

18102587D

HOUSE BILL NO. 839

Offered January 10, 2018

Prefiled January 9, 2018

A BILL to amend and reenact §§ 46.2-1573.25, 46.2-1573.27, 46.2-1573.28, 46.2-1573.31, 46.1573.33, and 46.2-1573.36 of the Code of Virginia; to amend the Code of Virginia by adding sections numbered 46.2-1573.27:1, 46.2-1573.35:1, 46.2-1573.35:2, and 46.2-1573.35:3 and by adding in Article 7.4 of Chapter 15 of Title 46.2 a section numbered 46.2-1573.38; and to repeal § 46.2-1573.30 of the Code of Virginia, relating to rights and duties of motorcycle franchises, dealers, manufacturers, and distributors.

Patron—Collins

Referred to Committee on Transportation

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-1573.25, 46.2-1573.27, 46.2-1573.28, 46.2-1573.31, 46.1573.33, and 46.2-1573.36 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 46.2-1573.27:1, 46.2-1573.35:1, 46.2-1573.35:2, and 46.2-1573.35:3 and by adding in Article 7.4 of Chapter 15 of Title 46.2 a section numbered 46.2-1573.38 as follows:

§ 46.2-1573.25. Motorcycle dealers filing of franchises.

A. Except as otherwise provided in this section, each motorcycle manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof shall file with the Commissioner a true copy of each new, amended, modified, or different form or addendum offered to more than one dealer that affects the rights, responsibilities, or obligations of the parties of a franchise or sales, service, or sales and service agreement to be offered to a motorcycle dealer or prospective motorcycle dealer in the Commonwealth no later than 60 days prior to the date the franchise or sales agreement is offered. In no event shall a new, amended, modified, or different form of franchise or sales, service, or sales and service agreement be offered a motorcycle dealer in the Commonwealth until the form has been determined by the Commissioner as not containing terms inconsistent with the provisions of this chapter. At the time a filing is made with the Commissioner pursuant to this section, the manufacturer, factory branch, distributor, distributor branch, or subsidiary shall also give written notice together with a copy of the papers so filed to the affected dealer or dealers.

B. The Department shall inform the manufacturer, factory branch, distributor, distributor branch, or subsidiary and the dealer or dealers or other parties named in the agreement of a preliminary recommendation as to the consistency of the agreement with the provisions of this chapter. If any of the parties involved have comments on the preliminary recommendation, they must be submitted to the Commissioner within 30 days of receiving the preliminary recommendation. The Commissioner shall render his decision within 15 days of receiving comments from the parties involved. If the Commissioner does not receive comments within the 30-day time period, he shall make the final determination as to the consistency of the agreement with the provisions of this chapter.

C. Any form or addendum that is not filed as required by this section may not be the basis for (i) any reduction in compensation due to a dealer from the franchisor, (ii) any franchisor demand or requirement by which a dealer must abide, or (iii) any penalty or detriment a franchisor imposes or attempts to impose on a motorcycle dealer. This section shall not apply to any dealer program or dealer incentive that is not inconsistent with any form or addendum already on file by the manufacturer with the state or that expires within 12 months of its start date, or the continuation, renewal, or modification of any dealer program or dealer incentive that was in place as of July 1, 2018. This section shall not apply to any consumer program or consumer incentive, including discount pricing programs.

D. The provisions of this article shall not apply to a manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative engaged in the manufacture or distribution of all-terrain vehicles or off-road motorcycles that does not also manufacture or does not also distribute in the Commonwealth any motorcycle designed for lawful use on the public highways.

§ 46.2-1573.27. Coercion of retail dealer by manufacturer or distributor with respect to retail installment sales contracts, extended service contract, or extended maintenance plans, financing or leasing prohibited; penalty.

A. It shall be unlawful for any manufacturer or distributor, or any officer, agent, or representative, or affiliate of either, to coerce or attempt to coerce any retail motorcycle dealer or prospective retail motorcycle dealer in the Commonwealth (i) to sell or offer to sell any extended warranties service contract or extended maintenance plan offered, sold, backed by, or sponsored by the manufacturer or

INTRODUCED

HB839

59 distributor or affiliate of either or (ii) to sell, assign, or transfer any retail installment sales contract or
60 lease obtained by the dealer in connection with the sale or lease by him in the Commonwealth of
61 motorcycles manufactured or sold by the manufacturer or distributor, to a specified finance company or
62 class of finance companies, *affiliate leasing company or class of leasing companies*, or to any other
63 specified persons by any of the following:

64 1. ~~Any~~ By any statement, suggestion, promise, or threat that the manufacturer or distributor will in
65 any manner benefit or injure the dealer, whether the statement, suggestion, threat, or promise is
66 ~~expressed~~ *express* or implied or made directly or indirectly.

67 2. ~~Any~~ By any act that will benefit or injure the dealer.

68 3. ~~Any~~ By any contract, or any ~~expressed~~ *express* or implied offer of contract, made directly or
69 indirectly to the dealer, for handling the motorcycle on the condition that the dealer *offer to sell or sell*
70 *any extended service contract or extended maintenance plan offered, sold, backed by, or sponsored by*
71 *the manufacturer or distributor or that the dealer* sell, assign, or transfer his retail installment sales
72 contract on *or lease of* the motorcycle, in the Commonwealth, to a specified finance company or class
73 of finance companies, *leasing company or class of leasing companies*, or to any other specified person.

74 4. ~~Any expressed~~ By any *express* or implied statement or representation made directly or indirectly
75 that the dealer is under any obligation whatsoever to *offer to sell or sell any extended service contract*
76 *or extended maintenance plan offered, sold, backed by, or sponsored by the manufacturer or distributor*
77 *or to* sell, assign, or transfer any of his retail sales contracts *or leases* in the Commonwealth on
78 motorcycles manufactured or sold by the manufacturer or distributor to a finance company; or class of
79 finance companies, *lease company or class of leasing companies*, or other specified person, because of
80 any relationship or affiliation between the manufacturer or distributor and the finance company or
81 companies, *leasing company or leasing companies*, or the specified person *or persons*.

82 B. Any such statements, threats, promises, acts, contracts, or offers of contracts, when their effect
83 may be to lessen or eliminate competition or tend to create a monopoly, are declared unfair trade
84 practices and unfair methods of competition and are prohibited.

