

Senate Calendar

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87th DAY OF BIENNIAL SESSION

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ORDERS OF THE DAY

ACTION CALENDAR

SPECIAL ORDER

FRIDAY, APRIL 3, 2009

TIME: 9:00 A.M.

(Third Reading per Chapter II, §72, Vermont Constitution and Senate Rule 83)

Proposed Amendment to the Constitution

PROPOSAL 5

Pursuant to Rule 83 of the Senate Rules, the proposed amendment to the Constitution, Proposal 5, set forth below, will be read the third time and acted upon. The question is: "Shall the Senate concur in the proposal and request the concurrence of the House?" [majority of whole Senate is required for passage]

SUBJECT: Elections; voter's oath; self-administration

PENDING ACTION: Third reading of the proposal (second biennium)

PROPOSAL 5

Sec. 1. PURPOSE

This proposal would amend the Constitution of the State of Vermont to provide that a person who will attain the age of 18 by the date of the general election shall have the right to vote in the primary election.

Sec. 2. Section 42 of Chapter II of the Vermont Constitution is amended to read:

§ 42. [VOTER'S QUALIFICATIONS AND OATH]

Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a voter of this state:

You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to

the best good of the same, as established by the Constitution, without fear or favor of any person.

Every person who will attain the full age of eighteen years by the date of the general election who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the oath or affirmation set forth in this section, shall be entitled to vote in the primary election.

Sec. 3. EFFECTIVE DATE

This proposal of amendment shall take effect from the date of its approval by a majority vote of the voters of the state.

UNFINISHED BUSINESS OF WEDNESDAY, MARCH 25, 2009

Third Reading

S. 99

An act relating to amending the Act 250 criteria relating to traffic, scattered development, and rural growth areas.

Second Reading

Favorable with Recommendation of Amendment

S. 94

An act relating to licensing state forestland for maple sugar production.

Reported favorably with recommendation of amendment by Senator Choate for the Committee on Agriculture.

The Committee recommends that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec.1. MAPLE SUGAR LICENSES ON STATE FOREST LAND

The commissioner of forests, parks and recreation shall consult with the Vermont maple sugar makers association to develop a procedure under which the commissioner shall issue additional licenses for the use of state forestland for the tapping of maple trees, the collection of maple sap, and the right to transport such sap to a processing site located off state forest land or to sites located on state forest land if approved by the commissioner. In addition, the commissioner of forests, parks and recreation shall consult with the Vermont maple sugar makers association to develop guidelines for tapping maple trees.

(Committee vote: 5-0-0)

UNFINISHED BUSINESS OF FRIDAY, MARCH 27, 2009

Second Reading

Favorable

H. 31

An act relating to approval of amendments to the charter of the town of Williston.

Reported favorably by Senator Flanagan for the Committee on Government Operations.

(Committee vote: 5-0-0)

H. 95

An act relating to the approval of an amendment to the charter of the city of Burlington.

Reported favorably by Senator Flanagan for the Committee on Government Operations.

(Committee vote: 5-0-0)

UNFINISHED BUSINESS OF TUESDAY, MARCH 31, 2009

Committee Bill for Second Reading

S. 129

An act relating to containing health care costs by decreasing variability in health care spending and utilization.

By the Committee on Health and Welfare (Senator Racine for the Committee)

Reported favorably by Senator Bartlett for the Committee on Appropriations.

(Committee vote: 5-0-2)

UNFINISHED BUSINESS OF WEDNESDAY, APRIL 1, 2009

S. 126

An act relating to digital forensic specialists.

Pending Question: Shall the bill be read the third time?

Committee Bill for Second Reading

S. 134

An act relating to the reduction and consolidation of certain nonstanding legislative committees.

By the Committee on Government Operations. (Sen. Doyle for the Committee)

UNFINISHED BUSINESS OF THURSDAY, APRIL 2, 2009

Third Reading

S. 54

An act relating to clean energy assessment districts.

S. 77

An act relating to the disposal of electronic waste.

Committee Bill for Notice

S. 136

An act relating to reducing the drop-out rate in Vermont secondary schools to zero by the year 2020.

By the Committee on Education.

NEW BUSINESS

Third Reading

S. 121

An act relating to miscellaneous election laws.

S. 127

An act relating to small school districts that pay tuition for their resident students.

Second Reading

Favorable with Recommendation of Amendment

S. 111

An act relating to legislative apportionment board appointments.

Reported favorably with recommendation of amendment by Senator White for the Committee on Government Operations.

The Committee recommends that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 17 V.S.A. § 1904(a) is amended to read:

(a) There is hereby created the legislative apportionment board, consisting of: a special master designated by the chief justice of the supreme court; ~~one freeman,~~ a resident of the state of Vermont for five years immediately preceding the appointment, appointed by the governor from each political party ~~which polled at least twenty-five percent of the votes cast for governor at the last preceding general election,~~ that has had more than three members serve as members of the general assembly, who are not all from the same county, for at least three of the five biennial legislative sessions since the taking of the previous decennial census of the United States; and one ~~freeman,~~ a resident of the state of Vermont for the five years immediately preceding the appointment, elected by the state committee of each of those political parties, a quorum of each committee being present and voting. No member of the board shall serve as a member or employee of the general assembly, or of either house thereof. The special master so designated shall be ~~chairman~~ chair of the board, and shall call such meetings as may be necessary for the accomplishment of the duties of the board hereafter set forth. The secretary of state of Vermont shall be secretary of the board, but shall have no vote.

(Committee vote: 3-2-0)

S. 117

An act relating to the date of the primary election.

Reported favorably with recommendation of amendment by Senator Ayer for the Committee on Government Operations.

