

SENATE No. 146

The Commonwealth of Massachusetts

PRESENTED BY:

Marc R. Pacheco

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

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

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

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | |
|-------------------------|------------------------------------|-----------------|
| <i>Marc R. Pacheco</i> | <i>First Plymouth and Bristol</i> | |
| <i>Michael D. Brady</i> | <i>Second Plymouth and Bristol</i> | <i>2/3/2017</i> |

SENATE No. 146

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 146) of Marc R. Pacheco and Michael D. Brady for legislation to further regulate business practices between motor vehicle dealers, manufacturers, and distributors. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

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

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

1 SECTION 1. Subsection (c) of section 4 of chapter 93B, as appearing in the 2014 Official
2 Edition, is hereby amended by striking out paragraph (5) and inserting in place thereof the
3 following paragraph:-

4 (5) to offer to sell or to sell any new motor vehicle to any person located in the
5 commonwealth at a lower actual price therefor than the actual price offered contemporaneously
6 to any other motor vehicle dealer located in the commonwealth for the same model vehicle
7 similarly equipped or to utilize any device, including, but not limited to, sales promotion plans or
8 programs, facility compliance or any form of incentive program, which result in the lesser actual
9 price unless available on equal terms to all dealers located in the commonwealth; provided,
10 however, that, for the purposes of this paragraph, “equal terms” shall not include the opportunity
11 to participate in any program that requires facility investment; provided further, that this
12 paragraph shall not apply to sales to a motor vehicle dealer for resale to any unit of the federal

13 government or any agency thereof or to the commonwealth or any of its political subdivisions;
14 provided further, that this paragraph shall not apply to sales to a motor vehicle dealer of any
15 motor vehicle ultimately sold, donated or used by the dealer in a driver education program. The
16 preceding provisions of this paragraph shall not apply so long as a manufacturer, distributor or
17 franchisor representative offers to sell or sells new motor vehicles to all motor vehicle dealers
18 located in the commonwealth at an equal price. In connection with a sale of a motor vehicle or
19 vehicles to a motor vehicle dealer for resale to any unit of the federal government or any agency
20 thereof or to the commonwealth or to any political subdivision thereof, no manufacturer or
21 distributor shall offer any discounts, refunds or any other similar type of inducement to any
22 dealer without making the same offer available to all other of its dealers within the relevant
23 market area, and if the inducements are made, the manufacturer or distributor shall give
24 simultaneous notice thereof to all of its dealers within the relevant market area. In addition, a
25 manufacturer, distributor, or franchisor representative shall not unreasonably withhold
26 participation in any lead generation marketing programs or warranty policy adjustments and shall
27 distribute leads from direct internet-based inquiries in an equitable manner to dealers based on
28 geographic proximity and vehicle availability. In order to prove a violation of the price
29 discrimination prohibitions in this paragraph, it shall be the dealer's burden to demonstrate a
30 price, discount or incentive provided to at least one other dealer was not reasonably available to
31 it.

32 SECTION 2. Paragraph (10) of said subsection (c) of said section 4 of said chapter 93B,
33 as so appearing, is hereby amended, in line 222, by inserting after the word "distributor." the
34 following sentence:- This blanket prohibition on manufacturer ownership applies

35 notwithstanding whether a manufacturer or distributor has previously used independently owned
36 or operated dealerships to distribute its vehicles.

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

39 (13) to require, coerce, or attempt to coerce any dealer by program, policy, standard, or
40 otherwise to: (a) change location of the dealership; (b) construct, renovate, or make any
41 substantial changes, alterations, or remodeling to a dealer's sales or services facilities; or (c) add
42 to or replace a dealer's sales or services facilities; provided, however, that nothing herein shall
43 prohibit a manufacturer or distributor from continuing a facility improvement program that is in
44 effect as of the effective date of this paragraph with more than one dealer in the commonwealth
45 or to renewing or modifying such program, or providing lump sum or regularly-scheduled
46 payments to assist a dealer in making a facility improvement, including construction, alteration
47 or remodeling, or installing signage or an image element of the manufacturer or distributor;
48 provided further, that the provisions of the facility improvement program in which such dealer
49 participates be contained in a written agreement voluntarily entered into by the dealer and must
50 be made available, on substantially similar terms, to any of the manufacturer's or distributor's
51 other same line-make dealers in the commonwealth with whom the manufacturer or distributor
52 offers to enter into such an agreement; provided further, that, except as necessary to comply with
53 a health or safety law or to comply with a technology requirement which is necessary to sell or
54 service a motor vehicle that the motor vehicle dealer is authorized or licensed by the
55 manufacturer or distributor, a manufacturer, distributor, or franchisor representative shall not
56 require, coerce, or attempt to coerce a motor vehicle dealer, by program, policy, facility guide,
57 standard or otherwise, to change the location of the dealership, replace, or construct a new dealer