85 C. ~~Any person violating any of the provisions of this section is guilty of a Class 1 misdemeanor. To~~
86 *further avoid any acts or practices the effect of which may be to lessen or eliminate competition, it shall*
87 *be unlawful for any manufacturer or distributor, or any officer, agent, or representative thereof, or any*
88 *person or company affiliated therewith, to condition the provision of lead information to a dealer upon*
89 *the agreement of the dealer to sell or lease a motorcycle to the prospective customer only if the*
90 *financing or leasing connected with the transaction is effected through a specified finance company or*
91 *class of finance companies or leasing company or class of leasing companies. For the purposes of this*
92 *section, "lead information" means information concerning a prospective customer who contacts or is*
93 *contacted by the manufacturer or distributor or any person or company affiliated therewith concerning*
94 *the manufacturer's or distributor's products. The provisions of this subsection, however, shall not*
95 *prohibit a manufacturer or distributor from so conditioning the provision of lead information concerning*
96 *any prospective customer who qualifies for any manufacturer-sponsored or distributor-sponsored factory*
97 *employee, factory retiree, or factory vendor new motorcycle purchase program.*

98 D. It shall be unlawful for any manufacturer or distributor or any affiliate thereof to coerce or
99 require a dealer that is a franchisee of the manufacturer or distributor to sell products sponsored, sold,
100 or offered by the manufacturer, distributor, or affiliate in connection with sales of motorcycles whether
101 or not in connection with any retail installment sales contract or lease; however, this subsection shall
102 not apply to used motorcycles sold under a manufacturer used motorcycle certification program. For
103 purposes of this section, the refusal by an affiliate of a manufacturer or distributor to accept assignment
104 of a retail installment sales contract or lease solely because it includes a product in connection with the
105 sale of the motorcycle not sponsored, sold, or offered by the manufacturer or distributor, or any affiliate
106 thereof, shall be unlawful, but an affiliate of a manufacturer or distributor may establish standards for
107 products in connection with a sale of a motorcycle to be included in retail installment sales contracts or
108 leases it will accept, provided that the standards, including the establishment of maximum prices for
109 products, are equally enforceable and enforced with respect to products in connection with the sale of a
110 motorcycle sponsored, sold, or offered by the manufacturer, distributor, or affiliate and products that
111 are not. Nothing in this section prohibits a manufacturer, distributor, or affiliate from offering dealer or
112 consumer incentive programs directly related to the sale of products sponsored, sold, or offered by the
113 manufacturer, distributor, or affiliate whether or not in connection with any retail installment sales
114 contract or lease. A dealer that chooses not to participate in these programs shall not be penalized as a
115 result. Nonpayment of the incentive due to nonparticipation in the incentive programs directly related to
116 the sale of products sponsored, sold, or offered by the manufacturer, distributor, or affiliate by the
117 dealer shall not qualify as a penalty.

118 E. Any person aggrieved by an action prohibited by this section may seek a hearing, pursuant to §
119 46.2-1573.36, against any manufacturer or distributor licensed under this title.

120 F. Nothing contained in this section shall prohibit a manufacturer or distributor from offering or

providing incentive benefits or bonus programs to a retail motorcycle dealer or prospective retail motorcycle dealer in the Commonwealth who makes the voluntary decision to offer to sell or sell any extended service contract or extended maintenance plan offered, sold, backed, or sponsored by the manufacturer or distributor or to sell, assign, or transfer any retail installment sale or lease by him in the Commonwealth of motorcycles manufactured or sold by the manufacturer or distributor to a specified finance company or leasing company controlled by or affiliated with the manufacturer or distributor.

§ 46.2-1573.27:1. Discrimination by manufacturers or distributors prohibited.

No manufacturer or distributor, or any officer, agent, or representative of either, shall discriminate against a dealer holding a franchise of the manufacturer or distributor in favor of another dealer or other dealers of the same line-make in the Commonwealth by:

1. Selling or offering to sell a new motorcycle to a dealer at a lower actual price, including the price for motorcycle transportation, than the actual price at which the same model similarly equipped is offered to or is available to another dealer in the Commonwealth during a similar time period;

2. Using a promotional program or device or an incentive, payment, or other benefit, whether paid at the time of the sale of the new motorcycle to the dealer or later, that results in the sale of or offer to sell a new motorcycle to a dealer at a lower price, including the price for motorcycle transportation, than the price at which the same model similarly equipped is offered or is available to another dealer in the Commonwealth during a similar time period. This subdivision shall not prohibit a promotional or incentive program that is functionally available to competing dealers of the same line-make in the Commonwealth on substantially comparable terms;

3. Providing lead information to a dealer when the address provided by the prospective customer (or the preferred contact address, if more than one address is provided) is in the relevant market area of another dealer or other dealers of the same line-make without providing or offering to provide the same information on equal terms to the dealer or dealers of the same line-make in whose relevant market area the prospective customer's address (or preferred contact address, if more than one address is provided) is located. The foregoing requirement of this subdivision shall not apply if (i) the lead information is generated under any program administered by an entity in which one or more dealers, together with the manufacturer or distributor, hold an ownership interest, where the program is designed to facilitate sales of motorcycles through dealers participating in the program, provided that ownership or the right to participate in the entity has been made available to all dealers of the same line-make in the Commonwealth on substantially comparable terms; (ii) the prospective customer requests that the lead information be forwarded to a particular dealer; or (iii) the lead information is the result of the prospective customer's request for a specific type of motorcycle when the specific type of motorcycle in the color and with the equipment desired by the prospective customer is not available at a dealer or dealers of the same line-make in whose relevant market area the prospective customer's address (or preferred contact address, if more than one address is provided) is located. For purposes of this subsection, "lead information" is information concerning a prospective customer (a) who contacts the manufacturer or distributor in response to an advertisement, a solicitation, or a message broadcast, distributed, or made available to the public by the manufacturer or distributor or (b) who is contacted by the manufacturer or distributor, and such contact is in relation to the sale of, service on, or parts or accessories for new or used motorcycles. This subdivision shall not be construed to permit provision of or access to customer information that is otherwise protected from disclosure by law or by agreement between a dealer and a manufacturer or distributor.

§ 46.2-1573.28. Other coercion of dealers; transfer, grant, succession to and cancellation of dealer franchises; delivery of motorcycles, parts, and accessories.

Notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer, factory branch, distributor, ~~or 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 through an affiliate in conduct prohibited under this section:

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 that 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 ~~do~~ by any other act unfair or injurious to the dealer; ~~by threatening to cancel any franchise existing between the~~. If a manufacturer, factory branch, distributor, or distributor branch, ~~or representative thereof~~ and the dealer 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 § 46.2-1573.31 shall be permitted; or (iii) to provide a

182 *termination agreement to be held by the manufacturer, factory branch, distributor, or distributor branch*
183 *for subsequent use, it shall be considered coercion and an act that is unfair and injurious to the dealer,*
184 *provided, however, that the provisions of § 46.2-1573.35:2 related to the good faith settlement of*
185 *disputes shall apply to the agreements described in clauses (i), (ii), and (iii) of this subdivision, mutatis*
186 *mutandis. This subdivision shall not apply to any agreement the enforcement of which is subject to the*
187 *jurisdiction of a United States Bankruptcy Court.*

188 *3. 2a. To coerce or attempt to coerce any dealer to join, contribute to, or affiliate with any*
189 *advertising association.*