The Committee recommends that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 17 V.S.A. § 2351 is amended to read:

§ 2351. PRIMARY ELECTION

A primary election shall be held on the ~~second~~ fourth Tuesday of ~~September~~ in August in each even numbered year for the nomination of candidates of major political parties for all offices to be voted for at the succeeding general election, except candidates for president and vice-president of the United States, their electors, and justices of the peace.

(Committee vote: 3-2-0)

S. 122

An act relating to recounts in elections for statewide offices.

Reported favorably with recommendation of amendment by Senator Ayer for the Committee on Government Operations.

The Committee recommends that the bill be amended in Sec. 1, in the first sentence, by striking out the following: “. divided by the number of persons to be elected,”

(Committee vote: 5-0-0)

Favorable with Proposal of Amendment

H. 91

An act relating to technical corrections to the juvenile judicial proceedings act of 2008.

Reported favorably with recommendation of proposal of amendment by Senator Nitka for the Committee on Judiciary.

The Committee recommends that the Senate propose to the House to amend the bill as follows:

In Sec. 2, 33 V.S.A. § 5123 in subsection (a) by striking out subdivision (1) in its entirety and inserting in lieu thereof a new subdivision (1) to read as follows:

(1) minimizes physical and psychological trauma;

(Committee Vote: 5-0-0)

(For House amendments, see House Journal for February 26, 2009, page 364.)

NOTICE CALENDAR

Second Reading

S. 51

An act to Vermont’s motor vehicle franchise laws.

Reported favorably with recommendation of amendment by Senator Scott for the Committee on Transportation.

The Committee recommends that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 9 V.S.A. chapter 108 is amended to read:

CHAPTER 108. MOTOR VEHICLE MANUFACTURERS,
DISTRIBUTORS, AND DEALERS FRANCHISING

§ 4083. TITLE OF CHAPTER

This chapter may be known and cited as the “Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act.”

§ 4084. LEGISLATIVE FINDINGS

(a) The legislature finds and declares that the distribution and sale of vehicles within this state vitally affects the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate vehicle manufacturers, distributors or wholesalers and factory or distributor representatives, and to regulate franchises issued by the aforementioned who are doing business in this state in order to prevent frauds, impositions and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this state.

(b) The legislature further finds that there continues to exist an inequality of bargaining power between motor vehicle franchisors and motor vehicle franchisees. This inequality of bargaining power enables motor vehicle franchisors to compel motor vehicle franchisees to execute franchises and related agreements that contain terms and conditions that would not routinely be agreed to by the motor vehicle franchisees if this inequality did not exist. Furthermore, as the result of the inequality of bargaining power, motor vehicle franchisees have not had the opportunity to have disputes with their motor vehicle franchisors arising out of the franchisor-franchisee relationship heard in an appropriate venue, convenient to both parties, by tribunals established by statute for the resolution of these disputes. It therefore is in the public interest to enact legislation to prevent unfair or arbitrary treatment of motor vehicle franchisees by motor vehicle franchisors. It is the legislature’s intent to have this chapter liberally construed in order to achieve its purpose.

§ 4085. DEFINITIONS

The following words, terms, and phrases when used in this chapter shall have the meanings respectively ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) “Board” means the transportation board as established in section 3 of Title 19.

(2) “Coerce” means the failure to act in a fair and equitable manner in performing or complying with any terms or provisions of a franchise or

agreement; provided, however, that recommendation, persuasion, urging, or argument shall not be synonymous with coerce or lack of good faith.

(3) “Dealership facilities” means the real estate, buildings, fixtures, and improvements which have been devoted to the conduct of business under the franchise by the new motor vehicle dealer;.

(2)(4) “Designated family member” means the spouse, child, grandchild, parent, brother, or sister of the owner of a new motor vehicle dealer who, in the case of the owner’s death, is entitled to inherit the ownership interest in the new motor vehicle dealer under the terms of the owner’s will, or who has been nominated in any other written instrument, or who, in the case of an incapacitated owner of a new motor vehicle dealer, has been appointed by a court as the legal representative of the new motor vehicle dealer’s property;.

(3)(5) “Established place of business” means a permanent, commercial building located within this state easily accessible and open to the public at all reasonable times and at which the business of a new motor vehicle dealer, including the display and repair of vehicles, may be lawfully carried on in accordance with the terms of all applicable building codes, zoning, and other land-use regulatory ordinances;.

(4)(6) “Franchise” means ~~the agreement or contract~~ all agreements and contracts between any new motor vehicle manufacturer, written or otherwise, and any new motor vehicle dealer which ~~purport~~ relate to the operation of the franchise and purports to fix the legal rights and liabilities of the parties to such ~~agreement~~ agreements or contract, contracts, including agreements pursuant to which the dealer purchases and resells the franchise product, performs warranty and other service on the manufacturer’s products, leases or rents the dealership premises; or agreements concerning the dealership premises or construction or renovation of the dealership premises.

(A) “Franchisee” means a motor vehicle dealer who enters into or is currently a party to a franchise with a franchisor.

(B) “Franchisor” means any manufacturer, distributor, distributor branch or factory branch, importer or other person, partnership, corporation, association, or entity, whether resident or nonresident, which enters into or is currently a party to a franchise with a motor vehicle dealer.

(7) “Fraud” means, in addition to its common law connotation, the misrepresentation, in any manner, of a material fact; a promise or representation not made honestly and in good faith, and the intentional failure to disclose a material fact.

~~(5)~~(8) “Good faith” means honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade as defined and interpreted in section 2-103(1)(b) of the Uniform Commercial Code;.

(9) “Line-make” means motor vehicles that are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the franchisor or manufacturer of the motor vehicle.