58 facility or substantially alter or remodel an existing dealer facility before the date that is ten years
59 after the date the construction of the new dealer facility or substantial alteration or remodeling at
60 that location was completed regardless of whether a successor dealer has been appointed;
61 provided further, that such construction, alteration or remodeling substantially complied with the
62 manufacturer's or distributor's brand image standards or plans that the manufacturer or
63 distributor provided at the time the construction, alteration, or remodeling was completed.

64 (14) to require a dealer to provide to the franchisor representative, manufacturer or
65 distributor its customer lists, service files, or information about a retail customer unless
66 necessary: (a) for the sale and delivery of a new motor vehicle to a retail buyer; (b) to validate
67 and pay customer or dealer incentives; (c) for reasonable marketing purposes; (d) for warranty
68 reimbursement substantiation under this chapter; or (e) to enable the manufacturer to fulfill
69 safety, recall, or other legal obligations imposed by state or federal law. A manufacturer or
70 distributor shall not share, sell, or transfer to other dealers or third parties customer information
71 obtained from a dealer and not otherwise publically available unless otherwise agreed to by the
72 originating dealer or unless the franchise has been terminated. Notwithstanding any consent,
73 authorization, release, franchise agreement or other agreement or contract, a manufacturer or
74 distributor, or any third party acting on behalf or through a manufacturer or distributor, having
75 electronic access to consumer or customer data or other information in a computer system
76 utilized by a dealer, or who has otherwise been provided consumer or customer data or
77 information by the dealer, shall fully indemnify and hold harmless the dealer from whom it has
78 acquired the consumer or customer data or other information from all claims, demands, damages,
79 liabilities, costs, and expenses incurred by the dealer, arising out of any alleged or actual data
80 security breaches or other unlawful use of said customer or consumer data or other information

81 by said manufacturer, distributor or third party acting on behalf of same, including, but not
82 limited to, judgments, settlements, fines, penalties, expenses related to the disclosure of security
83 breaches to customers and consumers, and attorneys' fees and expenses arising out of
84 complaints, claims, demands, security breaches, civil or administrative actions, and, to the fullest
85 extent allowable under the law, attorneys' fees and expenses arising from governmental
86 investigations and prosecutions relating to the access, storage, maintenance, use, sharing,
87 disclosure, or retention of the dealer's consumer or customer data or other information, or
88 maintenance or services provided to any computer system utilized by the dealer, by the
89 manufacturer, distributor or third party acting on behalf of or through the manufacturer or
90 distributor.

91 (15) to arbitrarily or unreasonably alter the geographic area of responsibility within which
92 it measures the dealer's performance. A manufacturer or distributor shall give advance notice of
93 any proposed alteration of a dealer's so-called area of responsibility at least 60 days before the
94 effective date of a proposed alteration. Notice shall include an explanation of the basis for the
95 change, and, upon request by such motor vehicle dealer within 30 days of the manufacturer's or
96 distributor's notice, the manufacturer or distributor immediately shall provide sufficient
97 supporting documentation. At any time prior to the effective date of such alteration, and after
98 completion of any internal appeal process provided by a manufacturer or distributor, a dealer
99 may protest the proposed alteration pursuant to section 15. Filing of a protest shall mean no
100 alteration is effective until an agreement is reached by the parties or a court makes a final
101 determination. The court may affirm, deny, or modify the proposed alteration of the dealer's area
102 of responsibility, may enter any other orders necessary to ensure that an alteration of the dealer's
103 area of responsibility is reasonable in light of all the relevant circumstances, and may assess the

104 attorneys' fees and expenses among the parties to the protest as appropriate. A manufacturer or
105 distributor shall not take any adverse action against a dealer as a result of a change to the dealer's
106 area or responsibility for at least 18 months after the effective date of the change.

