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HOUSE BILL NO. 1778

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Transportation
on February 19, 2009)

(Patron Prior to Substitute—Delegate Athey)

A BILL to amend and reenact §§ 46.2-1569, 46.2-1571, and 46.2-1573 of the Code of Virginia, relating to coercion of motor vehicle dealers by manufacturers, etc.; warranty obligations and sales incentives; hearings and other remedies.

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-1569, 46.2-1571, and 46.2-1573 of the Code of Virginia are amended and reenacted as follows:

§ 46.2-1569. Other coercion of dealers; transfer, grant, succession to and cancellation of dealer franchises; delivery of vehicles, parts, and accessories.

Notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:

1. To coerce or attempt to coerce any dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities, which have not been ordered by the dealer.

2. To coerce or attempt to coerce any dealer to enter into an agreement with the manufacturer, factory branch, distributor, or distributor branch, or representative thereof by threat to take or by taking any action in violation of the chapter, or by any other act unfair or injurious to the dealer.

2a. To coerce or attempt to coerce any dealer to join, contribute to, or affiliate with any advertising association.

2b. To coerce or require any dealer to establish in connection with the sale of a motor vehicle prices at which the dealer must sell products or services not manufactured or distributed by the manufacturer, factory branch, distributor, or distributor branch, whether by agreement, program, incentive provision, or otherwise.

3. To prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale, or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, unless the franchisor provides written notice to the dealer of its objection and the reasons therefor by certified mail or overnight delivery or other method designed to ensure delivery to the dealer at least thirty days prior to the proposed effective date of the transfer, sale, assignment, or change. No such objection shall be sufficient unless the failure to approve is reasonable. Notwithstanding the provisions of subsection D of § 46.2-1573, the only grounds that may be considered reasonable for a failure to approve are that an individual who is the applicant or is in control of an entity that is an applicant (i) lacks good moral character, (ii) lacks reasonable motor vehicle dealership management experience and qualifications, (iii) lacks financial ability to be the dealer, or (iv) fails to meet the standards otherwise established by this title to be a dealer. No such objection shall be effective to prevent the sale, transfer, assignment, or change if the Commissioner has determined, if requested in writing by the dealer within thirty days after receipt of an objection to the proposed sale, transfer, or change, and after a hearing on the matter, that the failure to permit or honor the sale, transfer, assignment, or change is unreasonable under the circumstances. No franchise may be sold, assigned, or transferred unless (i) the franchisor has been given at least ninety days' prior written notice by the dealer as to the identity, financial ability, and qualifications of the proposed transferee on forms generally utilized by the franchisor to conduct its review, as well as the full agreement for the proposed transaction, and (ii) the sale or transfer of the franchise and business will not involve, without the franchisor's consent, a relocation of the business.

3a. To impose a condition on the approval of the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise if the condition would violate the provisions of this title if imposed on the existing dealer.

In the event the manufacturer, factory branch, distributor or distributor branch takes action to prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, without a statement of specific grounds for doing so that is consistent with subdivision 3 hereof or imposes a condition in violation of subdivision 3a hereof, that shall constitute a violation of this section. The existing dealer may request review of the action or imposition of the condition in a hearing by the Commissioner. If the Commissioner finds that the action or the imposition of the condition was a violation of this section, the Commissioner may order that the sale or transfer be approved by the manufacturer, factory branch,

distributor, or distributor branch, without imposition of the condition. If the existing dealer does not request a hearing by the Commissioner concerning the action or the condition imposed by the manufacturer, factory branch, distributor, or distributor branch, and the action or condition was the proximate cause of the failure of the contract for the sale or transfer of ownership of the dealership, the applicant for approval of the sale or transfer or the existing dealer, or both, may commence an action at law for violation of this section. The action may be commenced in the circuit court of the city or county in which the dealer is located, or in any other circuit court with permissible venue, within two years following the action or the imposition of the condition by the manufacturer, factory branch, distributor, or distributor branch for the damages suffered by the applicant or the dealer as a result of the violation of this section by the manufacturer, factory branch, distributor, or distributor branch, plus the applicant's or dealer's reasonable attorney fees and costs of litigation. Notwithstanding the foregoing, an exercise of the right of first refusal by the manufacturer, factory branch, distributor, or distributor branch pursuant to § 46.2-1569.1 shall not be considered the imposition of a condition prohibited by this section.