~~(6)~~(10)(A) “Manufacturer” means any person, resident, or nonresident, who manufactures or assembles new motor vehicles, or imports for distribution through distributors of motor vehicles, or any partnership, firm, association, joint venture, corporation or trust, resident or nonresident, which is controlled by the manufacturer;.

(B) Additionally, the term manufacturer shall include the following terms:

~~(A)~~(i) “Distributor” means any person, resident or nonresident, who in whole or in part offers for sale, sells or distributes any new motor vehicle to new motor vehicle dealers or who maintains factory representatives or who controls any person, firm, association, corporation or trust, resident or nonresident, who in whole or in part offers for sale, sells or distributes any new motor vehicle to new motor vehicle dealers; and

~~(B)~~(ii) “Factory branch” means a branch office maintained by a manufacturer for the purpose of selling, or offering for sale, vehicles to a distributor or new motor vehicle dealer, or for directing or supervising in whole or in part factory or distributor representatives;.

~~(7)~~(11) “Motor vehicle” means every vehicle intended primarily for use and operation on the public highways which is self-propelled, not including farm tractors and other machines and tools used in the production, harvesting and care of farm products;.

~~(8)~~(12) “New motor vehicle” means a vehicle which has been sold to a new motor vehicle dealer and which has not been used for other than demonstration purposes and on which the original title has not been issued from the new motor vehicle dealer;.

~~(9)~~(13) “New motor vehicle dealer” means any person engaged in the business of selling, offering to sell, soliciting or advertising the sale of new motor vehicles and who holds, or held at the time a cause of action under this chapter accrued, a valid sales and service agreement, franchise or contract, granted by the manufacturer or distributor for the retail sale of said manufacturer’s or distributor’s new motor vehicles;.

~~(10)~~(14) “Owner” means any person holding an ownership interest in the business entity operating as a new motor vehicle dealer or under a franchise as defined in this chapter either as a corporation, partnership ~~or~~, sole proprietorship, or other legal entity. To the extent that the rights of any owner under this chapter conflict with the rights of any other owner, such rights shall accrue in priority order based on the percentage of ownership interest held by each owner; with the owner having the greatest ownership interest having first priority and succeeding priority accruing to other owners in the descending order of percentage of ownership interest;

~~(11)~~(15) “Person” means every natural person, partnership, corporation, association, trust, estate, ~~or~~ any other legal entity;

~~(12)~~(16) “Relevant market area” means the area within a radius of 25 miles around an existing dealer or the area of responsibility defined in the franchise, whichever is greater; except that, where a manufacturer is seeking to establish an additional new motor vehicle dealer and there are one or more existing new motor vehicle dealers of the same line-make within a 10-mile radius of the proposed dealer site, the “relevant market area” shall in all instances be the area within a radius of 10 miles around an existing dealer.

§ 4086. WARRANTY AND PREDELIVERY OBLIGATIONS TO NEW MOTOR VEHICLE DEALERS

(a) Each new motor vehicle manufacturer shall specify in writing to each of its new motor vehicle dealers licensed in this state the dealer’s obligations for predelivery preparation and warranty service on its products, shall compensate the new motor vehicle dealer for such service required of the dealer by the manufacturer, and shall provide the dealer the schedule of compensation to be paid the dealer for parts, work and service in connection therewith, and the time allowance for the performance of the work and service.

(b) A schedule of compensation shall not fail to include reasonable compensation for diagnostic work, as well as for repair service and labor. Time allowances for the diagnosis and performance of predelivery and warranty service shall be reasonable and adequate for the work to be performed. The hourly rate paid to a new motor vehicle dealer shall not be less than the rate charged by the dealer to customers for nonwarranty service and repairs. Each manufacturer shall compensate each of its dealers for parts used to fulfill warranty, predelivery and recall obligations of repair and servicing at ~~rates~~ amounts not less than the ~~rates~~ retail amounts customarily charged by the dealer to its retail customers for like parts for nonwarranty work. The amounts established by a dealer to its retail customers for labor and like parts for nonwarranty work are deemed to be fair and reasonable compensation; provided, however, a manufacturer may rebut such a presumption by showing

that such amount so established is unfair and unreasonable in light of the practices of at least four other franchised motor vehicle dealers in the vicinity offering the same line-make or a similar competitive line-make. A manufacturer may not otherwise recover all or any portion of its costs for compensating its motor vehicle dealers licensed in this state for warranty parts and service either by reduction in the amount due to the dealer or by separate charge, surcharge, or other imposition.

(c) For purposes of this section, the “retail amounts customarily charged” by the franchisee for parts may be established by submitting to the manufacturer 100 sequential nonwarranty customer-paid service repair orders or 60 days of nonwarranty customer-paid service repair orders, whichever is less in terms of total cost, covering repairs made no more than 180 days before the submission and declaring the average percentage markup. The average percentage markup so declared is the retail amount, which goes into effect 30 days following the declaration, subject to audit of the submitted repair orders by the manufacturer and adjustment of the average percentage markup based on that audit. Only retail sales not involving warranty repairs, not involving state inspection, not involving routine maintenance such as changing the oil and oil filter, and not involving accessories may be considered in calculating the average percentage markup. A manufacturer may not require a new motor vehicle dealer to establish the average percentage markup by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time-consuming to provide, including part-by-part or transaction-by-transaction calculations. A new motor vehicle dealer may not change the average percentage markup more than two times in one calendar year. Further, the manufacturer shall reimburse the new motor vehicle dealer for any labor performed at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty, provided the franchisee’s rate for labor not performed in satisfaction of a warranty is routinely posted in a place conspicuous to its service customer.

