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SENATE BILL NO. 709
FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by Senator McDougle
on February 10, 2016)

(Patron Prior to Substitute—Senator McDougle)

A BILL to amend and reenact §§ 46.2-1569, 46.2-1571, and 46.2-1572.4 of the Code of Virginia, relating to compensation of dealers for recalled vehicles.

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-1569, 46.2-1571, and 46.2-1572.4 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, distributor branch, or affiliate, or any field representative, officer, agent, or their representatives to do any of the following. It shall further be unlawful for any manufacturer, factory branch, distributor, distributor branch, or any field representative, officer, agent, or their representatives to engage in conduct prohibited under this section through an affiliate.

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. If a manufacturer, factory branch, distributor, or distributor branch conditions the grant of a new franchise to a dealer on the dealer's consent (i) to provide a site control agreement as defined in subdivision 10, (ii) to provide a written agreement containing an option to purchase the franchise of the dealer, provided, however, that agreements pursuant to § 46.2-1569.1 shall be permitted, or (iii) to provide a termination agreement to be held by the manufacturer, factory branch, distributor, or distributor branch for subsequent use, it shall be considered coercion and an act that is unfair and injurious to the dealer; provided, however, that the provisions of § 46.2-1572.3 related to the good faith settlement of disputes shall apply to the agreements described in clauses (i), (ii), and (iii) of this subdivision, mutatis mutandis. This subdivision shall not apply to any agreement the enforcement of which is subject to the jurisdiction of a United States Bankruptcy Court.

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 shall 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.

2c. 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 10 years that were required or 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 under a program offered after the effective date of this subdivision and available to more than one dealer in the Commonwealth that are premised wholly or in part on dealer facility improvements or installation of franchisor signs or other franchisor image elements, a dealer that constructed improvements or installed signs or other franchisor image elements required by or approved by the manufacturer, factory branch, distributor, or distributor branch and completed within the 10 years preceding the program shall be deemed 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 10-year period. This subdivision shall not apply to a program that provides lump sum payments to assist dealers in making facility improvements or to pay for signs or franchisor image elements when such payments are not dependent on the dealer selling or purchasing specific numbers of new vehicles and shall not apply to a program that is in effect with more than one dealer in the Commonwealth on the effective date of this subdivision, nor to any renewal or modification of such a program.

2d. To coerce or require any dealer, whether by agreement, program, incentive provision, or provision for loss of incentive payments or other benefits, to refrain from selling any used motor vehicle

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60 *subject to (i) recall, (ii) stop sale directive, (iii) technical service bulletin, or (iv) other manufacturer,*
61 *factory branch, distributor, or distributor branch notification to perform work on such used motor*
62 *vehicle, unless the manufacturer, factory branch, distributor, or distributor branch has a remedy and*
63 *parts available to the dealer to remediate the basis for the coercion or requirement of the dealer to*
64 *refrain from selling each affected used motor vehicle. If there is no remedy or there are no parts*
65 *available from the manufacturer, factory branch, distributor, or distributor branch to remediate each*
66 *affected used motor vehicle in the inventory of the dealer, the manufacturer, factory branch, distributor,*
67 *or distributor branch shall (a) compensate the dealer for any affected used motor vehicle in the*
68 *inventory of the dealer that it cannot sell because of such coercion or requirement at least one percent*
69 *a month or any part thereof of the cost of such used motor vehicle, including repairs and reconditioning*
70 *expenses based on the financial records of the dealer, and (b) establish a written procedure to*
71 *compensate dealers under this subdivision that it shall provide to dealers subject to its coercion or*
72 *requirement and file with the Commissioner as a franchise document pursuant to § 46.2-1566.*

73 *Any claim for compensation by a dealer shall be submitted on a monthly basis for the amount owed*
74 *pursuant to this subdivision. The manufacturer, factory branch, distributor, or distributor branch shall*
75 *process and pay the claim in the same manner as a claim for warranty reimbursements as provided in*
76 *§ 46.2-1571. This subdivision shall not prevent a manufacturer, factory branch, distributor, or*
77 *distributor branch from (1) requiring that a motor vehicle not be subject to an open recall or stop sale*
78 *directive in order to be qualified, remain qualified, or be sold as a certified pre-owned vehicle or*
79 *similar designation; (2) paying incentives for selling used vehicles with no unremedied recalls; or (3)*
80 *paying incentives for performing recall repairs on a vehicle in the dealer's inventory.*

81 *Nothing in this subsection shall prevent a manufacturer, factory branch, distributor, or distributor*
82 *branch from instructing that a dealer repair used vehicles of the line-make for which the dealer holds a*
83 *franchise with an open recall, provided that the instruction does not involve coercion that imposes a*
84 *penalty or provision of loss of benefits on the dealer.*