4. To grant an additional franchise for a particular line-make of motor vehicle in a relevant market area in which a dealer or dealers in that line-make are already located unless the franchisor has first advised in writing all other dealers in the line-make in the relevant market area. No such additional franchise may be established at the proposed site unless the Commissioner has determined, if requested by a dealer of the same line-make in the relevant market area within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that ~~there is reasonable evidence~~ *the franchisor can show by a preponderance of the evidence* that after the grant of the new franchise, the *relevant market area* will support all of the dealers in that line-make in the relevant market area. Establishing a franchised dealer in a relevant market area to replace a franchised dealer that has not been in operation for more than two years shall constitute the establishment of a new franchise subject to the terms of this subdivision. The two-year period for replacing a franchised dealer shall begin on the day the franchise was terminated, or, if a termination hearing was held, on the day the franchisor was legally permitted finally to terminate the franchise. *The relocation of a franchise in a relevant market area, whether by an existing dealer or by a dealer who is acquiring the franchise, shall constitute the establishment of a new franchise subject to the terms of this subdivision.* This subdivision shall not apply to (i) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be more than ten miles distant from any other dealer for the same line-make; (ii) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be more distant than the existing site from all other dealers of the same line-make in that relevant market area; or (iii) the relocation of an existing new motor vehicle dealer within two miles of the existing site of the relocating dealer.

5. Except as otherwise provided in this subdivision and notwithstanding the terms of any franchise, to terminate, cancel, or refuse to renew the franchise of any dealer without good cause and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least sixty days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for the action, and (ii) the Commissioner has determined, if requested in writing by the dealer within the sixty-day period and, after a hearing on the matter, that *the franchisor has shown by a preponderance of the evidence that there is good cause for the termination, cancellation, or nonrenewal of the franchise.* In any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision or, if that decision is appealed to the circuit court, pending the decision of the circuit court. In any case in which a franchisor neither advises a dealer that it does not intend to renew a franchise nor takes any action to renew a franchise beyond its expiration date, the franchise in question shall continue in effect on the terms last agreed to by the parties. Notwithstanding the other provisions of this subdivision notice of termination, cancellation, or nonrenewal may be provided to a dealer by a franchisor not less than fifteen days prior to the effective date of such termination, cancellation, or nonrenewal when the grounds for such action are any of the following:

a. Insolvency of the franchised motor vehicle dealer or filing of any petition by or against the franchised motor vehicle dealer, under any bankruptcy or receivership law, leading to liquidation or which is intended to lead to liquidation of the franchisee's business.

b. Failure of the franchised motor vehicle dealer to conduct its customary sales and service operations during its posted business hours for seven consecutive business days, except where the failure results from acts of God or circumstances beyond the direct control of the franchised motor vehicle dealer.

c. Revocation of any license which the franchised motor vehicle dealer is required to have to operate a dealership.

d. Conviction of the dealer or any principal of the dealer of a felony.

The change or discontinuance of a marketing or distribution system of a particular line-make product

by a manufacturer or distributor, while the name identification of the product is continued in substantial form by the same or a different manufacturer or distributor, may be considered to be a franchise termination, cancellation, or nonrenewal. The provisions of this paragraph shall apply to changes and discontinuances made after January 1, 1989, but they shall not be considered by any court in any case in which such a change or discontinuance occurring prior to that date has been challenged as constituting a termination, cancellation or nonrenewal.

5a. To fail to provide continued parts and service support to a dealer which holds a franchise in a discontinued line-make for at least five years from the date of such discontinuance. This requirement shall not apply to a line-make which was discontinued prior to January 1, 1989.