190 *2b. To coerce or require any dealer to establish in connection with the sale of a motorcycle prices at*
191 *which the dealer shall sell products or services not manufactured or distributed by the manufacturer,*
192 *factory branch, distributor, or distributor branch, whether by agreement, program, incentive provision,*
193 *or otherwise.*

194 *2c. To coerce or require any dealer, whether by agreement, program, incentive provision, or*
195 *otherwise, to construct improvements to its facilities or to install new signs or other franchisor image*
196 *elements that replace or substantially alter those improvements, signs, or franchisor image elements*
197 *completed within the preceding 10 years that were required or approved by the manufacturer, factory*
198 *branch, distributor, or distributor branch or one of its affiliates. If a manufacturer, factory branch,*
199 *distributor, or distributor branch offers incentives, or other payments under a program offered after the*
200 *effective date of this subdivision and available to more than one dealer in the Commonwealth that are*
201 *premised wholly or in part on dealer facility improvements or installation of franchisor signs or other*
202 *franchisor image elements, a dealer that constructed improvements or installed signs or other franchisor*
203 *image elements required by or approved by the manufacturer, factory branch, distributor, or distributor*
204 *branch and completed within the 10 years preceding the program shall be deemed to be in compliance*
205 *with the program requirements pertaining to construction of facilities or installation of signs or other*
206 *franchisor image elements that would replace or substantially alter those previously constructed or*
207 *installed within that 10-year period. This subdivision shall not apply to a program that provides lump*
208 *sum payments to assist dealers in making facility improvements or to pay for signs or franchisor image*
209 *elements when such payments are not dependent on the dealer's selling or purchasing specific numbers*
210 *of new motorcycles and shall not apply to a program that is in effect with more than one dealer in the*
211 *Commonwealth on the effective date of this subdivision, nor to any renewal or modification of such a*
212 *program.*

213 *2d. To coerce or require any dealer, whether by agreement, program, incentive provision, or*
214 *provision for loss of incentive payments or other benefits, to refrain from selling any used motorcycle*
215 *subject to (i) recall, (ii) stop sale directive, (iii) technical service bulletin, or (iv) other manufacturer,*
216 *factory branch, distributor, or distributor branch notification to perform work on such used motorcycle,*
217 *unless the manufacturer, factory branch, distributor, or distributor branch has a remedy and parts*
218 *available to the dealer to remediate the basis for the coercion or requirement of the dealer to refrain*
219 *from selling each affected used motorcycle. If there is no remedy or there are no parts available from*
220 *the manufacturer, factory branch, distributor, or distributor branch to remediate each affected used*
221 *motorcycle in the inventory of the dealer, then the manufacturer, factory branch, distributor, or*
222 *distributor branch shall (a) compensate the dealer for any affected used motorcycle in the inventory of*
223 *the dealer that it cannot sell because of such coercion or requirement at least one percent a month or*
224 *any part thereof of the cost of such used motorcycles, including repairs and reconditioning expenses*
225 *based on the financial records of the dealer, and (b) establish a written procedure to compensate*
226 *dealers under this subdivision that it shall provide to dealers subject to its coercion or requirement and*
227 *file with the Commissioner as a franchise document pursuant to § 46.2-1573.25.*

228 *Any claim for compensation by a dealer shall be submitted on a monthly basis for the amount owed*
229 *pursuant to this subdivision. The manufacturer, factory branch, distributor, or distributor branch shall*
230 *process and pay the claim in the same manner as a claim for warranty reimbursements as provided in*
231 *§ 46.2-1573.33. This subdivision shall not prevent a manufacturer, factory branch, distributor, or*
232 *distributor branch from (1) requiring that a motorcycle not be subject to an open recall or stop sale*
233 *directive in order to be qualified, remain qualified, or be sold as a certified pre-owned motorcycle or*
234 *similar designation; (2) paying incentives for selling used motorcycles with no unremedied recalls; or*
235 *(3) paying incentives for performing recall repairs on a motorcycle in the dealer's inventory.*

236 *Nothing in this subdivision shall prevent a manufacturer, factory branch, distributor, or distributor*
237 *branch from instructing that a dealer repair used motorcycles of the line-make for which the dealer*
238 *holds a franchise with an open recall, provided that the instruction does not involve coercion that*
239 *imposes a penalty or provision of loss of benefits on the dealer.*

240 *4. 3. To prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale*
241 *of the business, stock transfer, or otherwise, or the transfer, sale, or assignment of a dealer franchise, or*
242 *a change in the executive management or principal operator of the dealership, unless the franchisor*
243 *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 30 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 § 46.2-1573.36, 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 motorcycle dealership management experience and qualifications, (iii) lacks financial ability to be a dealer, or (iv) fails to meet the standards otherwise established by this title to be a dealer. No 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 30 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) (a) the franchisor has been given at least 90 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) (b) 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.

It shall constitute a violation of this section if 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 or imposes a condition in violation of this subdivision. 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 § 46.2-1573.31 shall not be considered the imposition of a condition prohibited by this section.

5. 4. To grant an additional franchise for a particular line-make of motorcycle 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, by certified mail, return receipt requested, 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 30 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 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 been terminated 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. A franchised dealer shall be considered to have been terminated on (i) the day the franchise was terminated or (ii) if a termination hearing was held, the day the franchisor was legally permitted to terminate the franchise. The relocation of a franchise in a relevant market area, whether by an existing dealer that has been in operation by the same dealer for more than 12 months 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) (a) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be

305 more than 10 miles distant from any other dealer for the same line-make; ~~(ii)~~ (b) the relocation of an
306 existing dealer within that dealer's relevant market area if the relocation site is to be more distant than
307 the existing site from all other dealers of the same line-make in that relevant market area; or ~~(iii)~~ (c) the
308 relocation of an existing new motorcycle dealer within two miles of the existing site of the relocating
309 dealer.