85 3. To prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of
86 the business, stock transfer, or otherwise, or the transfer, sale, or assignment of a dealer franchise, or a
87 change in the executive management or principal operator of the dealership, unless the franchisor
88 provides written notice to the dealer of its objection and the reasons therefor by certified mail or
89 overnight delivery or other method designed to ensure delivery to the dealer at least 30 days prior to the
90 proposed effective date of the transfer, sale, assignment, or change. No such objection shall be sufficient
91 unless the failure to approve is reasonable. Notwithstanding the provisions of subsection D of
92 § 46.2-1573, the only grounds that may be considered reasonable for a failure to approve are that an
93 individual who is the applicant or is in control of an entity that is an applicant (i) lacks good moral
94 character, (ii) lacks reasonable motor vehicle dealership management experience and qualifications, (iii)
95 lacks financial ability to be the dealer, or (iv) fails to meet the standards otherwise established by this
96 title to be a dealer. No such objection shall be effective to prevent the sale, transfer, assignment, or
97 change if the Commissioner has determined, if requested in writing by the dealer within 30 days after
98 receipt of an objection to the proposed sale, transfer, or change, and after a hearing on the matter, that
99 the failure to permit or honor the sale, transfer, assignment, or change is unreasonable under the
100 circumstances. No franchise may be sold, assigned, or transferred unless (a) the franchisor has been
101 given at least 90 days' prior written notice by the dealer as to the identity, financial ability, and
102 qualifications of the proposed transferee on forms generally utilized by the franchisor to conduct its
103 review, as well as the full agreement for the proposed transaction, and (b) the sale or transfer of the
104 franchise and business will not involve, without the franchisor's consent, a relocation of the business.

105 3a. To impose a condition on the approval of the sale or transfer of the ownership of a dealership by
106 the sale of the business, stock transfer, or otherwise if the condition would violate the provisions of this
107 title if imposed on the existing dealer.

108 In the event the manufacturer, factory branch, distributor or distributor branch takes action to prevent
109 or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business,
110 stock transfer, or otherwise, or the transfer, sale or assignment of a dealer franchise, or a change in the
111 executive management or principal operator of the dealership, without a statement of specific grounds
112 for doing so that is consistent with subdivision 3 hereof or imposes a condition in violation of
113 subdivision 3a hereof, that shall constitute a violation of this section. The existing dealer may request
114 review of the action or imposition of the condition in a hearing by the Commissioner. If the
115 Commissioner finds that the action or the imposition of the condition was a violation of this section, the
116 Commissioner may order that the sale or transfer be approved by the manufacturer, factory branch,
117 distributor, or distributor branch, without imposition of the condition. If the existing dealer does not
118 request a hearing by the Commissioner concerning the action or the condition imposed by the
119 manufacturer, factory branch, distributor, or distributor branch, and the action or condition was the
120 proximate cause of the failure of the contract for the sale or transfer of ownership of the dealership, the
121 applicant for approval of the sale or transfer or the existing dealer, or both, may commence an action at

122 law for violation of this section. The action may be commenced in the circuit court of the city or county
 123 in which the dealer is located, or in any other circuit court with permissible venue, within two years
 124 following the action or the imposition of the condition by the manufacturer, factory branch, distributor,
 125 or distributor branch for the damages suffered by the applicant or the dealer as a result of the violation
 126 of this section by the manufacturer, factory branch, distributor, or distributor branch, plus the applicant's
 127 or dealer's reasonable attorney fees and costs of litigation. Notwithstanding the foregoing, an exercise of
 128 the right of first refusal by the manufacturer, factory branch, distributor, or distributor branch pursuant to
 129 § 46.2-1569.1 shall not be considered the imposition of a condition prohibited by this section.

130 4. To grant an additional franchise for a particular line-make of motor vehicle in a relevant market
 131 area in which a dealer or dealers in that line-make are already located unless the franchisor has first
 132 advised in writing all other dealers in the line-make in the relevant market area. No such additional
 133 franchise may be established at the proposed site unless the Commissioner has determined, if requested
 134 by a dealer of the same line-make in the relevant market area within 30 days after receipt of the
 135 franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter,
 136 that the franchisor can show by a preponderance of the evidence that after the grant of the new
 137 franchise, the relevant market area will support all of the dealers in that line-make in the relevant market
 138 area. Establishing a franchised dealer in a relevant market area to replace a franchised dealer that has
 139 not been in operation for more than two years shall constitute the establishment of a new franchise
 140 subject to the terms of this subdivision. The two-year period for replacing a franchised dealer shall begin
 141 on the day the franchise was terminated, or, if a termination hearing was held, on the day the franchisor
 142 was legally permitted finally to terminate the franchise. The relocation of a franchise in a relevant
 143 market area, whether by an existing dealer or by a dealer who is acquiring the franchise, shall constitute
 144 the establishment of a new franchise subject to the terms of this subdivision. This subdivision shall not
 145 apply to (i) the relocation of an existing dealer within that dealer's relevant market area if the relocation
 146 site is to be more than 10 miles distant from any other dealer for the same line-make; (ii) the relocation
 147 of an existing dealer within that dealer's relevant market area if the relocation site is to be more distant
 148 than the existing site from all other dealers of the same line-make in that relevant market area; or (iii)
 149 the relocation of an existing new motor vehicle dealer within two miles of the existing site of the
 150 relocating dealer.