(d) It is a violation of this section for any new motor vehicle manufacturer to fail to perform any warranty obligations or to fail to include in written notices of factory recalls to new motor vehicle owners and dealers the expected date by which necessary parts and equipment will be available to dealers for the correction of such defects, or to fail to compensate any of the new motor vehicle dealers in this state for repairs effected by a recall.

~~(d)~~(e) All claims made by new motor vehicle dealers pursuant to this section for labor and parts shall be paid within ~~30~~ 45 days following their approval; provided, however, that the manufacturer retains the right to audit the claims and to charge back the dealer for fraudulent claims for a period of two years following payment. All claims shall be either approved or

disapproved within ~~30~~ 45 days after their receipt on forms and in the manner specified by the manufacturer, and any claim not specifically disapproved in writing within ~~30~~ 45 days after the receipt shall be construed to be approved and payment must follow within ~~30~~ 45 days. No claim which has been approved and paid may be charged back to the dealer unless it can be shown that the claim was false or fraudulent, that the repairs were not made properly or were unnecessary to correct the defective condition, or that the dealer failed to reasonably substantiate the claim either in accordance with the manufacturer's reasonable written procedures or by other reasonable means.

(f) A manufacturer shall retain the right to audit warranty claims for a period of one year after the date on which the claim is paid.

(g) A manufacturer shall retain the right to audit all incentive and reimbursement programs and charge back any amounts paid on claims that are false or unsubstantiated for a period of 18 months from the date on which the claim is paid or one year from the end of a program that gave rise to the payment, whichever is later.

(h) Any chargeback resulting from any audit shall not be made until a final order is issued by the transportation board if a protest to the proposed chargeback is filed within 30 days of the notification of the final amount claimed by the manufacturer, to be due after exhausting any procedure established by the manufacturer to contest the chargeback, other than arbitration. The manufacturer has the burden of proof in any proceeding filed at the board under this section.

(i) It is unlawful for a franchisor, manufacturer, factory branch, distributor branch, or subsidiary to own, operate, or control, either directly or indirectly, a motor vehicle warranty or service facility located in the state except on an emergency or interim basis or if no qualified applicant has applied for appointment as a dealer in a market previously served by a new motor vehicle dealer of that manufacturer's line-make.

§ 4087. TRANSPORTATION DAMAGES

(a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, the manufacturer is liable for all damages to motor vehicles before delivery to a carrier or transporter.

(b) If a new motor vehicle dealer determines the method of transportation, the risk of loss passes to the dealer upon delivery of the vehicle to the carrier.

(c) In every other instance, the risk of loss remains with the manufacturer until such time as the new motor vehicle dealer or his designee accepts the vehicle from the carrier.

(d)(1) On any new motor vehicle, a manufacturer or distributor shall disclose in writing to a dealer and a dealer shall disclose in writing to the ultimate purchaser any uncorrected damage or any corrected damage to the vehicle, as measured by retail repair costs, if the corrected damage exceeds the following percentage of the manufacturer's suggested retail price, as defined in 15 U.S.C. §§ 1231-1233:

(A) five percent up to the first \$10,000.00; and

(B) two percent on any amount over \$10,000.00.

(2) Damage to glass, tires, wheels and bumpers shall be excluded from the calculation required in this subsection when replaced by identical manufacturer's original equipment.

§ 4088. PRODUCT LIABILITY INDEMNIFICATION

Notwithstanding the terms of any franchise agreement, it shall be a violation of this law for any new motor vehicle manufacturer to fail to indemnify and hold harmless its franchised dealers against any judgment or settlement for damages, after reasonable notice of the proposed settlement to the manufacturer, including, but not limited to, court costs and reasonable attorneys' fees of the new motor vehicle dealer, arising out of complaints, claims or lawsuits including, but not limited to, strict liability, negligence, misrepresentation, warranty (express or implied), or rescission of the sale as is defined in section 2-608 of the Uniform Commercial Code, to the extent that the judgment or settlement relates to the alleged defective or negligent manufacture, assembly or design of new motor vehicles, parts or accessories or other functions by the manufacturer, beyond the control of the dealer.

§ 4089. TERMINATION; CANCELLATION OR NONRENEWAL

(a) Notwithstanding the terms, provisions or conditions of any franchise or notwithstanding the terms or provisions of any waiver, no manufacturer shall cancel, terminate or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has:

(1) satisfied the notice requirement of section 4090 of this title;

(2) has good cause for cancellation, termination, or nonrenewal;

(3) has acted in good faith as defined in this chapter; and

(4)(A) The transportation board finds after a hearing that the manufacturer has acted in good faith and there is good cause for cancellation, termination, failure to renew, or refusal to continue any franchise relationship. The new motor vehicle dealer may file a protest with the board within 45 days after receiving the 90-day notice. A copy of the protest shall be served by the

new motor vehicle dealer on the manufacturer. When a protest is filed to challenge the cancellation, termination, or nonrenewal of a franchise agreement under this section, such franchise agreement shall remain in full force and effect, and such franchisee shall retain all rights and remedies pursuant to the terms and conditions of such franchise agreement, including the right to sell or transfer such franchisee's ownership interest until a final determination by the board and any appeal; or

(B) The manufacturer, distributor, or branch or division thereof has received the written consent of the new motor vehicle dealer; or

(C) The appropriate period for filing a protest has expired.

(b) For purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon the franchisee by the franchise as set forth in subdivision (c)(1) of this section.