310 6. 5. Except as otherwise provided in this subdivision and notwithstanding the terms of any
311 franchise, to terminate, cancel, or refuse to renew the franchise of any dealer without good cause and
312 unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at
313 least 60 days prior to the effective date of such termination, cancellation, or the expiration date of the
314 franchise, setting forth the specific grounds for the action, and (ii) the Commissioner has determined, if
315 requested in writing by the dealer within the 60-day period *prior to the effective date of such*
316 *termination, cancellation, or the expiration date of the franchise;* and, after a hearing on the matter, that
317 *the franchisor has shown by a preponderance of the evidence that there is good cause for the*
318 *termination, cancellation, or nonrenewal of the franchise. If any manufacturer, factory branch,*
319 *distributor, or distributor branch takes action that will have the effect of terminating, canceling, or*
320 *refusing to renew the franchise of any dealer (a) by use of a termination agreement executed by the*
321 *dealer and obtained more than 90 days before the purported date of use, (b) by exercise of rights under*
322 *a written option to purchase the franchise of a dealer, or (c) by exercise of rights under a site control*
323 *agreement as defined in subdivision 10, that action shall be considered a termination, cancellation, or*
324 *refusal to renew pursuant to the terms of this subdivision and subject to the rights, provisions, and*
325 *procedures provided herein. In any case where a petition is made to the Commissioner for a*
326 *determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the*
327 *franchise in question shall continue in effect pending the Commissioner's decision or, if that decision is*
328 *appealed to the circuit court, pending the decision of the circuit court. Where the termination,*
329 *cancellation, or nonrenewal of a franchise will result from use of a termination agreement executed by*
330 *the dealer and obtained more than 90 days before the purported date of use, exercise of rights under a*
331 *written option to purchase the franchise of a dealer, or exercise of rights under a site control agreement*
332 *as defined in subdivision 10, such use or exercise shall be stayed pending the Commissioner's decision*
333 *or, if that decision is appealed to the circuit court, pending the decision of the circuit court, and its use*
334 *or exercise will be allowed only where the franchisor has shown by a preponderance of the evidence*
335 *that there is good cause for the termination, cancellation, or nonrenewal of the franchise. In any case in*
336 which a franchisor neither advises a dealer that it does not intend to renew a franchise nor takes any
337 action to renew a franchise beyond its expiration date, the franchise in question shall continue in effect
338 on the terms last agreed to by the parties. Notwithstanding the other provisions of this subdivision,
339 notice of termination, cancellation, or nonrenewal may be provided to a dealer by a franchisor not less
340 than 15 days prior to the effective date of such termination, cancellation, or nonrenewal when the
341 grounds for such action are any of the following:

342 a. Insolvency of the franchised motorcycle dealer or filing of any petition by or against the
343 franchised motorcycle dealer, under any bankruptcy or receivership law, leading to liquidation or that is
344 intended to lead to liquidation of the franchisee's business;

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

348 c. Revocation of any license that the franchised motorcycle dealer is required to have to operate a
349 dealership; or

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

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

358 7. 5a. To fail to provide continued parts and service support to a dealer that holds a franchise in a
359 discontinued line-make for at least five years from the date of such discontinuance. This requirement
360 shall not apply to a line-make that was discontinued prior to January 1, 1989.

361 5b. Upon the involuntary or voluntary termination, nonrenewal, or cancellation of the franchise of
362 any dealer, by either the manufacturer, distributor, or factory branch or by the dealer, notwithstanding
363 the terms of any franchise whether entered into before or after the enactment of this section, to fail to
364 pay the dealer for at least the following:

365 a. The dealer cost plus any charges by the franchisor for distribution, delivery, and taxes paid by the
366 dealer, less all allowances paid to the dealer by the franchisor, for new and undamaged motorcycles in

the dealer's inventory acquired from the franchisor or from another dealer of the same line-make in the ordinary course of business within 18 months of termination;

b. 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;

c. 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;

d. 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

e. The reasonable cost of transporting, handling, packing, and loading of motorcycles, parts, signs, tools, and special equipment subject to repurchase hereunder.

The provisions of subdivision 5b do not apply to a dealer who is unable to convey clear title to the property identified in subdivision 5b.

For purposes of subdivision 5b, 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:

a. 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, (ii) the date the action that resulted in the termination, cancellation, or nonrenewal first became general knowledge, or (iii) 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

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

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

8. 6. To fail to allow a dealer the right at any time to designate a member of his family as a successor to the dealership in the event of the death or incapacity of the dealer. Such designation may be made by the dealer or, in the event of the death or incapacity of the dealer, by the qualified executor or personal representative of the dealer. It shall be unlawful to prevent or refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated dealer if the franchisor has not provided to the member of the family previously designated by the dealer as his successor written notice of its objections to the succession and of such person's right to seek a hearing on the matter before the Commissioner pursuant to this article, and the Commissioner determines, if requested in writing by such member of the family within 30 days of receipt of such notice from the franchisor, and after a hearing on the matter before the Commissioner pursuant to this article, that the

428 failure to permit or honor the succession is unreasonable under the circumstances. No member of the
429 family may succeed to a franchise unless (i) the franchisor has been given written notice as to the
430 identity, financial ability, and qualifications of the member of the family in question and (ii) the
431 succession to the franchise will not involve, without the franchisor's consent, a relocation of the
432 business.

433 9. 7. To ~~delay, refuse, or fail to ship monthly deliver~~ to any dealer, if ordered by the dealer, the
434 ~~number of new motorcycles of each make, series, and model needed by the dealer to receive a~~
435 ~~percentage of total new motorcycle sales of each make, series, and model equitably related to the total~~
436 ~~new motorcycle production or importation currently being achieved nationally by each make, series, and~~
437 ~~model covered under the franchise in reasonable quantities and within a reasonable time, any new~~
438 ~~motorcycles of each series and model sold or distributed by the franchisor as covered by such franchise~~
439 ~~and that are publicly advertised by the manufacturer, factory branch, distributor, or distributor branch~~
440 ~~in the Commonwealth to be available for immediate delivery, provided, however, that the failure to~~
441 ~~deliver any motorcycle shall not be considered a violation of this chapter if such failure is due to an act~~
442 ~~of God, a work stoppage, or delay due to a strike or labor difficulty, a shortage of materials, a lack of~~
443 ~~available manufacturing capacity, a freight embargo, or other cause over which the manufacturer,~~
444 ~~factory branch, distributor, or distributor branch has no control. If ordered by a dealer, a franchisor~~
445 ~~shall deliver an equitable supply of new motorcycles during the model year of each series and model~~
446 ~~under the dealer's franchise in proportion to the sales objectives or goals established by the franchisor~~
447 ~~for the dealer compared with the sales objectives or goals established by the other same line-make~~
448 ~~dealers in the Commonwealth, provided, however, that the failure to deliver any motorcycle shall not be~~
449 ~~considered a violation of this chapter if such failure is due to a cause over which the manufacturer,~~
450 ~~factory branch, distributor, or distributor branch has no control. Upon the written request of any dealer~~
451 ~~holding its sales or sales and service franchise, the manufacturer or distributor shall disclose to the~~
452 ~~dealer in writing the basis upon which new motorcycles of the same line-make are allocated, scheduled,~~
453 ~~and delivered to the dealers of the same line-make. If allocation is in the Commonwealth and the basis~~
454 ~~upon which the current allocation or distribution is being made or will be made to such dealer. In the~~
455 ~~event that allocation is at issue in a request for a hearing, the dealer may demand the Commissioner to~~
456 ~~direct that the manufacturer or distributor provide to the dealer, within 30 days of such demand, all~~
457 ~~records of sales and all records of distribution of all motorcycles to the same line-make dealers who~~
458 ~~compete with the dealer requesting the hearing.~~

459 7a. To fail or refuse to offer to its same line-make franchised dealers all models manufactured for
460 the line-make, or require a dealer to pay any extra fee, or remodel, renovate, or recondition the dealer's
461 existing facilities, or purchase unreasonable advertising displays or other materials as a prerequisite to
462 receiving a model or a series of motorcycles.