151 5. Except as otherwise provided in this subdivision and notwithstanding the terms of any franchise,
 152 to terminate, cancel, or refuse to renew the franchise of any dealer without good cause and unless (i) the
 153 dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days
 154 prior to the effective date of such termination, cancellation, or the expiration date of the franchise,
 155 setting forth the specific grounds for the action, and (ii) the Commissioner has determined, if requested
 156 in writing by the dealer within the 60-day period prior to the effective date of such termination,
 157 cancellation, or the expiration date of the franchise and, after a hearing on the matter, that the franchisor
 158 has shown by a preponderance of the evidence that there is good cause for the termination, cancellation,
 159 or nonrenewal of the franchise. If any manufacturer, factory branch, distributor, or distributor branch
 160 takes action that will have the effect of terminating, canceling, or refusing to renew the franchise of any
 161 dealer (a) by use of a termination agreement executed by the dealer and obtained more than 90 days
 162 before the purported date of use, (b) by exercise of rights under a written option to purchase the
 163 franchise of a dealer, or (c) by exercise of rights under a site control agreement as defined in
 164 subdivision 10, that action shall be considered a termination, cancellation, or refusal to renew pursuant
 165 to the terms of this subdivision and subject to the rights, provisions, and procedures provided herein. In
 166 any case where a petition is made to the Commissioner for a determination as to good cause for the
 167 termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect
 168 pending the Commissioner's decision or, if that decision is appealed to the circuit court, pending the
 169 decision of the circuit court. Where the termination, cancellation, or nonrenewal of a franchise will
 170 result from use of a termination agreement executed by the dealer and obtained more than 90 days
 171 before the purported date of use, exercise of rights under a written option to purchase the franchise of a
 172 dealer, or exercise of rights under a site control agreement as defined in subdivision 10, such use or
 173 exercise shall be stayed pending the Commissioner's decision or, if that decision is appealed to the
 174 circuit court, pending the decision of the circuit court, and its use or exercise will be allowed only
 175 where the franchisor has shown by a preponderance of the evidence that there is good cause for the
 176 termination, cancellation, or nonrenewal of the franchise. In any case in which a franchisor neither
 177 advises a dealer that it does not intend to renew a franchise nor takes any action to renew a franchise
 178 beyond its expiration date, the franchise in question shall continue in effect on the terms last agreed to
 179 by the parties. Notwithstanding the other provisions of this subdivision notice of termination,
 180 cancellation, or nonrenewal may be provided to a dealer by a franchisor not less than 15 days prior to
 181 the effective date of such termination, cancellation, or nonrenewal when the grounds for such action are
 182 any of the following:

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

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

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

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

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

200 5a. To fail to provide continued parts and service support to a dealer which holds a franchise in a
201 discontinued line-make for at least five years from the date of such discontinuance. This requirement
202 shall not apply to a line-make which was discontinued prior to January 1, 1989.

203 5b. Upon the involuntary or voluntary termination, nonrenewal, or cancellation of the franchise of
204 any dealer, by either the manufacturer, distributor, or factory branch or by the dealer, notwithstanding
205 the terms of any franchise whether entered into before or after the enactment of this section, to fail to
206 pay the dealer for at least the following:

207 (1) The dealer cost plus any charges by the franchisor for distribution, delivery, and taxes paid by
208 the dealer, less all allowances paid to the dealer by the franchisor, for new and undamaged motor
209 vehicles in the dealer's inventory acquired from the franchisor or from another dealer of the same line
210 — make in the ordinary course of business within 18 months of termination;

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

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

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

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

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

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

228 5c. If the termination, cancellation, or nonrenewal of the dealer's franchise is the result of the
229 termination, elimination, or cessation of a line-make by the manufacturer, distributor, or factory branch,
230 then, in addition to the payments to the dealer pursuant to subdivision 5b, the manufacturer, distributor,
231 or factory branch shall be liable to the dealer for the following:

232 (1) An amount at least equivalent to the fair market value of the franchise for the line-make, which
233 shall be the greater of that value determined as of (i) the date the franchisor announces the action that
234 results in termination, cancellation, or nonrenewal, (ii) the date the action that resulted in the
235 termination, cancellation, or nonrenewal first became general knowledge, or (iii) the day 12 months prior
236 to the date on which the notice of termination, cancellation, or nonrenewal is issued. In determining the
237 fair market value of a franchise for a line-make, if the line-make is not the only line-make for which the
238 dealer holds a franchise in the dealership facilities, the dealer shall also be entitled to compensation for
239 the contribution of the line-make to payment of the rent or to covering obligation for the fair rental
240 value of the dealership facilities for the period set forth in subdivision 5c (2). Fair market value of the
241 franchise for the line-make shall only include the goodwill value of the dealer's franchise for that
242 line-make in the dealer's relevant market area.

243 (2) If the line-make is the only line-make for which the dealer holds a franchise in the dealership
244 facilities, the manufacturer, distributor, or factory branch shall also pay assistance with respect to the

245 dealership facilities leased or owned by the dealer as follows: (i) the manufacturer, distributor, or factory
 246 branch shall pay the dealer a sum equivalent to the rent for the unexpired term of the lease or three
 247 years' rent, whichever is the lesser, or (ii) if the dealer owns the dealership facilities, the manufacturer,
 248 distributor, or factory branch shall pay the dealer a sum equivalent to the reasonable rental value of the
 249 dealership facilities for three years.

250 To be entitled to facilities assistance from the manufacturer, distributor, or factory branch, the dealer
 251 shall have the obligation to mitigate damages by listing the dealership facilities for lease or sublease
 252 with a licensed real estate agent within 30 days after the effective date of the termination of the
 253 franchise and thereafter by reasonably cooperating with such real estate agent in the performance of the
 254 agent's duties and responsibilities. If the dealer is able to lease or sublease the dealership facilities on
 255 terms that are consistent with local zoning requirements to preserve the right to sell motor vehicles from
 256 the dealership facilities and the terms of the dealer's lease, the dealer shall be obligated to pay the
 257 manufacturer the net revenue received from such mitigation, but only following receipt of facilities
 258 assistance payments pursuant to clause (i) or (ii) of subdivision 5c (2), and only up to the total amount
 259 of facilities assistance payments that the dealer has received.