5b. Upon the involuntary or voluntary termination, nonrenewal, or cancellation of the franchise of any dealer, by either the manufacturer, distributor, or factory branch or by the dealer, notwithstanding the terms of any franchise whether entered into before or after the enactment of this section, to fail to pay the dealer for at least the following:

(1) The dealer cost plus any charges by the franchisor for distribution, delivery, and taxes paid by the dealer, less all allowances paid to the dealer by the franchisor, for new and undamaged motor vehicles of ~~current or one-year-prior model year purchased within 120 days of the termination~~ in the dealer's inventory, ~~whether~~ acquired from the franchisor or from another dealer of the same line-make in the ordinary course of business *within 18 months of termination*;

(2) The dealer cost as shown in the price catalog of the franchisor current at the time of repurchase of each new, unused, undamaged, and unsold part or accessory if such part or accessory is in the current parts catalog and is still in the original, resalable merchandising package and in unbroken lots, except that in the case of sheet metal, a comparable substitute for the original package may be used;

(3) The fair market value of each undamaged sign owned by the dealer that bears a trademark, trade name or commercial symbol used or claimed by the franchisor if such sign was purchased from or at the request of the franchisor;

(4) The fair market value of all special tools and automotive service equipment owned by the dealer that were recommended and designated as special tools or equipment by the franchisor, if the tools and equipment are in usable and good condition, normal wear and tear excepted; and

(5) The reasonable cost of transporting, handling, packing, and loading of motor vehicles, parts, signs, tools, and special equipment subject to repurchase hereunder.

The provisions of this ~~subsection~~ *subdivision* do not apply to a dealer who is unable to convey clear title to the property identified in this ~~subsection~~ *subdivision*.

For purposes of this ~~subsection~~ *subdivision*, a voluntary termination shall not include the transfer of the terminating dealer's franchised business in connection with a transfer of that business by means of sale of the equity ownership or assets thereof to another dealer.

5c. *If the termination, cancellation, or nonrenewal of the dealer's franchise is the result of the termination, elimination, or cessation of a line-make by the manufacturer, distributor, or factory branch, then, in addition to the payments to the dealer pursuant to subdivision 5b, the manufacturer, distributor, or factory branch shall be liable to the dealer for the following:*

(1) *An amount at least equivalent to the fair market value of the franchise for the line-make, which shall be the greater of that value determined as of (i) the date the franchisor announces the action that results in termination, cancellation, or nonrenewal first becomes general knowledge, or (ii) the day 12 months prior to the date on which the notice of termination, cancellation, or nonrenewal is issued. In determining the fair market value of a franchise for a line-make, if the line-make is not the only line-make for which the dealer holds a franchise in the dealership facilities, the dealer shall also be entitled to compensation for the contribution of the line-make to payment of the rent or to covering obligation for the fair rental value of the dealership facilities for the period set forth in subdivision 5c*

(2). *Fair market value of the franchise for the line-make shall only include the goodwill value of the dealer's franchise for that line-make in the dealer's relevant market area.*

(2) *If the line-make is the only line-make for which the dealer holds a franchise in the dealership facilities, the manufacturer, distributor, or factory branch shall also pay assistance with respect to the dealership facilities leased or owned by the dealer as follows: (i) the manufacturer, distributor, or factory branch shall pay the dealer a sum equivalent to the rent for the unexpired term of the lease or three years' rent, whichever is the lesser, or (ii) if the dealer owns the dealership facilities, the manufacturer, distributor, or factory branch shall pay the dealer a sum equivalent to the reasonable rental value of the dealership facilities for three years.*

To be entitled to facilities assistance from the manufacturer, distributor, or factory branch, the dealer shall have the obligation to mitigate damages by listing the dealership facilities for lease or sublease with a licensed real estate agent within 30 days after the effective date of the termination of the franchise and thereafter by reasonably cooperating with such real estate agent in the performance of the agent's duties and responsibilities. If the dealer is able to lease or sublease the dealership facilities on

183 *terms that are consistent with local zoning requirements to preserve the right to sell motor vehicles from*
184 *the dealership facilities and the terms of the dealer's lease, the dealer shall be obligated to pay the*
185 *manufacturer the net revenue received from such mitigation, but only following receipt of facilities*
186 *assistance payments pursuant to clause (i) or (ii) of subdivision 5c (2), and only up to the total amount*
187 *of facilities assistance payments that the dealer has received.*

188 6. To fail to allow a dealer the right at any time to designate a member of his family as a successor
189 to the dealership in the event of the death or incapacity of the dealer. It shall be unlawful to prevent or
190 refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated
191 dealer if the franchisor has not provided to the member of the family previously designated by the
192 dealer as his successor written notice of its objections to the succession and of such person's right to
193 seek a hearing on the matter before the Commissioner pursuant to this article, and the Commissioner
194 determines, if requested in writing by such member of the family within thirty days of receipt of such
195 notice from the franchisor, and after a hearing on the matter before the Commissioner pursuant to this
196 article, that the failure to permit or honor the succession is unreasonable under the circumstances. No
197 member of the family may succeed to a franchise unless (i) the franchisor has been given written notice
198 as to the identity, financial ability, and qualifications of the member of the family in question, and (ii)
199 the succession to the franchise will not involve, without the franchisor's consent, a relocation of the
200 business.