463 10. 7b. To require or otherwise coerce a dealer to underutilize the dealer's facilities by requiring or
464 otherwise coercing a dealer to exclude or remove from the dealer's facilities operations for selling or
465 servicing of a line-make of motorcycle for which the dealer has a franchise agreement to utilize the
466 facilities.

467 7c. To require a dealer to purchase goods or services from a vendor selected, identified, or
468 designated by a manufacturer, factory branch, distributor, distributor branch, or one of its affiliates by
469 agreement, program, incentive provision, or otherwise without making available to the dealer the option
470 to obtain the goods or services of substantially similar quality from a vendor chosen by the dealer. For
471 purposes of this subdivision, the term "goods" does not include moveable displays, brochures, and
472 promotional materials containing material subject to intellectual property rights of, or special tools and
473 training as required by the manufacturer, or parts to be used in repairs under warranty obligations of,
474 a manufacturer, factory branch, distributor, or distributor branch.

475 7d. To fail to provide a notice to a dealer when notifying it of the requirement to purchase goods or
476 services from a vendor selected, identified, or designated by a manufacturer, factory branch, distributor,
477 or distributor branch of the dealer's rights pursuant to subdivision 7c.

478 7e. To fail to provide to a dealer, when the manufacturer, factory branch, distributor, or distributor
479 branch claims that a vendor chosen by the dealer cannot supply goods and services of substantially
480 similar quality, a disclosure concerning the vendor selected, identified, or designated by the franchisor
481 stating (i) whether the manufacturer, factory branch, distributor, distributor branch, or one of its
482 affiliates, or any officer, director, or employee of the same, has an ownership interest, actual or
483 beneficial, in the vendor and, if so, the percentage of the ownership interest and (ii) whether the
484 manufacturer, factory branch, distributor, distributor branch, or one of its affiliates has an agreement or
485 arrangement by which the vendor pays to the manufacturer, factory branch, distributor, distributor
486 branch, or one of its affiliates, or any officer, director, or employee of the same, any compensation and,
487 if so, the basis and amount of the compensation to be paid as a result of any purchases by the dealer,
488 whether it is to be paid by direct payment by the vendor or by credit from the vendor for the benefit of
489 the recipient.

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

~~8. To include in any franchise agreement with a motorcycle dealer terms that are contrary to, prohibited by, or otherwise inconsistent with the requirements of this chapter.~~

~~8a. To require under any franchise agreement a motorcycle dealer to pay the attorney fees of the manufacturer or distributor related to hearings and appeals brought under this article.~~

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

~~14. To include in any franchise agreement with a motorcycle dealer terms that prohibit a motorcycle dealer from exercising his right to a trial by jury in any action where such right otherwise exists.~~

10. To enter into any agreement with a motorcycle dealer in which the manufacturer, factory branch, distributor, distributor branch, or one of its affiliates is given site control over the premises of a dealer that does not terminate upon the occurrence of any of the following events: (i) the right of the franchisor to manufacture or distribute the line-make of motorcycles covered by the dealer's franchise is sold, assigned, or otherwise transferred by the manufacturer, factory branch, distributor, or distributor branch to another; (ii) the final termination of the dealer's franchise for any reason; or (iii) the manufacturer, factory branch, distributor, or distributor branch of its affiliate fails for any reason to exercise its right of first refusal to purchase the assets or ownership of the business of the dealer when given the opportunity to do so by virtue of its franchise agreement, another agreement, or as set forth in § 46.2-1573.28. For purposes of this subdivision, the term "site control" means the contractual right to control in any way the commercial use and development of the premises upon which a dealer's business operations are located, including the right to approve of additional or different uses for the property beyond those of its franchise, the right to lease or sublease the dealer's property, or the right or option to purchase the dealer's property.

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

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

If a manufacturer, factory branch, distributor, or distributor branch offers incentives or other payments under a program offered after July 1, 2018, excluding any continuation, renewal, or modification of any existing program, and available to more than one dealer in the Commonwealth that are premised wholly or in part on dealer participation in manufacturer, factory branch, distributor, or distributor branch programs under which consumer data is provided to or accessed by the manufacturer, factory branch, distributor, or distributor branch, a dealer that exercises its rights under this subdivision shall be deemed to be in compliance with the program requirements pertaining to providing consumer data, provided that the dealer has otherwise met program requirements to the extent of providing any consumer data that is not nonpublic personal information.

It shall not constitute a violation of this subdivision for a manufacturer, factory branch, distributor, or distributor branch to require a motorcycle dealer to provide data (a) concerning a new motorcycle sale or used motorcycle sale under a manufacturer certification program, (b) to validate a customer or dealer incentive, (c) to calculate dealer or market sales or evaluate service performance or customer satisfaction to facilitate analysis of product quality and market feedback, (d) to facilitate warranty

551 service work on a motorcycle, (e) concerning information with respect to recall repairs or information
552 about a recalled motorcycle, (f) pursuant to a mutual agreement between a manufacturer, factory
553 branch, distributor, or distributor branch and a dealer, or (g) where consumer data is reasonably
554 necessary to enable a manufacturer, factory branch, distributor, or distributor branch to provide
555 programs, products, or services to a dealer.

556 A dealer that elects to submit or push data or information to the manufacturer, factory branch,
557 distributor, or distributor branch through any method other than that provided by the manufacturer,
558 factory branch, distributor, or distributor branch shall timely obtain and furnish the requested data in a
559 widely accepted electronic file format. A manufacturer, factory branch, distributor, or distributor branch
560 shall not impose a fee, surcharge, or charge of any type on a dealer that chooses to submit data
561 specified by the manufacturer, factory branch, distributor, or distributor branch rather than provide the
562 manufacturer, factory branch, distributor, or distributor branch access to the dealer's computer
563 database.