260 6. To fail to allow a dealer the right at any time to designate a member of his family as a successor
 261 to the dealership in the event of the death or incapacity of the dealer. Such designation may be made by
 262 the dealer or, in the event of the death or incapacity of the dealer, by the qualified executor or personal
 263 representative of the dealer. It shall be unlawful to prevent or refuse to honor the succession to a
 264 dealership by a member of the family of a deceased or incapacitated dealer if the franchisor has not
 265 provided to the member of the family designated the dealer's successor written notice of its objections to
 266 the succession and of such person's right to seek a hearing on the matter before the Commissioner
 267 pursuant to this article, and the Commissioner determines, if requested in writing by such member of the
 268 family within 30 days of receipt of such notice from the franchisor, and after a hearing on the matter
 269 before the Commissioner pursuant to this article, that the failure to permit or honor the succession is
 270 unreasonable under the circumstances. No member of the family may succeed to a franchise unless (i)
 271 the franchisor has been given written notice as to the identity, financial ability, and qualifications of the
 272 member of the family in question, and (ii) the succession to the franchise will not involve, without the
 273 franchisor's consent, a relocation of the business.

274 7. To delay, refuse, or fail to deliver to any dealer, if ordered by the dealer, in reasonable quantities
 275 and within a reasonable time, any new vehicles of each series and model sold or distributed by the
 276 franchisor as covered by such franchise and which are publicly advertised by the manufacturer, factory
 277 branch, distributor, or distributor branch in the Commonwealth to be available for immediate delivery,
 278 provided, however, that the failure to deliver any motor vehicle shall not be considered a violation of
 279 this chapter if such failure is due to an act of God, a work stoppage or delay due to a strike or labor
 280 difficulty, a shortage of materials, a lack of available manufacturing capacity, a freight embargo, or other
 281 cause over which the manufacturer, factory branch, distributor, or distributor branch shall have no
 282 control. If ordered by a dealer, a franchisor shall deliver an equitable supply of new vehicles during the
 283 model year of each series and model under the dealer's franchise in proportion to the sales objectives or
 284 goals established by the franchisor for the dealer compared to the sales objectives or goals established
 285 by the other same line-make dealers in the Commonwealth, provided, however, that the failure to deliver
 286 any motor vehicle shall not be considered a violation of this chapter if such failure is due to a cause
 287 over which the manufacturer, factory branch, distributor, or distributor branch shall have no control.
 288 Upon the written request of any dealer holding its sales or sales and service franchise, the manufacturer
 289 or distributor shall disclose to the dealer in writing the basis upon which new motor vehicles of the
 290 same line-make are allocated, scheduled, and delivered to dealers in the Commonwealth, and the basis
 291 upon which the current allocation or distribution is being made or will be made to such dealer. In the
 292 event that allocation is at issue in a request for a hearing, the dealer may demand the Commissioner to
 293 direct that the manufacturer or distributor provide to the dealer, within 30 days of such demand, all
 294 records of sales and all records of distribution of all motor vehicles to the same line-make dealers who
 295 compete with the dealer requesting the hearing.

296 7a. To fail or refuse to offer to its same line-make franchised dealers all models manufactured for the
 297 line-make, or require a dealer to pay any extra fee, or remodel, renovate, or recondition the dealer's
 298 existing facilities, or purchase unreasonable advertising displays or other materials as a prerequisite to
 299 receiving a model or a series of vehicles.

300 7b. To require or otherwise coerce a dealer to underutilize the dealer's facilities by requiring or
 301 otherwise coercing a dealer to exclude or remove from the dealer's facilities operations for selling or
 302 servicing of a line-make of vehicles for which the dealer has a franchise agreement to utilize the
 303 facilities.

304 7c. To require a dealer to purchase goods or services from a vendor selected, identified, or
 305 designated by a manufacturer, factory branch, distributor, distributor branch, or one of its affiliates by

306 agreement, program, incentive provision, or otherwise without making available to the dealer the option
307 to obtain the goods or services of substantially similar quality from a vendor chosen by the dealer. For
308 purposes of this subdivision, the term "goods" does not include moveable displays, brochures, and
309 promotional materials containing material subject to intellectual property rights of, or special tools and
310 training as required by the manufacturer, or parts to be used in repairs under warranty obligations of, a
311 manufacturer, factory branch, distributor, or distributor branch.

312 7d. To fail to provide a notice to a dealer when notifying it of the requirement to purchase goods or
313 services from a vendor selected, identified, or designated by a manufacturer, factory branch, distributor,
314 or distributor branch of the dealer's rights pursuant to subdivision 7c.