201 7. To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of
202 each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of
203 each make, series, and model equitably related to the total new vehicle production or importation
204 currently being achieved nationally by each make, series, and model covered under the franchise. Upon
205 the written request of any dealer holding its sales or sales and service franchise, the manufacturer or
206 distributor shall disclose to the dealer in writing the basis upon which new motor vehicles are allocated,
207 scheduled, and delivered to the dealers of the same line-make. In the event that allocation is at issue in
208 a request for a hearing, the dealer may demand the Commissioner to direct that the manufacturer or
209 distributor provide to the dealer, within thirty days of such demand, all records of sales and all records
210 of distribution of all motor vehicles to the same line-make dealers who compete with the dealer
211 requesting the hearing.

212 7a. To fail or refuse to offer to its same line-make franchised dealers all models manufactured for the
213 line-make, or require a dealer to pay any extra fee, or remodel, renovate, or recondition the dealer's
214 existing facilities, or purchase unreasonable advertising displays or other materials as a prerequisite to
215 receiving a model or a series of vehicles.

216 7b. To require or otherwise coerce a dealer to underutilize the dealer's facilities *by requiring or*
217 *otherwise coercing a dealer to exclude or remove from the dealer's facilities operations for selling or*
218 *servicing of a line-make of vehicles for which the dealer has a franchise agreement to utilize the*
219 *facilities.*

220 8. To include in any franchise with a motor vehicle dealer terms that are contrary to, prohibited by,
221 or otherwise inconsistent with the requirements of this chapter.

222 8a. For any franchise agreement, to require a motor vehicle dealer to pay the attorney's fees of the
223 manufacturer or distributor related to hearings and appeals brought under this article.

224 9. To fail to include in any franchise with a motor vehicle dealer the following language: "If any
225 provision herein contravenes the laws or regulations of any state or other jurisdiction wherein this
226 agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by
227 such laws or regulations, such provision shall be deemed to be modified to conform to such laws or
228 regulations, and all other terms and provisions shall remain in full force," or words to that effect.

229 § 46.2-1571. Warranty and sales incentive obligations.

230 A. Each motor vehicle manufacturer, factory branch, distributor, or distributor branch shall (i) specify
231 in writing to each of its motor vehicle dealers licensed in the Commonwealth the dealer's obligations for
232 preparation, delivery, and warranty service on its products and (ii) compensate the dealer for warranty
233 parts, service and diagnostic work required of the dealer by the manufacturer or distributor as follows:

234 1. Compensation of a dealer for warranty parts, service and diagnostic work shall not be less than the
235 amounts charged by the dealer for the manufacturer's or distributor's original parts, service and
236 diagnostic work to retail customers for nonwarranty service, parts and diagnostic work installed or
237 performed in the dealer's service department unless the amounts are not reasonable. Warranty parts
238 compensation shall be stated as a percentage of markup, which shall be an agreed reasonable
239 approximation of retail markup and which shall be uniformly applied to all of the manufacturer's or
240 distributor's parts unless otherwise provided for in this section. If the dealer and manufacturer or
241 distributor cannot agree on the warranty parts compensation markup to be paid to the dealer, the markup
242 shall be determined by an average of the dealer's retail markup on all of the manufacturer's or
243 distributor's parts as described in subdivisions 2 and 3 of this subsection.

244 2. For purposes of determining warranty parts and service compensation paid to a dealer by the

manufacturer or distributor, menu-priced parts or services, group discounts, special event discounts, and special event promotions shall not be considered in determining amounts charged by the dealer to retail customers. For purposes of determining labor compensation for warranty body shop repairs paid to a dealer by the manufacturer or distributor, internal and insurance-paid repairs shall not be considered in determining amounts charged by the dealer to retail customers.