(c) Notwithstanding the terms, provisions or conditions of any agreement or franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation, or nonrenewal when:

(1) there is a failure by the new motor vehicle dealer to comply with a provision of the franchise which provision is both reasonable and of material significance to the franchise relationship, provided that ~~the dealer has been notified in writing of the failure within~~ compliance on the part of the new motor vehicle dealer is reasonably possible; or if the failure by the new motor vehicle dealer to comply with a provision of the franchise is pursuant to a notice issued under 4090(a)(3); and the manufacturer, distributor, or branch or division thereof first acquired actual or constructive knowledge of such failure not more than 180 days after ~~the manufacturer first acquired knowledge of such failure~~ prior to the date on which notification is given pursuant to section 4090 of this title;

(2) if the failure by the new motor vehicle dealer, defined in subdivision (1) of this subsection, relates to the performance of the new motor vehicle dealer in sales or service, then good cause shall be defined as the failure of the new motor vehicle dealer to comply with reasonable performance criteria established by the manufacturer if the new motor vehicle dealer was apprised by the manufacturer in writing of such failure; and:

(A) ~~said~~ the notification stated that notice was provided ~~of~~ for failure of performance pursuant to this section;

(B) the new motor vehicle dealer was afforded a reasonable opportunity, for a period of not less than six months, to comply with such criteria; ~~and~~

(C) the new motor vehicle dealer did not demonstrate substantial progress towards compliance with the manufacturer's performance criteria during such period and the new motor vehicle dealer's failure was not primarily due to economic or market factors within the dealer's relevant market area beyond the dealer's control; and

(D) the performance criteria established by the manufacturer are fair, reasonable, and equitable as applied to all same line-make franchisees of the manufacturer in the state.

~~(e)~~(d) The manufacturer shall have the burden of proof under this section for showing that it has acted in good faith, that all notice requirements have been satisfied, and that there was good cause for the franchise termination, cancellation, nonrenewal, or noncontinuance.

(e) Notwithstanding the terms, provisions, or conditions of any agreement or franchise, or the terms or provisions of any waiver, the following do not constitute good cause for the termination, cancellation, nonrenewal, or noncontinuance of a franchise:

(1) The change of ownership of the new motor vehicle dealer's dealership, excluding any change in ownership which would have the effect of the sale of the franchise without the reasonable consent of the manufacturer, distributor, or branch or division thereof.

(2) The fact that the new motor vehicle dealer refused to purchase or accept delivery of any new motor vehicle parts, accessories, or any other commodity or services not ordered by the new motor vehicle dealer.

(3) The fact that the new motor vehicle dealer owns, has an investment in, participates in the management of, or holds a license for the sale of another make, line, or brand of new motor vehicle, or that the new motor vehicle dealer has established another make, line, or brand of new motor vehicle in the same dealership facilities as those of the manufacturer, distributor, or branch or division thereof, provided that the new motor vehicle dealer maintains a reasonable line of credit for each make or line of new motor vehicle and that the new motor vehicle dealer remains in substantial compliance with any reasonable facilities requirements of the manufacturer, distributor, or branch or division thereof.

(4) The fact that the new motor vehicle dealer sells or transfers ownership of the dealership or sells or transfers capital stock in the dealership

to the new motor vehicle dealer's spouse, son, or daughter. The manufacturer, distributor, or branch or division thereof shall give effect to such change in ownership unless the transfer of the new motor vehicle dealer's license is denied or the new owner is unable to license, as the case may be.

§ 4090. NOTIFICATION OF TERMINATION; CANCELLATION AND NONRENEWAL

(a) Notwithstanding the terms, provisions, or conditions of any franchise prior to the termination, cancellation, or nonrenewal of any franchise, the manufacturer shall furnish notification of such termination, cancellation or nonrenewal to the new motor vehicle dealer as follows:

(1) in the manner described in subsection (b) of this section; and

(2) not less than 90 days prior to the effective date of such termination, cancellation, or nonrenewal; or

(3) not less than 15 days prior to the effective date of such termination, cancellation, or nonrenewal ~~with respect to any of the following~~ which occurs as a result of:

(A) insolvency of the new motor vehicle dealer, or filing of any petition by or against the new motor vehicle dealer under any bankruptcy or receivership law;

(B) failure of the new motor vehicle dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, except for acts of God or circumstances beyond the direct control of the new motor vehicle dealer;

(C) conviction of the new motor vehicle dealer, or any owner or operator thereof, of any crime which is punishable by imprisonment;

(D) revocation of any license which the new motor vehicle dealer is required to have to operate a dealership.

~~(4) not less than 180 days prior to the effective date of such termination or cancellation where the manufacturer or distributor is discontinuing the sale of the product line~~ Not less than 180 prior to the effective date of such termination, cancellation, or nonrenewal which occurs as a result of:

(A) any change in ownership, operation, or control of all or any part of the business of the manufacturer, whether by sale or transfer of assets, corporate stock, or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law, or otherwise; or

(B) the termination, suspension, or cessation of a part or all of the business operations of the manufacturer; or

(C) discontinuance of the sale of the product line or a change in distribution system by the manufacturer whether through a change in distributors or through the manufacturer's decision to cease conducting business through a distributor altogether.

(b) Notification under this section shall be in writing; shall be by certified mail or personally delivered to the new motor vehicle dealer; and shall contain:

(1) a statement of intention to terminate, cancel, or not to renew the franchise; and

(2) a statement of the reasons for the termination, cancellation, or nonrenewal; and

(3) the date on which the termination, cancellation, or nonrenewal takes effect.