315 7e. To fail to provide to a dealer, when the manufacturer, factory branch, distributor, or distributor
316 branch claims that a vendor chosen by the dealer cannot supply goods and services of substantially
317 similar quality, a disclosure concerning the vendor selected, identified, or designated by the franchisor
318 stating (i) whether the manufacturer, factory branch, distributor, distributor branch, or one of its
319 affiliates, or any officer, director, or employee of the same, has an ownership interest, actual or
320 beneficial, in the vendor and, if so, the percentage of the ownership interest and (ii) whether the
321 manufacturer, factory branch, distributor, distributor branch, or one of its affiliates has an agreement or
322 arrangement by which the vendor pays to the manufacturer, factory branch, distributor, distributor
323 branch, or one of its affiliates, or any officer, director, or employee of the same, any compensation and,
324 if so, the basis and amount of the compensation to be paid as a result of any purchases by the dealer,
325 whether it is to be paid by direct payment by the vendor or by credit from the vendor for the benefit of
326 the recipient.

327 7f. To fail to provide to a dealer, if the goods and services to be supplied to the dealer by a vendor
328 selected, identified, or designated by the manufacturer, factory branch, distributor, or distributor branch
329 are signs or other franchisor image elements to be leased to the dealer, the right to purchase the signs or
330 other franchisor image elements of like kind and quality from a vendor selected by the dealer. If the
331 vendor selected by the manufacturer, factory branch, distributor, or distributor branch is the only
332 available vendor, the dealer must be given the opportunity to purchase the signs or other franchisor
333 image elements at a price substantially similar to the capitalized lease costs thereof. This subdivision
334 shall not be construed to allow a dealer to impair or eliminate the intellectual property rights of the
335 manufacturer, factory branch, distributor, or distributor branch, nor to permit a dealer to erect or
336 maintain signs that do not conform to the intellectual property usage guidelines of the manufacturer,
337 factory branch, distributor, or distributor branch.

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

340 8a. For any franchise agreement, to require a motor vehicle dealer to pay the attorney fees of the
341 manufacturer or distributor related to hearings and appeals brought under this article.

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

347 10. To enter into any agreement with a motor vehicle dealer in which the manufacturer, factory
348 branch, distributor, distributor branch, or one of its affiliates is given site control over the premises of a
349 dealer that does not terminate upon the occurrence of any of the following events: (i) the right of the
350 franchisor to manufacture or distribute the line-make of vehicles covered by the dealer's franchise is
351 sold, assigned, or otherwise transferred by the manufacturer, factory branch, distributor, or distributor
352 branch to another; (ii) the final termination of the dealer's franchise for any reason; or (iii) the
353 manufacturer, factory branch, distributor, or distributor branch of its affiliate fails for any reason to
354 exercise its right of first refusal to purchase the assets or ownership of the business of the dealer when
355 given the opportunity to do so by virtue of its franchise agreement, another agreement, or as set forth in
356 § 46.2-1569. For purposes of this subdivision, the term "site control" shall mean the contractual right to
357 control in any way the commercial use and development of the premises upon which a dealer's business
358 operations are located, including the right to approve of additional or different uses for the property
359 beyond those of its franchise, the right to lease or sublease the dealer's property, or the right or option
360 to purchase the dealer's property.

361 11. To require or coerce a motor vehicle dealer, whether by agreement, program, incentive provision,
362 or otherwise, to submit or to provide a manufacturer, factory branch, distributor, or distributor branch
363 access to consumer data maintained by the dealer (i) by any method that violates or would violate the
364 dealer's chosen policies and processes for complying with obligations to protect consumer data under
365 laws of the United States or the Commonwealth or (ii) through franchisor access to the computer
366 database of the dealer if the dealer chooses to submit data specified by the franchisor.

367 The manufacturer, factory branch, distributor, or distributor branch shall provide a dealer the right to

368 cancel the dealer's participation in a program under which the dealer provides consumer data or access
 369 to data to the manufacturer, factory branch, distributor, or distributor branch, provided that a
 370 manufacturer, factory branch, distributor, or distributor branch may require notice of up to 60 days of
 371 the dealer's decision to cancel the dealer's participation.

372 If a manufacturer, factory branch, distributor, or distributor branch offers incentives or other
 373 payments under a program offered after July 1, 2015, excluding any continuation, renewal, or
 374 modification of any existing program, and available to more than one dealer in the Commonwealth that
 375 are premised wholly or in part on dealer participation in manufacturer, factory branch, distributor, or
 376 distributor branch programs under which consumer data is provided to or accessed by the manufacturer,
 377 factory branch, distributor, or distributor branch, a dealer that exercises its rights under this subdivision
 378 shall be deemed to be in compliance with the program requirements pertaining to providing consumer
 379 data, provided that the dealer has otherwise met program requirements to the extent of providing any
 380 consumer data that is not nonpublic personal information.

381 It shall not constitute a violation of this subdivision for a manufacturer, factory branch, distributor, or
 382 distributor branch to require a motor vehicle dealer to provide data (a) concerning a new motor vehicle
 383 sale or used motor vehicle sale under a manufacturer certification program, (b) to validate a customer or
 384 dealer incentive, (c) to calculate dealer or market sales or evaluate service performance or customer
 385 satisfaction to facilitate analysis of product quality and market feedback, (d) to facilitate warranty service
 386 work on a vehicle, (e) concerning information with respect to recall repairs or information about a
 387 recalled vehicle, (f) pursuant to a mutual agreement between a manufacturer, factory branch, distributor,
 388 or distributor branch and a dealer, or (g) where consumer data is reasonably necessary to enable a
 389 manufacturer, factory branch, distributor, or distributor branch to provide programs, products, or services
 390 to a dealer.