564 **§ 46.2-1573.31. Manufacturer or distributor right of first refusal.**

565 Notwithstanding the terms of any franchise agreement, in the event of a proposed sale or transfer of
566 a dealership, the manufacturer or distributor shall be permitted to exercise a right of first refusal to
567 acquire the new motorcycle dealer's assets or ownership, if such sale or transfer is conditioned upon the
568 manufacturer's or dealer's entering into a dealer agreement with the proposed new owner or transferee,
569 only if all the following requirements are met:

570 1. To exercise its right of first refusal, the manufacturer or distributor must notify the dealer in
571 writing within 45 days of its receipt of the completed proposal for the proposed sale or transfer;

572 2. The exercise of the right of first refusal will result in the dealer's and dealer owner's receiving the
573 same or greater consideration as they have contracted to receive in connection with the proposed change
574 of ownership or transfer;

575 3. The proposed sale or transfer of the dealership's assets does not involve the transfer or sale to a
576 member or members of the family of one or more dealer owners, or to a qualified manager or a
577 partnership ~~or~~, *limited liability company*, corporation, or other entity controlled by such persons; and

578 4. The manufacturer or distributor agrees to pay the reasonable expenses, including attorney fees that
579 do not exceed the usual, customary, and reasonable fees charged for similar work done for other clients,
580 incurred by the proposed new owner and transferee prior to the manufacturer's or distributor's exercise
581 of its right of first refusal in negotiating and implementing the contract for the proposed sale or transfer
582 of the dealership or dealership assets. Notwithstanding the foregoing, no payment of such expenses and
583 ~~attorney's~~ attorney fees shall be required if the dealer has not submitted or caused to be submitted an
584 accounting of those expenses within 30 days of the dealer's receipt of the manufacturer's or distributor's
585 written request for such an accounting. Such accounting may be requested by a manufacturer or
586 distributor before exercising its right of first refusal.

587 **§ 46.2-1573.33. Recall, warranty, and sales incentive obligations.**

588 A. Each motorcycle manufacturer, factory branch, distributor, or distributor branch shall (i) specify in
589 writing to each of its motorcycle dealers licensed in the Commonwealth the dealer's obligations for
590 preparation, delivery, *recall*, and warranty service on its products and (ii) compensate the dealer for
591 *recall* or warranty parts, service, and diagnostic work required of the dealer by the manufacturer or
592 distributor as follows:

593 1. Compensation of a dealer for *recall* or warranty parts, service, and diagnostic work shall not be
594 less than the amounts charged by the dealer for the manufacturer's or distributor's original parts, service,
595 and diagnostic work to retail customers for nonwarranty service, parts, and diagnostic work installed or
596 performed in the dealer's service department unless the amounts are not reasonable; *Recall or warranty*
597 *parts compensation shall be stated as a percentage of markup, which shall be an agreed reasonable*
598 *approximation of retail markup and which shall be uniformly applied to all of the manufacturer's or*
599 *distributor's parts unless otherwise provided for in this section. If the dealer and manufacturer or*
600 *distributor cannot agree on the recall or warranty parts compensation markup to be paid to the dealer,*
601 *the markup shall be determined by an average of the dealer's retail markup on all of the manufacturer's*
602 *or distributor's parts as described in subdivisions 2 and 3.*

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

609 3. Increases in dealer *recall* or warranty parts and service compensation and diagnostic work
610 compensation, pursuant to this section, shall be requested by the dealer in writing, shall be based on 100
611 consecutive repair orders or all repair orders over a 90-day period, whichever occurs first, and, in the
612 case of parts, shall be stated as a percentage of markup that shall be uniformly applied to all the

manufacturer's or distributor's parts;

4. In the case of *recall or 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 *recall or 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 motorcycles that 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 *recall or 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; ~~or.~~

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 *recall or warranty* service or parts.

~~Warranty~~ 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 non-motorcycle, residential purposes. Recall, 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 *recall, warranty, or sales* 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 *recall or warranty* repairs to resolve a condition discovered by the dealer during the course of a separate repair requested by the customer or to resolve a condition on the basis of advice or recommendation by the dealer. Claims for dealer compensation shall be paid within 30 days of dealer submission or within 30 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 *recall or warranty* parts or service compensation and service incentives shall only be for the ~~12-month~~ six-month period immediately following the date of the claim and, in the case of chargebacks for sales compensation only, for the ~~18-month~~ six-month period immediately following the date of claim. However, such limitations shall not be effective ~~in the case of~~ if a manufacturer, factory branch, distributor, or distributor branch has reasonable cause to believe that a claim submitted by a dealer is intentionally false or fraudulent claims. For purposes of this section, "reasonable cause" means a bona fide belief based upon evidence that the material issues of fact are such that a person of ordinary caution, prudence, and judgment could believe that a claim was intentionally false or fraudulent. A dealer shall not be charged back or otherwise liable for sales incentives or charges related to a motorcycle sold by the dealer to a purchaser other than a licensed, franchised motorcycle dealer and subsequently exported or resold, unless the manufacturer, factory branch, distributor, or distributor branch can demonstrate by a preponderance of the evidence that the dealer should have known of and did not exercise due diligence in discovering the purchaser's intention to export or resell the motorcycle.

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

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

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 motorcycle 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 motorcycle dealers licensed in the Commonwealth for repairs effected by the dealer of merchandise damaged in manufacture or transit to the dealer where the carrier is designated by the manufacturer, factory branch, distributor, or distributor branch;

5. Fail to *fully* compensate its motorcycle dealers licensed in the Commonwealth for *recall or warranty* parts, work, and service pursuant to subsection A *either by reduction in the amount due to the*

674 dealer or by separate charge, surcharge, or other imposition by which the motorcycle manufacturer,
675 factory branch, distributor, or distributor branch seeks to recover its costs of complying with subsection
676 A, or for legal costs and expenses incurred by such dealers in connection with recall or warranty
677 obligations for which the manufacturer, factory branch, distributor, or distributor branch is legally
678 responsible or that the manufacturer, factory branch, distributor, or distributor branch imposes upon the
679 dealer;

680 6. Misrepresent in any way to purchasers of motorcycles that warranties with respect to the
681 manufacture, performance, or design of the motorcycle are made by the dealer, either as warrantor or
682 co-warrantor;

683 7. Require the dealer to make warranties to customers in any manner related to the manufacture,
684 performance, or design of the motorcycle; or

685 8. Shift or attempt to shift to the motorcycle dealer, directly or indirectly, any liabilities of the
686 manufacturer, factory branch, distributor, or distributor branch under the Virginia Motor Vehicle
687 Warranty Enforcement Act (§ 59.1-207.9 et seq.), unless such liability results from the act or omission
688 by the dealer; or

689 9. Deny any dealer the right to return any part or accessory that the dealer has not sold within 12
690 months where the part or accessory was not obtained through a specific order initiated by the dealer
691 but instead was specified for, sold to, and shipped to the dealer pursuant to an automated ordering
692 system, provided that such part or accessory is in the condition required for return to the manufacturer,
693 factory branch, distributor, or distributor branch and the dealer returns the part within 30 days of its
694 becoming eligible under this subdivision. For purposes of this subdivision, an "automated ordering
695 system" means a computerized system that automatically specifies parts and accessories for sale and
696 shipment to the dealer without specific order thereof initiated by the dealer. The manufacturer, factory
697 branch, distributor, or distributor branch shall not charge a restocking or handling fee for any part or
698 accessory being returned under this subdivision. This subdivision shall not apply if the manufacturer,
699 factory branch, distributor, or distributor branch has available to the dealer an alternate system for
700 ordering parts and accessories that provides for shipment of ordered parts and accessories to the dealer
701 within the same time frame as the dealer would receive them when ordered through the automated
702 ordering system.

