional vehicles or a loan or grant of money as an inducement for the motor vehicle
59 dealer to relocate, expand, improve, remodel, alter, or renovate its facilities if the manufacturer
60 or distributor delivers an assurance to the dealer that it will offer to supply to the dealer a
61 sufficient quantity of new motor vehicles, consistent with its allocation obligations at law and to
62 its other same line-make motor vehicle dealers, which will economically justify such relocation,
63 expansion, improvement, remodeling, renovation, or alteration, in light of reasonably current and
64 reasonably projected market and economic conditions. The provisions of the increase in vehicle
65 allocation, the loan or grant and the assurance, and the basis for them must be contained in a
66 written agreement voluntarily entered into by the dealer and must be made available, on
67 substantially similar terms, to any of the manufacturer's or distributor's other same line-make
68 dealers in the commonwealth with whom the manufacturer or distributor offers to enter into such
69 an agreement. A manufacturer or distributor shall not withhold from a motor vehicle dealer a
70 bonus, incentive, or other benefit that is available to its other same line-make motor vehicle
71 dealers in the commonwealth, or to take or threaten to take action that is unfair or adverse to a
72 dealer who does not enter into an agreement with the manufacturer or distributor pursuant to this
73 paragraph no more often than every 7 years.

74 (14) to require or coerce a dealer to provide information about a retail customer unless
75 the information is necessary for the sale and delivery of a new motor vehicle to a retail buyer, to
76 validate and pay customer or dealer incentives, for warranty reimbursement substantiation under
77 the law, or to enable the manufacturer to fulfill safety, recall, or other legal obligations. A
78 manufacturer or distributor shall not share, sell, or transfer customer information, obtained from
79 a dealer and not otherwise publically available, to other dealers or third parties unless otherwise
80 agreed to by the originating dealer.

81 (15) to arbitrarily or unreasonably alter the geographic area of responsibility within which
82 it measures the dealer's performance. A manufacturer or distributor shall give advance notice of
83 any proposed alteration of a dealer's so-called area of responsibility at least 60 days before the
84 effective date of a proposed alteration. Notice shall include an explanation of the basis for the
85 change, and, upon request by such motor vehicle dealer, the manufacturer or distributor
86 immediately shall provide any and all supporting documentation. At any time before the
87 effective date of such alteration, and after completion of any internal appeal process provided by
88 a manufacturer or distributor, a dealer may protest the proposed alteration. Filing of a protest
89 shall mean no alteration is effective until an agreement is reached by the parties or a court makes
90 a final determination. If a dealer's area of responsibility is altered, the manufacturer shall allow
91 18 months prior to taking any adverse action claiming a breach based on the new area of
92 responsibility.

93 (16) to utilize an arbitrary or unreasonable formula or other calculation or process
94 intended to gauge performance as a basis for making any decision or taking any action adverse to
95 a dealer's interest. A dealer's inability to meet or substantially meet any performance standard

96 unilaterally established by the manufacturer or distributor shall not be considered a default or
97 breach of a franchise agreement and shall not provide independent good cause for a termination.

98 (17) To require a dealer to purchase goods or services from a vendor selected, identified,
99 or designated by a manufacturer or distributor by agreement, program, incentive provision, or
100 otherwise without making available to the dealer the option to obtain the goods or services of
101 substantially similar quality from a vendor chosen by the dealer. For purposes of this
102 subdivision, the term "goods" does not include moveable displays, brochures, and promotional
103 materials containing material subject to intellectual property rights of, or special tools and
104 training as required by the manufacturer, or parts to be used in repairs under warranty obligations
105 of, a manufacturer, factory branch, distributor, or distributor branch.

106 SECTION 4. Said section 4 of said chapter 93B, as so appearing, is hereby further
107 amended by inserting after subsection (d) the following subsection:-

108 (e) For purposes of this chapter, it shall be presumed that a motor vehicle dealer has been
109 coerced or required to agree to a term or condition in violation of this chapter as a condition of
110 the offer, grant or renewal of a franchise or of any lease or agreement ancillary or collateral to a
111 franchise, if the motor vehicle dealer, at the time of the offer, grant or renewal of the franchise,
112 lease or agreement is not offered the option of an identical franchise agreement, lease or related
113 agreement without the term or condition proscribed by this section.

114 SECTION 5. Subsection (c) of section 5 of said chapter 93B, as so appearing, is hereby
115 amended by inserting at the end thereof the following paragraph:-

116 If such action is timely commenced, such action shall serve to stay as if enjoined, without
117 bond, the proposed termination or non-renewal until a final judgment has been rendered in an
118 adjudicatory proceeding or action, or until the parties mutually agree otherwise. If the
119 termination is based in whole or in part upon performance of the dealer in sales and service, there
120 shall be no good cause if the dealer substantially complies with the reasonable performance
121 provisions established by the manufacturer or distributor during such cure period, and there shall
122 be no good cause if the failure to demonstrate such substantial compliance was due to factors
123 which were beyond the control of such dealer. In any situation where the manufacturer or
124 distributor pursues a termination based in whole or in part on a failure to substantially comply
125 with a performance standard, before any cure period commences, the manufacturer or distributor
126 must provide the dealer with the underlying data that supports the performance standard cited.