391 A dealer that elects to submit or push data or information to the manufacturer, factory branch,
 392 distributor, or distributor branch through any method other than that provided by the manufacturer,
 393 factory branch, distributor, or distributor branch shall timely obtain and furnish the requested data in a
 394 widely accepted electronic file format. A manufacturer, factory branch, distributor, or distributor branch
 395 shall not impose a fee, surcharge, or charge of any type on a dealer that chooses to submit data
 396 specified by the manufacturer, factory branch, distributor, or distributor branch rather than provide the
 397 manufacturer, factory branch, distributor, or distributor branch access to the dealer's computer database.

398 **§ 46.2-1571. Recall, warranty, and sales incentive obligations.**

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

404 1. Compensation of a dealer for *recall or* warranty parts, service, and diagnostic work shall not be
 405 less than the amounts charged by the dealer for the manufacturer's or distributor's original parts, service,
 406 and diagnostic work to retail customers for nonwarranty service, parts, and diagnostic work installed or
 407 performed in the dealer's service department unless the amounts are not reasonable. ~~Warranty~~ *Recall or*
 408 *warranty* parts compensation shall be stated as a percentage of markup, which shall be an agreed
 409 reasonable approximation of retail markup and which shall be uniformly applied to all of the
 410 manufacturer's or distributor's parts unless otherwise provided for in this section. If the dealer and
 411 manufacturer or distributor cannot agree on the *recall or* warranty parts compensation markup to be paid
 412 to the dealer, the markup shall be determined by an average of the dealer's retail markup on all of the
 413 manufacturer's or distributor's parts as described in subdivisions 2 and 3.

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

420 3. Increases in dealer *recall or* warranty parts and service compensation and diagnostic work
 421 compensation, pursuant to this section, shall be requested by the dealer in writing, shall be based on 100
 422 consecutive repair orders or all repair orders over a 90-day period, whichever occurs first, and, in the
 423 case of parts, shall be stated as a percentage of markup that shall be uniformly applied to all the
 424 manufacturer's or distributor's parts.

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

427 5. If a manufacturer or distributor furnishes a part to a dealer at no cost for use by the dealer in
 428 performing work for which the manufacturer or distributor is required to compensate the dealer under

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

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

443 This section does not apply to compensation for parts such as components, systems, fixtures,
444 appliances, furnishings, accessories, and features that are designed, used, and maintained primarily for
445 nonvehicular, residential purposes. ~~Warranty~~ *Recall, warranty*, and sales incentive audits of dealer
446 records may be conducted by the manufacturer, factory branch, distributor, or distributor branch on a
447 reasonable basis, and dealer claims for *recall, warranty*, or sales incentive compensation shall not be
448 denied except for good cause, such as performance of nonwarranty repairs, lack of material
449 documentation, fraud, or misrepresentation. A dealer's failure to comply with the specific requirements
450 of the manufacturer or distributor for processing the claim shall not constitute grounds for the denial of
451 the claim or reduction of the amount of compensation to the dealer as long as reasonable documentation
452 or other evidence has been presented to substantiate the claim. The manufacturer, factory branch,
453 distributor, or distributor branch shall not deny a claim or reduce the amount of compensation to the
454 dealer for *recall or warranty* repairs to resolve a condition discovered by the dealer during the course of
455 a separate repair requested by the customer *or to resolve a condition on the basis of advice or*
456 *recommendation by the dealer*. Claims for dealer compensation shall be paid within 30 days of dealer
457 submission or within 30 days of the end of an incentive program or rejected in writing for stated
458 reasons. The manufacturer, factory branch, distributor, or distributor branch shall reserve the right to
459 reasonable periodic audits to determine the validity of all such paid claims for dealer compensation. Any
460 chargebacks for *recall or warranty* parts or service compensation and service incentives shall only be for
461 the six-month period immediately following the date of the claim and, in the case of chargebacks for
462 sales compensation only, for the six-month period immediately following the date of claim. However,
463 such limitations shall not be effective if a manufacturer, factory branch, distributor, or distributor branch
464 has reasonable cause to believe that a claim submitted by a dealer is intentionally false or fraudulent.
465 For purposes of this section, "reasonable cause" means a bona fide belief based upon evidence that the
466 material issues of fact are such that a person of ordinary caution, prudence, and judgment could believe
467 that a claim was intentionally false or fraudulent. A dealer shall not be charged back or otherwise liable
468 for sales incentives or charges related to a motor vehicle sold by the dealer to a purchaser other than a
469 licensed, franchised motor vehicle dealer and subsequently exported or resold, unless the manufacturer,
470 factory branch, distributor, or distributor branch can demonstrate by a preponderance of the evidence
471 that the dealer should have known of and did not exercise due diligence in discovering the purchaser's
472 intention to export or resell the motor vehicle.