703 C. Notwithstanding the terms of any franchise, it shall be unlawful for any motorcycle manufacturer,
704 factory branch, distributor, or distributor branch to fail to indemnify and hold harmless its motorcycle
705 dealers against any losses or damages arising out of complaints, claims, or suits relating to the
706 manufacture, assembly, or design of motorcycles, parts, or accessories, or other functions by the
707 manufacturer, factory branch, distributor, or distributor branch beyond the control of the dealer,
708 including, without limitation, the selection by the manufacturer, factory branch, distributor, or distributor
709 branch of parts or components for the motorcycle or any damages to merchandise occurring in transit to
710 the dealer where the carrier is designated by the manufacturer, factory branch, distributor, or distributor
711 branch. The dealer shall notify the manufacturer of pending suits in which allegations are made that
712 come within this subsection whenever reasonably practicable to do so. Every motorcycle dealer franchise
713 issued to, amended, or renewed for motorcycle dealers in the Commonwealth shall be construed to
714 incorporate provisions consistent with the requirements of this subsection.

715 D. On any new motorcycle, any uncorrected damage or any corrected damage exceeding three
716 percent of the manufacturer's or distributor's suggested retail price as defined in 15 U.S.C. §§ 1231-1233,
717 as measured by retail repair costs, must be disclosed to the dealer in writing prior to delivery. ~~Factory~~
718 ~~mechanical repair and damage to tires are excluded from the three percent rule when properly replaced~~
719 ~~by identical manufacturer's or distributor's original equipment or parts.~~ Whenever a new motorcycle is
720 damaged in transit, when the carrier or means of transportation is determined by the manufacturer or
721 distributor, or whenever a motorcycle is otherwise damaged prior to delivery to the new motorcycle
722 dealer, the new motorcycle dealer shall:

723 1. Notify the manufacturer or distributor of the damage within three business days from the date of
724 ~~delivery or discovery of the damage~~ to the new motorcycle to the new motorcycle dealership or within
725 the additional time specified in the franchise; and

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

729 E. ~~If the manufacturer or distributor refuses or fails to authorize correction of such damage within 10~~
730 ~~days after receipt of notification, or if the dealer rejects the motorcycle because damage exceeds the~~
731 ~~three percent rule, ownership of the new motorcycle shall revert to the manufacturer or distributor, and~~
732 ~~the new motorcycle dealer shall have no obligation, financial or otherwise, with respect to such~~
733 ~~motorcycle. Should either the manufacturer, distributor, or the dealer elect to correct the damage or any~~
734 ~~other damage exceeding the three percent rule, full disclosure shall be made by the dealer in writing to~~
735 ~~the buyer and an acknowledgment by the buyer is required. If there is less than three percent damage,~~

no disclosure is required, provided the damage has been corrected. Predelivery mechanical work shall not require a disclosure. Failure to disclose any corrected damage within the knowledge of the selling dealer to a new motorcycle in excess of the three percent rule shall constitute grounds for revocation of the buyer order, provided that, within 30 days of purchase, the motorcycle is returned to the dealer with an accompanying written notice of the grounds for revocation. In case of revocation pursuant to this section, the dealer shall accept the motorcycle and refund any payments made to the dealer in connection with the transaction, less a reasonable allowance for the consumer's use of the motorcycle as defined in § 59.1-207.11.

F. E. 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, either party may petition the Commissioner in writing, within 30 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 the Administrative Process Act (§ 2.2-4000 et seq.). 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 recall or warranty parts or service compensation, including service incentives, sales incentives, other sales compensation, surcharges, fees, penalties, or any financial imposition of any type arising from an alleged failure of the dealer to comply with a policy of, directive from, or agreement with the manufacturer, factory branch, distributor, or distributor branch until 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.

§ 46.2-1573.35:1. Mediation of disputes.

At any time before a hearing under this article is commenced before the Commissioner, either party to a franchise agreement for the sale or service of motorcycles may demand that a dispute be submitted to nonbinding mediation as a condition precedent to the right to a hearing before the Commissioner.

A demand for mediation may be served on the other party and shall be filed with the Commissioner at any time before a hearing is commenced by the Commissioner. The service of the demand for mediation shall, of itself, toll the time required to file requests for hearings and for the time for commencing and completing hearings under this article until mediation is concluded.

A demand for mediation shall be in writing and shall be served upon the other party by certified mail at an address designated in the franchise agreement or in the records of the Department. The demand for mediation shall contain a brief statement of the dispute and the relief sought by the party filing the demand.

Within 10 days after the date on which the demand for mediation is served, the Commissioner shall select one mediator from his approved list of mediators or from the lists of hearing officers as set forth in § 2.2-4024. Within 25 days of the date of demand, the parties shall meet with the mediator for the purpose of attempting to resolve the dispute. The meeting place shall be within the Commonwealth at a location selected by the mediator. The mediator may extend the date of the meeting for good cause shown by either party or upon the stipulation of both parties.

§ 46.2-1573.35:2. Waiver prohibited.

No motorcycle manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof shall obtain from a motorcycle dealer a waiver of the dealer's rights by threatening to impose a detriment upon the dealer's business or threatening to withhold from the dealer any entitlement, benefit, or service to which the dealer is entitled by virtue of any franchise agreement, contract, statute, regulation, or law of any kind or that has been granted to more than one other franchisee of the manufacturer, factory branch, distributor, or distributor branch in the Commonwealth. This section shall not apply to good faith settlement of disputes, including disputes pertaining to contract negotiations, in which a waiver is granted in exchange for fair consideration in the form of a benefit conferred upon the dealer; however, this section shall apply to a dispute as to whether a waiver of such rights by a motorcycle dealer has been obtained in violation of this section.

§ 46.2-1573.35:3. Manufacturer or distributor use of performance standards.

A. Any performance standard or program that is used by a manufacturer or distributor for measuring dealership performance and may have a material effect on a dealer, and the application of any such standard or program by a manufacturer or distributor, shall be fair, reasonable and equitable, and if based upon a survey, shall be based upon a statistically valid sample. Upon the request of any

797 dealer, a manufacturer or distributor shall disclose in writing to the dealer a description of how a
798 performance standard or program is designed and all relevant information used in the application of the
799 performance standard or program to that dealer.

800 B. A manufacturer or distributor shall not use any data, calculations, or statistical determinations of
801 the sales performance of a dealer for any purpose, including (i) loss of incentive payments or other
802 benefits, (ii) claim of breach or threats thereof, or (iii) notice of termination or threats thereof for the
803 period of time the manufacturer, factory branch, distributor, or distributor branch has established an
804 agreement, program, incentive program, or provision for loss of incentive payments or other benefits
805 that causes a dealer to refrain from selling any used motorcycle subject to (a) recall, (b) stop sale
806 directive, (c) technical service bulletin, or (d) other manufacturer, factory branch, distributor, or
807 distributor branch notification to perform work on a dealer's used motorcycles in its inventory when
808 there is no remedy or there are no parts to remediate each such affected used motorcycle from the
809 manufacturer, factory branch, distributor, or distributor branch and for 90 days after the termination of
810 such agreement, program, incentive program, or provision for loss of incentive payments or other
811 benefits.