127 SECTION 6. Said section 5 of said chapter 93B, as so appearing, is hereby further
128 amended by inserting after subsection (m) the following subsection:-

129 (n) Where a termination or nonrenewal will result from use of any agreement to terminate
130 or non-renew that was executed by the dealer and obtained more than 90 days before the
131 purported date of use, exercise of rights under such written agreement shall be void. In any case

132 in which a manufacturer, distributor or franchisor representative fails to properly advise a dealer
133 that it does not intend to renew a franchise or take any action to renew a franchise beyond its
134 expiration date, the franchise in question shall continue in effect on the terms last agreed to by
135 the parties.

136 SECTION 7. Section 8 of said chapter 93B, as so appearing, is hereby amended by
137 striking out subsection (a) and inserting in place thereof the following subsection:-

138 (a) Notwithstanding any terms or provisions of a franchise agreement to the contrary, a
139 manufacturer or distributor shall indemnify its motor vehicle dealers and hold them harmless
140 from and against all damages, liabilities, losses, and reasonable expenses of suit, including
141 reasonable attorneys' fees, arising out of or incurred in the defense of any claim brought by any
142 person seeking compensation or other relief predicated upon the negligent design or manufacture
143 of a new motor vehicle, or any part or component thereof, manufactured or distributed by the
144 manufacturer or distributor unless the basis for liability is finally determined by a court to be
145 solely the result of fault or neglect on the part of the motor vehicle dealer. The manufacturer or
146 distributor, after having been notified promptly in writing by the motor vehicle dealer that a
147 demand has been made or a formal claim has been asserted and is pending, shall assume the
148 defense thereof and resolve the same at its own expense.

149 SECTION 8. Subsection (b) of section 9 of said chapter 93B, as most recently amended
150 by section 8 of chapter 152 of the acts of 2012, is hereby amended by inserting after paragraph
151 (4) the following paragraph:-

152 (5)(i) A manufacturer or distributor shall not require, influence, or attempt to influence a
153 motor vehicle dealer to implement or change the prices for which it sells parts or labor in retail
154 customer repairs. A manufacturer or distributor shall not implement or continue a policy,
155 procedure, or program to any of its dealers in this state for compensation under this section
156 which is inconsistent with this section.

157 (ii) A manufacturer or distributor shall not otherwise recover its costs from dealers,
158 including an increase in the wholesale price of a vehicle or surcharge imposed on a dealer
159 intended to recover the cost of reimbursing a dealer for parts and labor pursuant to this section;
160 provided, however, that a manufacturer or distributor shall not be prohibited from increasing
161 prices for vehicles or parts in the normal course of business.

162 (iii) Time allowances for the diagnosis and performance of warranty work and service
163 shall be reasonable and adequate for the work to be performed.

164 SECTION 9. Said section 9 of said chapter 93B, as so appearing, is hereby further
165 amended by inserting after subsection (j) the following subsection:-

166 (k) Notwithstanding any term of a franchise agreement, it shall be a violation of this
167 chapter for a distributor or manufacturer to charge back, deny vehicle allocation, withhold
168 payments, or take any other adverse actions against a motor vehicle dealer because of a sale of a
169 new motor vehicle that is exported from the United States, unless it is shown that the dealer
170 knew or reasonably should have known on the date of the sale that the new motor vehicle was to
171 be exported. A motor vehicle dealer shall rebuttably be presumed to have no knowledge of the
172 export if the motor vehicle is sold by the dealer to anyone who presents documentation
173 demonstrating he is a resident of the United States and he is titling and registering the motor
174 vehicle in any state within the United States.

175 SECTION 10. Section 15 of said chapter 93B, as so appearing, is hereby amended by
176 striking out subsection (a) and inserting in place thereof the following subsection:-

177 (a) Any manufacturer, distributor or motor vehicle dealer who alleges an unfair method
178 of competition or an unfair or deceptive act or practice as defined by this chapter, any act
179 prohibited or declared unlawful by this chapter, or any rule or regulation adopted under this
180 chapter, may bring an action in the superior court, or if applicable in the federal district court for
181 the district of Massachusetts, for damages and equitable relief, including injunctive relief, as
182 described in the following sentence: The party filing suit may obtain equitable relief if it can
183 demonstrate a substantial likelihood that the alleged conduct violates the provisions of this
184 chapter.

185 SECTION 11. Said section 15 of said chapter 93B, as so appearing, is hereby further
186 amended by striking out subsection (c) and inserting in place thereof the following subsection:-

187 (c) If the dealer prevails in any action or protest brought under this chapter and
188 successfully demonstrates to the court that the actions, claims or defenses of the other party
189 violated any provision of this chapter, then the court shall, in addition to other relief provided for
190 by this chapter and notwithstanding the amount in controversy and whether the prevailing party
191 has sustained any actual damage, award to the prevailing dealer its reasonable costs of suit,
192 including reasonable attorneys' fees.

193 SECTION 12. Section 16 of said chapter 93B, as so appearing, is hereby amended by
194 inserting at the end thereof the following subsection:-

195 (c) This chapter emphasizes the legislature's findings that there exists an inequality in the
196 bargaining position between motor vehicle dealers, manufacturers and distributors. Accordingly,
197 in any judicial proceeding, this chapter shall be liberally construed in order to achieve its purpose
198 of preventing arbitrary and unfair treatment of dealers by manufacturers and distributors.
199 Additionally, in an effort to avoid any retributionary fears that may cause dealers to refrain from
200 asserting their rights, any association of dealers has standing to initiate an action pursuant to this
201 chapter in its own name on behalf of one or more of its members so long as one or more of its
202 members would otherwise have standing to initiate an action in their own right, and any relief

203 requested will benefit more than one member of said association. In any such situation, the
204 provisions of this chapter shall be liberally construed to allow such association act on behalf of
205 its members.