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## SENATE BILL NO. 1040

Offered January 20, 1997

*A BILL to amend and reenact §§ 46.2-1993.3 and 46.2-1993.67 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 46.2-1993.67:1, relating to motorcycle dealers.*

Patrons—Waddell, Houck, Marsh, Reasor, Reynolds and Ticer; Delegates: Bloxom and Sherwood

Referred to the Committee on Transportation

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 46.2-1993.3 and 46.2-1993.67 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 46.2-1993.67:1 as follows:**

§ 46.2-1993.3. Suit to enjoin violations; manufacturer, factory branch, distributor, distributor branch, factory or distributor representative subject to jurisdiction of courts of the Commonwealth; recovery of damages costs, and attorney's fees.

A. The Commissioner, whenever he believes from evidence submitted to him that any person has been violating, is violating or is about to violate any provision of this chapter, in addition to any other remedy, may bring an action in the name of the Commonwealth to enjoin any violation of this chapter.

B. Any manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative who obtains a license under this chapter, is engaged in business in the Commonwealth and is subject to the jurisdiction of the courts of the Commonwealth. Any manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative of motorcycles of a recognized line-make that are sold or leased in the Commonwealth pursuant to a plan, system, or channel of distribution established, approved, authorized, or known to the manufacturer, shall be subject to the jurisdiction of the courts of the Commonwealth in any action seeking relief under or to enforce any of the remedies or penalties provided for in this chapter.

C. If, in any action by a motorcycle dealer against a manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative, the motorcycle dealer prevails, he shall have a cause of action against the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative licensee for reasonable attorney's fees and costs incurred by him in such proceeding, and he shall have a cause of action under subsection D.

D. Any motorcycle dealer who has suffered pecuniary loss or who as been otherwise adversely affected because of a violation of this chapter by a manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative, notwithstanding the existence of any other remedies under this chapter, shall have a cause of action against the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative for damages and may recover damages in any court of competent jurisdiction in an amount equal to three times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. Upon a prima facie showing by the person bringing the action that such a violation by the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative has occurred, the burden or proof shall then be upon the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative to prove that such violation or unfair practice did not occur.

§ 46.2-1993.67. Other coercion of dealers; transfer, grant, succession to and cancellation of dealer franchises; delivery of motorcycles, parts, and accessories.

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 motorcycle or motorcycles, 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, or do any other act unfair to the dealer, by threatening to cancel any franchise existing between the manufacturer, factory branch, distributor, distributor branch, or representative thereof and the dealer.

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

4. 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 at least thirty days prior to the proposed effective date of the transfer, sale, assignment, or change. No such objection shall be

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60 effective to prevent the sale, transfer, assignment, or change if the Commissioner has determined, if  
61 requested in writing by the dealer within thirty days after receipt of an objection to the proposed sale,  
62 transfer, or change, and after a hearing on the matter, that the failure to permit or honor the sale,  
63 transfer, assignment, or change is unreasonable under the circumstances. No franchise may be sold,  
64 assigned, or transferred unless (i) the franchisor has been given at least ninety days' prior written notice  
65 by the dealer as to the identity, financial ability, and qualifications of the proposed transferee; and (ii)  
66 the sale or transfer of the franchise and business will not involve, without the franchisor's consent, a  
67 relocation of the business.

68 5. To grant an additional franchise for a particular line-make of motorcycle in a relevant market area  
69 in which a dealer or dealers in that line-make are already located unless the franchisor has first advised  
70 in writing all other dealers in the line-make in the relevant market area. No such additional franchise  
71 may be established at the proposed site unless the Commissioner has determined, if requested by a  
72 dealer of the same line-make in the relevant market area within thirty days after receipt of the  
73 franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter,  
74 that there is reasonable evidence that after the grant of the new franchise, the market will support all of  
75 the dealers in that line-make in the relevant market area. Establishing a franchised dealer in a relevant  
76 market area to replace a franchised dealer that has not been in operation for more than two years shall  
77 constitute the establishment of a new franchise subject to the terms of this subdivision. The two-year  
78 period for replacing a franchised dealer shall begin on the day the franchise was terminated, or, if a  
79 termination hearing was held, on the day the franchisor was legally permitted finally to terminate the  
80 franchise. This subdivision shall not apply to (i) the relocation of an existing dealer within that dealer's  
81 relevant market area if the relocation site is to be more than ten miles distant from any other dealer for  
82 the same line-make; (ii) the relocation of an existing dealer within that dealer's relevant market area if  
83 the relocation site is to be more distant than the existing site from all other dealers of the same  
84 line-make in that relevant market area; or (iii) the relocation of an existing new motorcycle dealer within  
85 two miles of the existing site of the relocating dealer.