812 The data on which the manufacturer or distributor seeks to rely under this subsection shall only be
813 for a period or periods not excluded under this subsection. For any performance standard or program
814 that is used by a manufacturer or distributor for measuring dealership performance during the period or
815 periods excluded under this subsection, a dealer shall be deemed in compliance with any such program
816 requirements related to sales performance or sales or service customer satisfaction performance of a
817 dealer.

818 This subsection shall not prevent a manufacturer, factory branch, distributor, or distributor branch
819 from (1) requiring that a motorcycle not be subject to an open recall or stop sale directive in order to
820 be qualified, remain qualified, or be sold as a certified pre-owned motorcycle or similar designation; (2)
821 paying incentives for selling used motorcycles with no unremedied recalls; (3) paying incentives for
822 performing recall repairs on a motorcycle in the dealer's inventory; or (4) instructing that a dealer
823 repair used motorcycle of the line-make for which the dealer holds a franchise with an open recall,
824 provided that the instruction does not involve coercion that imposes a penalty or provision of loss of
825 benefits on the dealer.

826 C. A dealer may apply to the manufacturer, factory branch, distributor, or distributor branch for
827 adjustment to data, calculations, or statistical determinations of sales performance or sales and service
828 customer satisfaction performance for any period of time that such dealer has at least five percent of its
829 new motorcycle inventory subject to a recall or stop sale directive and for 90 days after the end of such
830 period of time. Within 30 days of application for adjustment, the manufacturer, factory branch,
831 distributor, or distributor branch shall use reasonable efforts to review and adjust the data, calculations,
832 or other statistical determinations back to the date that the dealer was prevented from selling the new
833 motorcycles. A dealer applying for adjustment shall have the burden of showing that the prevention of
834 sale had a material, adverse impact on such dealer's new motorcycle sales performance or sales and
835 service customer satisfaction performance, and the adjustments by the manufacturer, factory branch,
836 distributor, or distributor branch shall use reasonable efforts to remediate the effect of the impact shown
837 on the data, calculations, or statistical determinations of sales performance or sales and service
838 customer satisfaction performance.

839 The manufacturer shall take into consideration any adjustments to a dealer's new motorcycle sales
840 performance or sales and service customer satisfaction performance made by the manufacturer under
841 this subsection in determining a dealer's compliance with a manufacturer performance standard or
842 program.

843 **§ 46.2-1573.36. Hearings and other remedies; civil penalties.**

844 A. In every case of a hearing before the Commissioner authorized under this article, the
845 Commissioner shall give reasonable notice of each hearing to all interested parties, and the
846 Commissioner's decision shall be binding on the parties, subject to the rights of judicial review and
847 appeal as provided in the Administrative Process Act (§ 2.2-4000 et seq.). In every case of a hearing
848 before the Commissioner authorized under this article based on a request or petition of a motorcycle
849 dealer, the manufacturer, factory branch, distributor, or distributor branch shall have the burden of
850 proving by a preponderance of the evidence that the manufacturer, factory branch, distributor, or
851 distributor branch has good cause to take the action or actions for which the dealer has filed the
852 petition for a hearing or that such actions are reasonable if required under the relevant provision.

853 B. Hearings before the Commissioner under this article shall commence within 90 days of the request
854 for a hearing, ~~and the~~ by prehearing conference between the hearing officer and the parties in person,
855 by telephone, or by other electronic means designated by the Commissioner. The hearing officer shall
856 set the hearing on a date or dates consistent with the rights of due process of the parties. The
857 Commissioner's decision shall be rendered within 60 days from the receipt of the hearing officer's
858 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 and held within 60 days following the request for a hearing. Reasonable efforts shall be made to ensure that a hearing officer shall have at least five years of experience as a hearing officer in administrative hearings in the Commonwealth, shall have telephone and email capability, and shall be an active member of the Virginia State Bar. 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 90 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 2a, 3, 4, 5, 6, and 9 of § 46.2-1573.28 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 service capitalization of the franchisor's standards and the adequacy of the dealer's 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 motorcycle warranties;
6. The dealer's performance under the terms of its franchise; and
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.

With respect to subdivision 6, any performance standard or program for measuring dealership performance that may have a material effect on a dealer, and the application of any such standard or program by a manufacturer or distributor, shall be fair, reasonable, and equitable and, if based upon a survey, shall be based upon a statistically valid sample. Upon the request of any dealer, a manufacturer or distributor shall disclose in writing to the dealer a description of how a performance standard or program is designed and all relevant information used in the application of the performance standard or program to that dealer.

E. An interested party in a hearing held pursuant to subsection A 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. 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 established pursuant to § 33.2-1524.

F. During the hearing process, parties may obtain documents and materials by discovery pursuant to Rules 4:9 and 4:9A of the Supreme Court of Virginia. The parties shall exchange reports of experts, which shall meet the standard of Rule 4:1 of the Supreme Court of Virginia, at times to be established by the hearing officer. The parties may utilize any other form of discovery provided under the Rules of Supreme Court of Virginia if allowed by the hearing officer on the basis of good cause shown. For discovery permitted under the Rules of Supreme Court of Virginia, a party may object to the discovery sought or seek to limit the discovery sought on any grounds permitted by the Rules or applicable law.

§ 46.2-1573.38. Limited right of dealers to sell new motorcycles following termination of franchise. Notwithstanding any provision of this title to the contrary, a motorcycle dealer shall have the right, for 180 days following the termination of its franchise, to continue to sell and advertise as new any existing new motorcycle inventory of the line-make of the terminated franchise, under the following circumstances:

1. The motorcycle was acquired in the ordinary course of business as a new motorcycle by a dealer franchised to sell that motorcycle;
2. The franchise agreement of the dealer is terminated, canceled, or rejected by the manufacturer, factory branch, distributor, or distributor branch and the termination, cancellation, or rejection is not a result of the revocation of the dealer's license to operate as a dealer or the dealer's conviction of a

920 *crime; and*

921 *3. The motorcycle was held in the inventory of the dealer on the date of the franchise agreement's*
922 *termination.*

923 *This provision does not entitle a dealer whose franchise agreement has been terminated, canceled, or*
924 *rejected to continue to perform warranty service repairs or continue to be eligible to offer or receive*
925 *consumer or dealer incentives offered by the manufacturer, factory branch, distributor, or distributor*
926 *branch, except as earned by the dealer prior to termination of the franchise agreement.*

927 **2. That § 46.2-1573.30 of the Code of Virginia is repealed.**