107 (16) to require a dealer to purchase goods or services from a vendor selected, identified,
108 or designated by a manufacturer or distributor by agreement, program, incentive provision, or
109 otherwise in connection with a dealer expanding, constructing, or significantly modifying its
110 dealership facility without allowing the dealer the option to obtain a good or service of
111 substantially similar quality from a vendor chosen by the dealer and approved by the
112 manufacturer, which approval may not be unreasonably withheld. For purposes of this
113 subdivision, the term "goods" does not include moveable displays, brochures, and promotional
114 materials containing material subject to intellectual property rights of, or parts to be used in
115 repairs under warranty obligations of, a manufacturer or a distributor, or special tools and
116 training as required by the manufacturer or distributor. Nothing under this paragraph shall be
117 construed to (i) allow a dealer or vendor to eliminate or impair a manufacturer's or distributor's
118 intellectual property rights, including trademarks, or (ii) permit a dealer to erect or maintain signs
119 that do not conform to the intellectual property usage guidelines of the manufacturer.

120 SECTION 4. Said section 4 of said chapter 93B, as so appearing, is hereby further
121 amended by inserting at the end thereof the following subsection:-

122 (e)(1) It shall be a violation of this section for a manufacturer, distributor, or franchisor
123 representative to coerce or require any dealer, whether by agreement, program, incentive
124 provision, or provision for loss of incentive payments or other benefits, to refrain from selling
125 any used motor vehicle subject to (i) recall, (ii) stop sale or do not drive directive, (iii) technical

126 service bulletin, or (iv) other manufacturer, distributor, or franchisor representative notification
127 to perform work on such used motor vehicle, unless the manufacturer, distributor, or franchisor
128 representative has a remedy and parts available to the dealer to remediate the basis for the
129 coercion or requirement of the dealer to refrain from selling each affected used motor vehicle. If
130 there is no remedy or there are no parts available from the manufacturer, distributor, or
131 franchisor representative to remediate each affected used motor vehicle in the inventory of the
132 dealer, the manufacturer, distributor, or franchisor representative shall (i) compensate the dealer
133 for any affected used motor vehicle in the inventory of the dealer that it cannot sell because of
134 such coercion or requirement at the rate of at least three percent per month or any part thereof of
135 the cost of such used motor vehicle, including repairs and reconditioning expenses based on the
136 financial records of the dealer, and (ii) establish a written procedure to compensate dealers under
137 this subsection that it shall provide to dealers; provided, however, that such amount of
138 compensation shall not be less than the retail repair and parts rates set pursuant to section 9. Any
139 claim for compensation by a dealer shall be submitted on a monthly basis for the amount owed
140 pursuant to this section. The manufacturer or distributor shall process and pay the claim in the
141 same manner as a claim for warranty reimbursements as provided in section 9.

142 (2) This section shall not prevent a manufacturer or distributor from (i) requiring that a
143 motor vehicle not be subject to an open recall or stop sale or do not drive directive in order to be
144 qualified, remain qualified, or be sold as a certified pre-owned vehicle or similar designation; (ii)
145 paying incentives for selling used vehicles with no unremedied recalls; or (iii) paying incentives
146 for performing recall repairs on a vehicle in the dealer's inventory.

147 (3) Nothing in this subsection shall prevent a manufacturer or distributor from instructing
148 that a dealer repair used vehicles of the line-make for which the dealer holds a franchise with an

149 open recall; provided, that the instruction does not involve coercion that imposes a penalty or
150 provision of loss of benefits on the dealer.

151 (4) This section shall apply only to used vehicles subject to safety or emissions recalls
152 pursuant to and recalled in accordance with federal law and regulations adopted thereunder or
153 where a stop sale or do not drive notification has been issued, and to motor vehicle
154 manufacturers and new motor vehicle dealers with used vehicles of the line-make that the dealer
155 is franchised to sell or is authorized to perform recall repairs.