86 *No new or additional motorcycle dealer franchise shall be established in any community or territory*  
87 *when (i) a timely protest is filed by an existing franchised motorcycle dealer and (ii) the manufacturer,*  
88 *factory branch, distributor, distributor branch, or factory or distributor representative fails to show that*  
89 *the existing franchised dealer or dealers who register new motorcycle retail sales or retail leases of the*  
90 *same line-make in the community or territory of the proposed franchise are not providing adequate*  
91 *representation of such line-make motorcycles in such community or territory. The burden of proof in*  
92 *establishing inadequate representation shall be on the manufacturer, factory branch, distributor,*  
93 *distributor branch, or factory or distributor representative.*

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

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

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

116 c. Revocation of any license which the franchised motorcycle dealer is required to have to operate a  
117 dealership;

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

119 The change or discontinuance of a marketing or distribution system of a particular line-make product  
120 by a manufacturer or distributor, while the name identification of the product is continued in substantial  
121 form by the same or different manufacturer or distributor, may be considered to be a franchise

122 termination, cancellation, or nonrenewal. The provisions of this paragraph shall apply to changes and  
123 discontinuances made after January 1, 1989, but they shall not be considered by any court in any case in  
124 which such a change or discontinuance occurring prior to that date has been challenged as constituting a  
125 termination, cancellation or nonrenewal.

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

129 8. To fail to allow a dealer the right at any time to designate a member of his family as a successor  
130 to the dealership in the event of the death or incapacity of the dealer. It shall be unlawful to prevent or  
131 refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated  
132 dealer if the franchisor has not provided to the member of the family previously designated by the  
133 dealer as his successor written notice of its objections to the succession and of such person's right to  
134 seek a hearing on the matter before the Commissioner pursuant to this article, and the Commissioner  
135 determines, if requested in writing by such member of the family within thirty days of receipt of such  
136 notice from the franchisor, and after a hearing on the matter before the Commissioner pursuant to this  
137 article, that the failure to permit or honor the succession is unreasonable under the circumstances. No  
138 member of the family may succeed to a franchise unless (i) the franchisor has been given written notice  
139 as to the identity, financial ability, and qualifications of the member of the family in question and (ii)  
140 the succession to the franchise will not involve, without the franchisor's consent, a relocation of the  
141 business.

142 9. To fail to ship monthly to any dealer, if ordered by the dealer, the number of new motorcycles of  
143 each make, series, and model needed by the dealer to receive a percentage of total new motorcycle sales  
144 of each make, series, and model equitably related to the total new motorcycle production or importation  
145 currently being achieved nationally by each make, series, and model covered under the franchise. Upon  
146 the written request of any dealer holding its sales or sales and service franchise, the manufacturer or  
147 distributor shall disclose to the dealer in writing the basis upon which new motorcycles are allocated,  
148 scheduled, and delivered to the dealers of the same line-make. If allocation is at issue in a request for a  
149 hearing, the dealer may demand the Commissioner to direct that the manufacturer or distributor provide  
150 to the dealer, within thirty days of such demand, all records of sales and all records of distribution of all  
151 motorcycles to the same line-make dealers who compete with the dealer requesting the hearing.

152 10. To require or otherwise coerce a dealer to underutilize the dealer's facilities.

153 11. To include in any franchise with a motorcycle dealer terms that are contrary to, prohibited by, or  
154 otherwise inconsistent with the requirements of this chapter.

155 12. For any franchise agreement to require a motorcycle dealer to pay the attorney's fees of the  
156 manufacturer or distributor related to hearings and appeals brought under this article.

157 13. To fail to include in any franchise with a motorcycle dealer the following language: "If any  
158 provision herein contravenes the laws or regulations of any state or other jurisdiction wherein this  
159 agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by  
160 such laws or regulations, such provision shall be deemed to be modified to conform to such laws or  
161 regulations, and all other terms and provisions shall remain in full force," or words to that effect.

162 § 46.2-1993.67:1. *When discontinuation, cancellation, or nonrenewal of franchise unfair.*

163 *A discontinuation, cancellation, or nonrenewal of a franchise agreement is unfair if it is not clearly*  
164 *permitted by the franchise agreement, is not undertaken in good faith, is not undertaken for good cause,*  
165 *or is based on an alleged breach of the franchise agreement that is not in fact a material and*  
166 *substantial breach.*