3. Increases in dealer warranty parts and service compensation and diagnostic work compensation, pursuant to this section, shall be requested by the dealer in writing, shall be based on 100 consecutive repair orders or all repair orders over a ninety-day period, whichever occurs first and, in the case of parts, shall be stated as a percentage of markup which shall be uniformly applied to all the manufacturer's or distributor's parts.

4. In the case of warranty parts compensation, the provisions of this subsection shall be effective only for model year 1992 and succeeding model years.

5. If a manufacturer or distributor furnishes a part to a dealer at no cost for use by the dealer in performing work for which the manufacturer or distributor is required to compensate the dealer under this section, the manufacturer or distributor shall compensate the dealer for the part in the same manner as warranty parts compensation, less the wholesale costs, for such part as listed in the manufacturer's current price schedules. A manufacturer or distributor may pay the dealer a reasonable handling fee instead of the compensation otherwise required by this subsection for special high-performance complete engine assemblies in limited production motor vehicles which constitute less than five percent of model production furnished to the dealer at no cost, if the manufacturer or distributor excludes such special high-performance complete engine assemblies in determining whether the amounts requested by the dealer for warranty compensation are consistent with the amounts that the dealer charges its other retail service customers for parts used by the dealer to perform similar work.

6. In the case of service work, manufacturer original parts or parts otherwise specified by the manufacturer or distributor, and parts provided by a dealer either pursuant to an adjustment program as defined in § 59.1-207.34 or as otherwise requested by the manufacturer or distributor, the dealer shall be compensated in the same manner as for warranty service or parts.

This section does not apply to compensation for parts such as components, systems, fixtures, appliances, furnishings, accessories, and features that are designed, used, and maintained primarily for nonvehicular, residential purposes. Warranty and sales incentive audits of dealer records may be conducted by the manufacturer, factory branch, distributor, or distributor branch on a reasonable basis, and dealer claims for warranty or sales incentive compensation shall not be denied except for good cause, such as performance of nonwarranty repairs, lack of material documentation, fraud, or misrepresentation. A dealer's failure to comply with the specific requirements of the manufacturer or distributor for processing the claim shall not constitute grounds for the denial of the claim or reduction of the amount of compensation to the dealer as long as reasonable documentation or other evidence has been presented to substantiate the claim. *The manufacturer, factory branch, distributor, or distributor branch shall not deny a claim or reduce the amount of compensation to the dealer for warranty repairs to resolve a condition discovered by the dealer during the course of a separate repair requested by the customer.* Claims for dealer compensation shall be paid within thirty days of dealer submission or within thirty days of the end of an incentive program or rejected in writing for stated reasons. The manufacturer, factory branch, distributor, or distributor branch shall reserve the right to reasonable periodic audits to determine the validity of all such paid claims for dealer compensation. Any chargebacks for warranty parts or service compensation and service incentives shall only be for the twelve-month period immediately following the date of the claim and, in the case of chargebacks for sales compensation only, for the eighteen-month period immediately following the date of claim. However, such limitations shall not be effective in the case of intentionally false or fraudulent claims. A dealer shall not be charged back or otherwise liable for sales incentives or charges related to a motor vehicle sold by the dealer to a purchaser other than a licensed, franchised motor vehicle dealer and subsequently exported or resold, ~~provided unless the dealer, manufacturer, factory branch, distributor, or distributor branch can demonstrate by a preponderance of the evidence that he exercised due diligence and that the sale was made in good faith and without knowledge of the dealer should have known of and did not exercise due diligence in discovering the purchaser's intention to export or resell the motor vehicle.~~

B. It shall be unlawful for any motor vehicle manufacturer, factory branch, distributor, or distributor branch to:

1. Fail to perform any of its warranty obligations, including tires, with respect to a motor vehicle;
2. Fail to assume all responsibility for any liability resulting from structural or production defects;
3. Fail to include in written notices of factory recalls to vehicle owners and dealers the expected date by which necessary parts and equipment will be available to dealers for the correction of defects;
4. Fail to compensate any of the motor vehicle dealers licensed in the Commonwealth for repairs