156 (5) It shall be a violation of this section for a manufacturer, distributor, or franchisor
157 representative to reduce the amount of compensation otherwise owed to a new motor vehicle
158 dealer, whether through a chargeback, removal from an incentive program, reduction in amount
159 owed under an incentive program, or any other means, because the dealer has submitted a claim
160 for reimbursement under this section or was otherwise compensated for a vehicle subject to a
161 recall.

162 (6) For the purposes of this subsection, a “stop sale” or “do not drive” notification shall
163 be defined as a notification issued by a manufacturer or distributor to some or all of its
164 franchised dealerships stating that certain used vehicles in inventory should not be sold or leased,
165 at retail or wholesale, due to a federal safety defect or noncompliance recall, a federal or
166 California emissions recall, or for any other reason.

167 (7) A dealer that sells a used motor vehicle at retail that (i) is subject to a recall pursuant
168 to 49 U.S.C. § 30111 et seq. and (ii) remains unremedied at the time of sale shall provide to the
169 buyer a written disclosure of the recall. If, at the time of sale, there is a remedy available for such
170 used motor vehicle, the dealer shall disclose to the buyer that (a) there is a remedy for the recall

171 and the buyer must return to have the dealer provide the remedy, if the dealer holds a franchise to
172 sell as new and to service the line-make of such used motor vehicle, or (b) there is a remedy for
173 the recall and the buyer must contact a dealer of the line-make to provide the remedy, if the
174 dealer does not hold a franchise to sell as new and to service the line-make of such used motor
175 vehicle. If, at the time of sale, there is no remedy available for such used motor vehicle, the
176 dealer shall disclose to the buyer that (1) there is no remedy for the recall and the buyer must
177 return to have the dealer provide the remedy when the buyer learns or has notice that the remedy
178 is available, if the dealer holds a franchise to sell as new and to service the line-make of such
179 used motor vehicle, or (2) there is no remedy for the recall and the buyer must contact a dealer of
180 the line-make to provide the remedy when the buyer learns or has notice that the remedy is
181 available, if the dealer does not hold a franchise to sell as new and to service the line-make of
182 such used motor vehicle.

183 SECTION 5. Section 5 of said chapter 93B, as so appearing, is hereby amended by
184 striking subsections (f) and (g) and replacing those subsections with the following:-

185 (f) Within the applicable notice period set forth in subsections (b) or (d), either the motor
186 vehicle dealer or the manufacturer or distributor may file a complaint in the superior court, or if
187 applicable in the federal district court for the district of Massachusetts, to enforce or enjoin a
188 termination, nonrenewal or renewal upon changes, amendments, additions or deletions of the
189 type described in subsection (a); but nothing contained in this subsection shall relieve a party
190 from the requirements of subsection (b) of section 15. Unless otherwise agreed to in writing by
191 the parties, trial shall be held within 120 days of the expiration of the applicable notice period but
192 not sooner than 90 days after the expiration of the applicable notice period, notwithstanding any
193 standing orders, presumptive time standards, or administrative directives issued or established by

194 the superior court or the federal district court providing for either an earlier or later time for trial.
195 Failure of either party to file a complaint within the time period set forth in subsections (b) and
196 (d) shall bar the filing of a complaint on such grounds at any time in the future. If no protest is
197 filed by any party having received proper notice, the termination, nonrenewal or modification
198 may proceed.

199 (g) Upon the timely filing of a complaint by the dealer or manufacturer to enjoin or
200 enforce a termination, the effective date of termination or nonrenewal shall be automatically
201 enjoined pending a final determination after a trial on the merits by the trial court of the issues
202 raised by a complaint filed pursuant to subsection (f) and any subsequent appeal. The franchise
203 agreement shall remain in full force and effect and the franchisee shall retain all rights and
204 remedies pursuant to both this statute and the terms and conditions of the franchise agreement,
205 including, but not limited to, the right to sell or transfer such franchisee's ownership interest
206 prior to a final determination by the court and any appeal. The franchisor shall at all times prior
207 to a final determination by the trial court and any appeal give full consideration to any proposed
208 buyer applicant or successor dealer submitted by franchisee pursuant to Section 4(c)(8).