§ 4091. PAYMENTS

(a) ~~Upon~~ Within 90 days of the termination, nonrenewal, or cancellation of any franchise, pursuant to this chapter section 4089 of this title or to the termination, nonrenewal, or cancellation of a franchise by the franchisee or by mutual agreement, the new motor vehicle dealer shall be ~~allowed fair and reasonable compensation paid~~ by the manufacturer for the:

(1) ~~new motor vehicle inventory which has been acquired from the manufacturer;~~

(2) ~~supplies and parts which have been acquired from the manufacturer;~~

(3) ~~equipment and furnishings provided the new motor vehicle dealer purchased from the manufacturer or its approved sources; and~~

(4) ~~special tools.~~ dealer cost plus any charges by the manufacturer thereof for distribution, delivery, and taxes paid by the dealer, less all allowances paid to the dealer by the manufacturer for all new and undamaged motor vehicle inventory purchased from the manufacturer or distributor or from another new motor vehicle dealer of the same line-make in the ordinary course of business if the vehicles have 500 miles or less on the odometer and:

(A) were purchased within the previous 12 months; or

(B) are of the current model year or one-year-prior model year.

A motor vehicle shall be "undamaged" under this subsection if any corrected damage to the vehicle does not exceed the amounts set forth in subsection 4087(d) of this title;

(2) the dealer cost of each new, unused, undamaged, and unsold part or accessory if such part or accessory is in the current parts catalogue and is still

in the original, resaleable merchandising package and acquired from the manufacturer or distributor or from another new motor vehicle dealer of the same line-make in the ordinary course of business;

(3) the fair market value of all special tools owned by the dealer which were recommended in writing and designated as special tools and equipment by the manufacturer, distributor, or branch or division thereof and purchased from or at the request of the manufacturer or distributor, if the tools and equipment are in usable and good condition, normal wear and tear excepted;

(4) the fair market value of each undamaged sign owned by the dealer which bears a trademark, trade name, or commercial symbol used or claimed by the manufacturer if the sign was purchased from or at the request of the manufacturer, distributor, or branch or division thereof;

(5) the cost of transporting, handling, packing, and loading of motor vehicles, parts, signs, and special tools, subject to repurchase by the manufacturer.

(b) In addition to the other payments set forth in this section, if a termination, cancellation, or nonrenewal is premised upon any of the occurrences set forth in subdivision 4090(a)(4) of this title, then the manufacturer shall be liable to the dealer for an amount equivalent to the fair market value of the motor vehicle franchise on the day before the date the franchisor announces the action which results in termination, cancellation, or nonrenewal.

~~(b)~~(c) Payment is contingent on the new motor vehicle dealer having clear title to the inventory and other items and having the ability to convey the title to the manufacturer excepting any liens or encumbrances on the inventory and other items that will be released when the manufacturer pays the motor vehicle dealer and lien holder for the inventory and other items.

(d) The manufacturer may avoid paying fair market value of the motor vehicle franchise to the dealer under subsection (b) of this section if the franchisor, or another motor vehicle franchisor pursuant to an agreement with the franchisor, offers the franchisee a replacement motor vehicle franchise substantially similar to the existing motor vehicle franchise which takes effect no later than the date of the termination, cancellation, or nonrenewal of the franchisee's existing motor vehicle franchise.

§ 4092. DEALERSHIP FACILITIES ASSISTANCE UPON TERMINATION, CANCELLATION, OR NONRENEWAL

(a) In the event of a termination, cancellation, or nonrenewal under this chapter; and

(1) the new motor vehicle dealer is leasing the dealership facilities from a lessor other than the manufacturer, the manufacturer shall pay the new motor vehicle dealer a sum equivalent to the rent for the unexpired term of the lease or one year's rent, whichever is less; or

(2) if the new motor vehicle dealer owns the dealership facilities, the manufacturer shall pay the new motor vehicle dealer a sum equivalent to the reasonable rental value of the dealership facilities for one year.

(b) If the termination, cancellation, or nonrenewal is pursuant to ~~subsection subdivision 4090(b)(a)(4)~~ of this title, then, with respect to such facilities as were required as a condition of the franchise and used to conduct sales and service operations related to the franchise product, the manufacturer or distributor shall in addition to the relief described in subsection (a) of this section:

(1) assume the obligations for any lease of the dealership facilities for the unexpired term of the lease or three years' rent, whichever is less; or

(2) arrange for a new lease of any dealership facilities; or

(3) negotiate a lease termination for the dealership facilities at the manufacturer's expense.

(c) If, in an action for damages under this section, the manufacturer or distributor fails to prove either that the manufacturer or distributor has acted in good faith or that there was good cause for the franchise termination, cancellation or nonrenewal, then the court, agency or commission shall order, in addition to any other damages under this section, that the manufacturer or distributor pay the new motor vehicle dealer an amount equal to the value of the dealership, as an ongoing business location.

§ 4093. RIGHT OF DESIGNATED FAMILY MEMBER TO SUCCEED IN OWNERSHIP

(a) Any owner of a new motor vehicle dealer may appoint by will, or any other written instrument, a designated family member to succeed in the ownership interest of the new motor vehicle dealer.

(b) Unless there exists good cause for refusal to honor succession on the part of the manufacturer or distributor, any designated family member of a deceased or incapacitated owner of a new motor vehicle dealer may succeed to the ownership of the new motor vehicle dealer under the existing franchise provided that:

(1) the designated family member gives the manufacturer or distributor written notice of his or her intention to succeed to the ownership of the new motor vehicle dealer within 120 days of the owner's death or incapacity; and

(2) the designated family member agrees to be bound by all the terms and conditions of the franchise.

(c) The manufacturer or distributor may request, and the designated family member shall provide, promptly upon said request, personal and financial data that are reasonably necessary to determine whether the succession should be honored.

§ 4094. REFUSAL TO HONOR SUCCESSION TO OWNERSHIP; NOTICE REQUIRED

(a) If a manufacturer or distributor believes that good cause exists for refusing to honor the succession to the ownership of a new motor vehicle dealer by a family member of a deceased or incapacitated owner of a new motor vehicle dealer under the existing franchise agreement, the manufacturer or distributor may, not more than 60 days following receipt of notice of the designated family member's intent to succeed to the ownership of the new motor vehicle dealer, or any personal or financial data which it has requested, serve upon the designated family member notice of its refusal to honor the succession and of its intent to discontinue the existing franchise with the dealer no sooner than 90 days from the date the notice is served.