306 effected by the dealer of merchandise damaged in manufacture or transit to the dealer where the carrier
307 is designated by the manufacturer, factory branch, distributor, or distributor branch;

308 5. Fail to fully compensate its motor vehicle dealers licensed in the Commonwealth for warranty
309 parts, work, and service pursuant to subsection A either by reduction in the amount due to the dealer or
310 by separate charge, surcharge, or other imposition by which the motor vehicle manufacturer, factory
311 branch, distributor, or distributor branch seeks to recover its costs of complying with subsection A, or
312 for legal costs and expenses incurred by such dealers in connection with warranty obligations for which
313 the manufacturer, factory branch, distributor, or distributor branch is legally responsible or which the
314 manufacturer, factory branch, distributor, or distributor branch imposes upon the dealer;

315 6. Misrepresent in any way to purchasers of motor vehicles that warranties with respect to the
316 manufacture, performance, or design of the vehicle are made by the dealer, either as warrantor or
317 co-warrantor;

318 7. Require the dealer to make warranties to customers in any manner related to the manufacture,
319 performance, or design of the vehicle; or

320 8. Shift or attempt to shift to the motor vehicle dealer, directly or indirectly, any liabilities of the
321 manufacturer, factory branch, distributor or distributor branch under the Virginia Motor Vehicle
322 Warranty Enforcement Act (§ 59.1-207.9 et seq.), unless such liability results from the act or omission
323 by the dealer.

324 C. Notwithstanding the terms of any franchise, it shall be unlawful for any motor vehicle
325 manufacturer, factory branch, distributor, or distributor branch to fail to indemnify and hold harmless its
326 motor vehicle dealers against any losses or damages arising out of complaints, claims, or suits relating
327 to the manufacture, assembly, or design of motor vehicles, parts, or accessories, or other functions by
328 the manufacturer, factory branch, distributor, or distributor branch beyond the control of the dealer,
329 including, without limitation, the selection by the manufacturer, factory branch, distributor, or distributor
330 branch of parts or components for the vehicle or any damages to merchandise occurring in transit to the
331 dealer where the carrier is designated by the manufacturer, factory branch, distributor, or distributor
332 branch. The dealer shall notify the manufacturer of pending suits in which allegations are made which
333 come within this subsection whenever reasonably practicable to do so. Every motor vehicle dealer
334 franchise issued to, amended, or renewed for motor vehicle dealers in Virginia shall be construed to
335 incorporate provisions consistent with the requirements of this subsection.

336 D. On any new motor vehicle, any uncorrected damage or any corrected damage exceeding three
337 percent of the manufacturer's or distributor's suggested retail price as defined in 15 U.S.C. §§ 1231-1233,
338 as measured by retail repair costs, must be disclosed to the dealer in writing prior to delivery. Factory
339 mechanical repair and damage to glass, tires, and bumpers are excluded from the three percent rule
340 when properly replaced by identical manufacturer's or distributor's original equipment or parts. Whenever
341 a new motor vehicle is damaged in transit, when the carrier or means of transportation is determined by
342 the manufacturer or distributor, or whenever a motor vehicle is otherwise damaged prior to delivery to
343 the new motor vehicle dealer, the new motor vehicle dealer shall:

344 1. Notify the manufacturer or distributor of the damage within three business days from the date of
345 delivery of the new motor vehicle to the new motor vehicle dealership or within the additional time
346 specified in the franchise; and

347 2. Request from the manufacturer or distributor authorization to replace the components, parts, and
348 accessories damaged or otherwise correct the damage, unless the damage to the vehicle exceeds the three
349 percent rule, in which case the dealer may reject the vehicle within three business days.