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

211 (n) Where a termination or nonrenewal will result from use of any agreement to terminate
212 or not renew that was executed by the dealer and obtained by a manufacturer, distributor or
213 franchisor representative more than 90 days before the purported date of use, exercise of rights
214 under such written agreement shall be void. In any case in which a manufacturer, distributor or
215 franchisor representative fails to properly advise a dealer that it does not intend to renew a

216 franchise or take any action to renew a franchise beyond its expiration date, the franchise in
217 question shall continue in effect on the terms last agreed to by the parties.

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

220 (a) Notwithstanding any terms or provisions of a franchise agreement to the contrary, a
221 manufacturer or distributor shall indemnify its motor vehicle dealers and hold them harmless
222 from and against all damages, liabilities, losses, settlement and reasonable expenses of suit,
223 including reasonable attorneys' fees, arising out of or incurred in the defense of any claim
224 brought by any person seeking compensation or other relief predicated upon the negligent or
225 defective design or manufacture of a new motor vehicle, including, but not limited to, claims for
226 breach of contract, claims asserted pursuant to chapter 93A of the General Laws, and claims for
227 breach of express or implied warranty relating to a new motor vehicle, or any part or component
228 thereof, manufactured or distributed by the manufacturer or distributor unless the basis for
229 liability is finally determined by a court to be solely the result of negligence on the part of the
230 motor vehicle dealer. The manufacturer or distributor, after having been notified promptly in
231 writing by the motor vehicle dealer that a demand has been made or a formal claim has been
232 asserted and is pending, shall promptly assume the defense thereof and resolve the same at its
233 own expense.

234 SECTION 8. Subsection (b) of section 9 of said chapter 93B, as so appearing, is hereby
235 amended by inserting after paragraph (4) the following paragraph:-

236 (5)(i) A manufacturer or distributor shall not require, influence, or attempt to influence a
237 motor vehicle dealer to implement or change the prices for which it sells parts or labor in retail

238 customer repairs. A manufacturer or distributor shall not implement or continue a policy,
239 procedure, or program with any of its dealers in this state for compensation under this section
240 which is inconsistent with this section.

241 (ii) A manufacturer or distributor shall not, pursuant to a surcharge or other assessment
242 stated on the vehicle invoice provided to the dealer or through such other charge or means,
243 otherwise recover its costs for reimbursing a dealer for parts and labor pursuant to this section;
244 provided, however, that a manufacturer or distributor shall not be prohibited from increasing
245 prices for vehicles or parts in the normal course of business.

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

248 (k) Notwithstanding any term of a franchise agreement, it shall be a violation of this
249 chapter for a manufacturer, distributor, or franchisor representative to charge back or otherwise
250 hold liable a franchised motor vehicle dealer for sales incentives or charges, deny vehicle
251 allocation, withhold payments or other things of value for which the dealer is eligible, or take or
252 threaten to take any other adverse actions against, in connection with or as a result of any new
253 motor vehicle sold by the dealer and subsequently exported from the United States; provided,
254 that such dealer can demonstrate that after exercising due diligence and acting in good faith he
255 did not know nor reasonably should have known of the purchaser's intention to export the motor
256 vehicle. A franchised motor vehicle dealer which causes a new motor vehicle to be registered in
257 the commonwealth or in a foreign state and causes to be collected the appropriate sales and use
258 tax, or that reasonably relied on a franchisor to complete a sale shall be presumed to have
259 exercised due diligence and acted in good faith. Prior to taking an adverse action against a dealer,

260 including, but not limited to, a chargeback, as a result of an export, a manufacturer or distributor
261 shall provide written notice to the franchised motor vehicle dealer of the adverse action, and, if a
262 chargeback, the specific amount of the chargeback, and the vehicle or vehicles at issue. A dealer
263 shall not be liable for the delivery of any vehicle sold through a franchisor's fleet program where
264 the sale or lease was not initiated or negotiated by the dealer and dealer's function was solely to
265 provide delivery on behalf of the manufacturer or distributor.

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

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