(b) The notice must state the specific grounds for the refusal to honor the succession and of its intent to discontinue the existing franchise with the new motor vehicle dealer no sooner than 90 days from the date the notice is served.

(c) If notice of refusal and discontinuance is not timely served upon the family member, the franchise shall continue in effect subject to termination only as otherwise permitted by this chapter.

(d) In the event of a conflict between the written instrument filed by the motor vehicle dealer with the manufacturer designating a certain person as his or her successor and the provisions of this section, the written instrument filed with the manufacturer shall govern.

§ 4095. BURDEN OF PROOF

In determining whether good cause for the refusal to honor the succession exists, the manufacturer, distributor, factory branch, or importer has the burden of proving that the successor is a person who is not of good moral character or does not meet the franchisor's existing and reasonable standards and, considering the volume of sales and service of the new motor vehicle dealer, uniformly applied minimum business experience standards in the market area.

§ 4096. UNLAWFUL ACTS BY MANUFACTURERS OR DISTRIBUTORS

It shall be a violation of this chapter; for any manufacturer, as defined under this chapter, to require ~~or to~~ attempt to require, coerce, or attempt to coerce any new motor vehicle dealer in this state:

(1) to order or accept delivery of any new motor vehicle, part or accessory thereof, equipment or any other commodity not required by law or a recall campaign which shall not have been voluntarily ordered by the new motor vehicle dealer; except that this subdivision is not intended to modify or supersede any terms or provisions of the franchise requiring new motor vehicle dealers to market a representative line of those motor vehicles which the manufacturer or distributor is publicly advertising;

(2) to order or accept delivery of any new motor vehicle with special features, accessories or equipment not included in the list price of such motor vehicles as publicly advertised by the manufacturer or distributor;

(3) to participate monetarily in an advertising campaign or contest, or to purchase any promotional materials, training materials, showroom or other display decorations or materials at the expense of the new motor vehicle dealer, or to require any dealer without his or her prior written agreement to participate in any manufacturer's rebate program or to require a dealer to contribute to a manufacturer's warranty rebate program, either by discount or otherwise without prior notification and prior written consent of the dealer;

(4) to enter into any agreement with the manufacturer or to do any other act prejudicial to the new motor vehicle dealer by threatening to terminate or cancel a franchise or any contractual agreement existing between the dealer and the manufacturer; except that this subdivision is not intended to preclude the manufacturer or distributor from insisting on compliance with the reasonable terms or provisions of the franchise or other contractual agreement, and notice in good faith to any new motor vehicle dealer of the new motor vehicle dealer's violation of such terms or provisions shall not constitute a violation of the chapter;

(5) to change the capital structure of the new motor vehicle dealer or the means by or through which the new motor vehicle dealer finances the operation of the dealership provided that the new motor vehicle dealer at all times meets any reasonable capital standards determined by the manufacturer in accordance with uniformly applied criteria; and also provided that no change in the capital structure shall cause a change in the principal management or have the effect of a sale of the franchise without the consent of the manufacturer or distributor; said consent shall not be unreasonably withheld;

(6) to refrain from participation in the management of, investment in, or the acquisition of any other ~~line~~ line-make of new motor vehicle or related

products; provided, however, that this subdivision does not apply unless the new motor vehicle dealer maintains a reasonable line of credit for each make or ~~line~~ line-make of new motor vehicle, the new motor vehicle dealer remains in compliance with any reasonable facilities requirements of the manufacturer, and no change is made in the principal management of the new motor vehicle dealer. For purposes of this act, “reasonable facilities requirements” shall not include a requirement that a motor vehicle dealer establish or maintain exclusive facilities, personnel or display space.

(A) The new motor vehicle dealer shall provide written notice to the manufacturer and the board no less than 90 days prior to the dealer’s intent to participate in the management of, investment in, or acquisition of another line-make of new motor vehicles or related products.

(B) Within 45 days of receipt of the notice from the dealer, the manufacturer may file with the board a protest alleging specific facts to support its claim that the new motor vehicle dealer cannot maintain a reasonable line of credit for each make or line-make of new motor vehicle, the new motor vehicle dealer cannot remain in compliance with any reasonable facilities requirements of the manufacturer, or that a change is being made in the principal management of the new motor vehicle dealer. The manufacturer shall also serve the protest on the new motor vehicle dealer within the 45-day period. If the manufacturer does not file a protest with the board within 45 days, then the dealer may participate in the management of, investment in, or acquisition of another line-make of new motor vehicles or related products as set forth in its written notice of intent.

(C) Within 45 days of the receipt of a protest from a manufacturer, the board shall meet, hear and take evidence limited to the claims set forth in the manufacturer’s protest and make a determination on each of the manufacturer’s claims. The burden of proof shall be on the manufacturer. The decision of the board shall be final and no appeal may be taken;

(7) to ~~prospectively~~ assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability to be imposed by this law or to require any controversy between a new motor vehicle dealer and a manufacturer, distributor, or representative, to be referred to any person other than the duly constituted courts of the state or the United States of America, if such referral would be binding upon the new motor vehicle dealer;

(8) to change location of the dealership or to make any substantial alterations to the dealership premises or facilities when to do so would be unreasonable or without written assurance of a sufficient supply of new motor vehicles so as to justify such an expansion in light of the current market and economic conditions.