350 E. If the manufacturer or distributor refuses or fails to authorize correction of such damage within
351 ten days after receipt of notification, or if the dealer rejects the vehicle because damage exceeds the
352 three percent rule, ownership of the new motor vehicle shall revert to the manufacturer or distributor,
353 and the new motor vehicle dealer shall have no obligation, financial or otherwise, with respect to such
354 motor vehicle. Should either the manufacturer, distributor, or the dealer elect to correct the damage or
355 any other damage exceeding the three percent rule, full disclosure shall be made by the dealer in writing
356 to the buyer and an acknowledgement by the buyer is required. If there is less than three percent
357 damage, no disclosure is required, provided the damage has been corrected. Predelivery mechanical work
358 shall not require a disclosure. Failure to disclose any corrected damage within the knowledge of the
359 selling dealer to a new motor vehicle in excess of the three percent rule shall constitute grounds for
360 revocation of the buyer order, provided that, within thirty days of purchase, the motor vehicle is
361 returned to the dealer with an accompanying written notice of the grounds for revocation. In case of
362 revocation pursuant to this section, the dealer shall accept the vehicle and refund any payments made to
363 the dealer in connection with the transaction, less a reasonable allowance for the consumer's use of the
364 vehicle as defined in § 59.1-207.11. Nothing in this section shall be construed to exempt from the
365 provisions of this section damage to a new motor vehicle that occurs following delivery of the vehicle
366 to the dealer.

367 F. If there is a dispute between the manufacturer, factory branch, distributor, or distributor branch

and the dealer with respect to any matter referred to in subsection A, B, or C of this section, either party may petition the Commissioner in writing, within thirty days after either party has given written notice of the dispute to the other, for a hearing. The decision of the Commissioner shall be binding on the parties, subject to rights of judicial review and appeal as provided in Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2. However, nothing contained in this section shall give the Commissioner any authority as to the content or interpretation of any manufacturer's or distributor's warranty. 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) or for sales incentives or other sales compensation until 40 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 30 days following receipt of such final notice, the dealer may petition the Commissioner, in writing, for a hearing. If a dealer requests such a hearing, 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 and a final decision of the Commissioner concerning the validity of the chargeback.

§ 46.2-1573. Hearings and other remedies; civil penalties.

A. In every case of a hearing before the Commissioner authorized under this article, the Commissioner shall give reasonable notice of each hearing to all interested parties, and the Commissioner's decision shall be binding on the parties, subject to the rights of judicial review and appeal as provided in Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2.

B. Hearings before the Commissioner under this article shall commence within ninety days of the request for a hearing and the Commissioner's decision shall be rendered within sixty days from the receipt of the hearing officer's recommendation. Hearings authorized under this article shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court of Virginia. On request of the Commissioner, the Executive Secretary will name a hearing officer from the list, selected on a rotation system administered by the Executive Secretary. The hearing officer shall provide recommendations to the Commissioner within ninety days of the conclusion of the hearing.

C. Notwithstanding any contrary provision of this article, the Commissioner shall initiate investigations, conduct hearings, and determine the rights of parties under this article whenever he is provided information by the Motor Vehicle Dealer Board or any other person indicating a possible violation of any provision of this article.

D. For purposes of any matter brought to the Commissioner under subdivisions 3, 4, 5, 6 and 7b of § 46.2-1569 with respect to which the Commissioner is to determine whether there is good cause for a proposed action or whether it would be unreasonable under the circumstances, the Commissioner shall consider:

1. The volume of the affected dealer's business in the relevant market area;
2. The nature and extent of the dealer's investment in its business;
3. The *adequacy of the dealer's capitalization to the franchisor's standards and the adequacy of the dealer's service facilities, equipment, parts, supplies, and personnel;*
4. The effect of the proposed action on the community;
5. The extent and quality of the dealer's service under motor vehicle warranties;
6. The dealer's performance under the terms of its franchise;
7. Other economic and geographical factors reasonably associated with the proposed action; and
8. The recommendations, if any, from a three-member panel composed of members of the Board who are franchised dealers not of the same line-make involved in the hearing and who are appointed to the panel by the Commissioner.

E. An interested party in a hearing held pursuant to subsection A of this section shall comply with the effective date of compliance established by the Commissioner in his decision in such hearing, unless a stay or extension of such date is granted by the Commissioner or the Commissioner's decision is under judicial review and appeal as provided in subsection A of this section. If, after notice to such interested party and an opportunity to comment, the Commissioner finds an interested party has not complied with his decision by the designated date of compliance, unless a stay or extension of such date has been granted by the Commissioner or the Commissioner's decision is under judicial review and appeal, the Commissioner may assess such interested party a civil penalty not to exceed \$1,000 per day of noncompliance. Civil penalties collected under this subsection shall be deposited into the Transportation Trust Fund.

2. That an emergency exists and this act is in force from its passage.