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

475 1. Fail to perform any of its *recall or warranty* obligations, including tires, with respect to a motor
476 vehicle;

477 2. Fail to assume all responsibility for any liability resulting from structural or production defects;

478 3. Fail to include in written notices of factory recalls to vehicle owners and dealers the expected date
479 by which necessary parts and equipment will be available to dealers for the correction of defects;

480 4. Fail to compensate any of the motor vehicle dealers licensed in the Commonwealth for repairs
481 effected by the dealer of merchandise damaged in manufacture or transit to the dealer where the carrier
482 is designated by the manufacturer, factory branch, distributor, or distributor branch;

483 5. Fail to fully compensate its motor vehicle dealers licensed in the Commonwealth for *recall or*
484 *warranty* parts, work, and service pursuant to subsection A either by reduction in the amount due to the
485 dealer or by separate charge, surcharge, or other imposition by which the motor vehicle manufacturer,
486 factory branch, distributor, or distributor branch seeks to recover its costs of complying with subsection
487 A, or for legal costs and expenses incurred by such dealers in connection with *recall or warranty*
488 obligations for which the manufacturer, factory branch, distributor, or distributor branch is legally
489 responsible or which the manufacturer, factory branch, distributor, or distributor branch imposes upon
490 the dealer;

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

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

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

500 9. Deny any dealer the right to return any part or accessory that the dealer has not sold within 12
501 months where the part or accessory was not obtained through a specific order initiated by the dealer but
502 instead was specified for, sold to and shipped to the dealer pursuant to an automated ordering system,
503 provided that such part or accessory is in the condition required for return to the manufacturer, factory
504 branch, distributor, or distributor branch, and the dealer returns the part within 30 days of it becoming
505 eligible under this subdivision. For purposes of this subdivision, an "automated ordering system" shall be
506 a computerized system that automatically specifies parts and accessories for sale and shipment to the
507 dealer without specific order thereof initiated by the dealer. The manufacturer, factory branch,
508 distributor, or distributor branch shall not charge a restocking or handling fee for any part or accessory
509 being returned under this subdivision. This subdivision shall not apply if the manufacturer, factory
510 branch, distributor, or distributor branch has available to the dealer an alternate system for ordering parts
511 and accessories that provides for shipment of ordered parts and accessories to the dealer within the same
512 time frame as the dealer would receive them when ordered through the automated ordering system.

513 C. Notwithstanding the terms of any franchise, it shall be unlawful for any motor vehicle
514 manufacturer, factory branch, distributor, or distributor branch to fail to indemnify and hold harmless its
515 motor vehicle dealers against any losses or damages arising out of complaints, claims, or suits relating
516 to the manufacture, assembly, or design of motor vehicles, parts, or accessories, or other functions by
517 the manufacturer, factory branch, distributor, or distributor branch beyond the control of the dealer,
518 including, without limitation, the selection by the manufacturer, factory branch, distributor, or distributor
519 branch of parts or components for the vehicle or any damages to merchandise occurring in transit to the
520 dealer where the carrier is designated by the manufacturer, factory branch, distributor, or distributor
521 branch. The dealer shall notify the manufacturer of pending suits in which allegations are made that
522 come within this subsection whenever reasonably practicable to do so. Every motor vehicle dealer
523 franchise issued to, amended, or renewed for motor vehicle dealers in Virginia shall be construed to
524 incorporate provisions consistent with the requirements of this subsection.

525 D. On any new motor vehicle, any uncorrected damage or any corrected damage exceeding three
526 percent of the manufacturer's or distributor's suggested retail price as defined in 15 U.S.C. §§ 1231
527 -1233, as measured by retail repair costs, must be disclosed to the dealer in writing prior to delivery.
528 Factory mechanical repair and damage to glass, tires, and bumpers are excluded from the three percent
529 rule when properly replaced by identical manufacturer's or distributor's original equipment or parts.
530 Whenever a new motor vehicle is damaged in transit, when the carrier or means of transportation is
531 determined by the manufacturer or distributor, or whenever a motor vehicle is otherwise damaged prior
532 to delivery to the new motor vehicle dealer, the new motor vehicle dealer shall:

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

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

539 E. If the manufacturer or distributor refuses or fails to authorize correction of such damage within 10
540 days after receipt of notification, or if the dealer rejects the vehicle because damage exceeds the three
541 percent rule, ownership of the new motor vehicle shall revert to the manufacturer or distributor, and the
542 new motor vehicle dealer shall have no obligation, financial or otherwise, with respect to such motor
543 vehicle. Should either the manufacturer, distributor, or the dealer elect to correct the damage or any
544 other damage exceeding the three percent rule, full disclosure shall be made by the dealer in writing to
545 the buyer and an acknowledgement by the buyer is required. If there is less than three percent damage,
546 no disclosure is required, provided the damage has been corrected. Predelivery mechanical work shall
547 not require a disclosure. Failure to disclose any corrected damage within the knowledge of the selling
548 dealer to a new motor vehicle in excess of the three percent rule shall constitute grounds for revocation
549 of the buyer order, provided that, within 30 days of purchase, the motor vehicle is returned to the dealer
550 with an accompanying written notice of the grounds for revocation. In case of revocation pursuant to
551 this section, the dealer shall accept the vehicle and refund any payments made to the dealer in

552 connection with the transaction, less a reasonable allowance for the consumer's use of the vehicle as
553 defined in § 59.1-207.11. Nothing in this section shall be construed to exempt from the provisions of
554 this section damage to a new motor vehicle that occurs following delivery of the vehicle to the dealer.

555 F. If there is a dispute between the manufacturer, factory branch, distributor, or distributor branch
556 and the dealer with respect to any matter referred to in subsection A, B, or C, either party may petition
557 the Commissioner in writing, within 30 days after either party has given written notice of the dispute to
558 the other, for a hearing. The decision of the Commissioner shall be binding on the parties, subject to
559 rights of judicial review and appeal as provided in Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2.
560 However, nothing contained in this section shall give the Commissioner any authority as to the content
561 or interpretation of any manufacturer's or distributor's warranty. A manufacturer, factory branch,
562 distributor, or distributor branch may not collect chargebacks, fully or in part, either through direct
563 payment or by charge to the dealer's account, for *recall or warranty parts or service compensation*,
564 including service incentives, sales incentives, other sales compensation, surcharges, fees, penalties, or
565 any financial imposition of any type arising from an alleged failure of the dealer to comply with a
566 policy of, directive from, or agreement with the manufacturer, factory branch, distributor, or distributor
567 branch until 40 days following final notice of the amount charged to the dealer following all internal
568 processes of the manufacturer, factory, factory branch, distributor, or distributor branch. Within 30 days
569 following receipt of such final notice, the dealer may petition the Commissioner, in writing, for a
570 hearing. If a dealer requests such a hearing, the manufacturer, factory branch, distributor, or distributor
571 branch may not collect the chargeback, fully or in part, either through direct payment or by charge to
572 the dealer's account, until the completion of the hearing and a final decision of the Commissioner
573 concerning the validity of the chargeback.

574 **§ 46.2-1572.4. Manufacturer or distributor use of performance standards.**

575 A. Any performance standard or program that is used by a manufacturer or distributor for measuring
576 dealership performance and may have a material effect on a dealer, and the application of any such
577 standard or program by a manufacturer or distributor, shall be fair, reasonable and equitable, and if
578 based upon a survey, shall be based upon a statistically valid sample. Upon the request of any dealer, a
579 manufacturer or distributor shall disclose in writing to the dealer a description of how a performance
580 standard or program is designed and all relevant information used in the application of the performance
581 standard or program to that dealer.

582 B. *A manufacturer or distributor shall not use any data, calculations, or statistical determinations of*
583 *the sales performance of a dealer for any purpose, including (i) loss of incentive payments or other*
584 *benefits, (ii) claim of breach or threats thereof, or (iii) notice of termination or threats thereof for the*
585 *period of time the manufacturer, factory branch, distributor, or distributor branch has established an*
586 *agreement, program, incentive program, or provision for loss of incentive payments or other benefits*
587 *that causes a dealer to refrain from selling any used motor vehicle subject to (a) recall, (b) stop sale*
588 *directive, (c) technical service bulletin, or (d) other manufacturer, factory branch, distributor, or*
589 *distributor branch notification to perform work on a dealer's used motor vehicles in its inventory when*
590 *there is no remedy or there are no parts to remediate each such affected used motor vehicle from the*
591 *manufacturer, factory branch, distributor, or distributor branch and for 90 days after the termination of*
592 *such agreement, program, incentive program, or provision for loss of incentive payments or other*
593 *benefits.*

594 *The data on which the manufacturer or distributor seeks to rely under this subsection shall only be*
595 *for a period or periods not excluded under this subsection. For any performance standard or program*
596 *that is used by a manufacturer or distributor for measuring dealership performance during the period or*
597 *periods excluded under this subsection, a dealer shall be deemed in compliance with any such program*
598 *requirements related to sales performance or sales or service customer satisfaction performance of a*
599 *dealer.*

600 *This subsection shall not prevent a manufacturer, factory branch, distributor, or distributor branch*
601 *from (1) requiring that a motor vehicle not be subject to an open recall or stop sale directive in order*
602 *to be qualified, remain qualified, or be sold as a certified pre-owned vehicle or similar designation; (2)*
603 *paying incentives for selling used vehicles with no unremedied recalls; (3) paying incentives for*
604 *performing recall repairs on a vehicle in the dealer's inventory; or (4) instructing that a dealer repair*
605 *used vehicles of the line-make for which the dealer holds a franchise with an open recall, provided that*
606 *the instruction does not involve coercion that imposes a penalty or provision of loss of benefits on the*
607 *dealer.*

608 C. A dealer may apply to the manufacturer, factory branch, distributor, or distributor branch for
609 adjustment to data, calculations, or statistical determinations of sales performance or sales and service
610 customer satisfaction performance for any period of time that such dealer has at least five percent of its
611 new motor vehicle inventory subject to a recall or stop sale directive and for 90 days after the end of
612 such period of time. Within 30 days of application for adjustment, the manufacturer, factory branch,
613 distributor, or distributor branch shall use reasonable efforts to review and adjust the data, calculations,

614 *or other statistical determinations back to the date that the dealer was prevented from selling the new*
615 *motor vehicles. A dealer applying for adjustment shall have the burden of showing that the prevention*
616 *of sale had a material, adverse impact on such dealer's new vehicle sales performance or sales and*
617 *service customer satisfaction performance, and the adjustments by the manufacturer, factory branch,*
618 *distributor, or distributor branch shall use reasonable efforts to remediate the effect of the impact shown*
619 *on the data, calculations, or statistical determinations of sales performance or sales and service*
620 *customer satisfaction performance.*
621 *The manufacturer shall take into consideration any adjustments to a dealer's new vehicle sales*
622 *performance or sales and service customer satisfaction performance made by the manufacturer under*
623 *this subsection in determining a dealer's compliance with a manufacturer performance standard or*
624 *program.*