§ 4097. MANUFACTURER VIOLATIONS

It shall be a violation of this chapter for any manufacturer defined under this chapter:

(1) to delay, refuse, or fail to deliver new motor vehicles or new motor vehicle parts or accessories in a reasonable time, and in reasonable quantity relative to the new motor vehicle dealer's facilities and sales potential in the new motor vehicle dealer's relevant market area, after acceptance of an order from a new motor vehicle dealer having a franchise for the retail sale of any new motor vehicle sold or distributed by the manufacturer, any new motor vehicle, parts or accessories to new vehicles as are covered by such franchise, if such vehicle, parts, accessories are publicly advertised as being available for delivery or actually being delivered. This subdivision is not violated, however, if failure is caused by acts or causes beyond the control of the manufacturer;

(2) to refuse to disclose to any new motor vehicle dealer, handling the same line-make, the manner and mode of distribution of that line-make within the ~~relevant market area~~ state;

(3) to obtain money, goods, service, or any other benefit from any other person with whom the new motor vehicle dealer does business, on account of, or in relation to, the transaction between the new motor vehicle dealer and such other person, other than for compensation for services rendered, unless such benefit is promptly accounted for, and transmitted to, the new motor vehicle dealer;

(4) to increase prices of new motor vehicles which the new motor vehicle dealer had ordered for private retail consumers prior to the new motor vehicle dealer's receipt of the written official price increase notification. A sales contract signed by a private retail consumer shall constitute evidence of each such order provided that the vehicle is in fact delivered to that consumer. In the event of manufacturer price reductions or cash rebates paid to the new motor vehicle dealer, the amount of any reduction or rebate received by a new motor vehicle dealer shall be passed on to the private retail consumer by the new motor vehicle dealer. Price reductions shall apply to all vehicles in the dealer's inventory which were subject to the price reduction. Price differences applicable to a new model or series shall not be considered a price increase or price decrease. Price changes caused by either the addition to a motor vehicle of required or optional equipment; or revaluation of the United States dollar, in the case of foreign-make vehicles or components; or an increase in transportation charges due to increased rates imposed by common carriers shall not be subject to the provisions of this subdivision;

(5) to offer any refunds or other types of inducements to any person for the purchase of new motor vehicles of a certain line or make to be sold to the state or any political subdivision thereof without making the same offer available upon request to all other new motor vehicle dealers in the same line-make within the ~~relevant market area~~ state;

(6) to release to any outside party, except under subpoena or as otherwise required by law or in an administrative, judicial or arbitration proceeding involving the manufacturer or new motor vehicle dealer, any business, financial, or personal information which may be from time-to-time provided by the new motor vehicle dealer to the manufacturer, without the express written consent of the new motor vehicle dealer;

(7) to deny any new motor vehicle dealer the right of free association with any other new motor vehicle dealer for any lawful purpose;

(8) to ~~unfairly~~ compete with a new motor vehicle dealer in the same line-make operating under an agreement or franchise from the aforementioned manufacturer in the relevant market area. A manufacturer shall not, however, be deemed to be competing when operating a dealership either temporarily for a reasonable period, or in a bona fide retail operation which is for sale to any qualified independent person at a fair and reasonable price, or in a bona fide relationship in which an independent person has made a significant investment subject to loss in the dealership and can reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions;

(9) to unfairly discriminate among its new motor vehicle dealers with respect to warranty reimbursement;

(10) to unreasonably withhold consent to a change in executive management or the sale, transfer, or exchange of the franchise to a qualified buyer capable of being licensed as a new motor vehicle dealer in this state. If a new motor vehicle dealer desires to make a change in its executive management or ownership or to sell its principal assets, the new motor vehicle dealer will give the franchisor written notice of the proposed change or sale. The franchisor shall not arbitrarily refuse to agree to such proposed change or sale and may not disapprove or withhold approval of such change or sale unless the franchisor can prove that:

(A) its decision is not arbitrary; and

(B) the new management, owner, or transferee is unfit or unqualified to be a dealer based on the franchisor's prior written, reasonable, objective standards or qualifications which directly relate to the prospective transferee's business experience, moral character, and financial qualifications;

(11) to fail to respond in writing to a request for consent as specified in subdivision (10) of this section within 60 days of receipt of a written request on the forms, if any, generally utilized by the manufacturer or distributor for such purposes and containing the information required therein. Such failure to respond shall be deemed to be consent to the request;

(12) to unfairly prevent a new motor vehicle dealer from receiving fair and reasonable compensation for the value of the new motor vehicle dealership;

(13) to engage in any predatory practice ~~against a new motor vehicle dealer~~ or in any action or failure to act with respect to a dealer if the action or failure to act is arbitrary, in bad faith, or discriminatory compared to similarly situated dealers;

(14) to terminate any franchise solely because of the death or incapacity of an owner who is not listed in the franchise as one on whose expertise and abilities the manufacturer relied in the granting of the franchise.;

(15) to require a motor vehicle franchisee to agree to a term or condition in a franchise, or in any lease related to the operation of the franchise or agreement ancillary or collateral to a franchise, as a condition to the offer, grant, or renewal of the franchise, lease, or agreement, that:

(A) Requires the motor vehicle franchisee to waive trial by jury in actions involving the motor vehicle franchisor;

(B) Specifies the jurisdictions, venues, or tribunals in which disputes arising with respect to the franchise, lease, or agreement shall or shall not be submitted for resolution or otherwise prohibits a motor vehicle franchisee from bringing an action in a particular forum otherwise available under the law of this state;

(C) Requires that disputes between the motor vehicle franchisor and motor vehicle franchisee be submitted to arbitration or to any other binding alternate dispute resolution procedure; provided, however, that any franchise, lease, or agreement may authorize the submission of a dispute to arbitration or to binding alternate dispute resolution if the motor vehicle franchisor and motor vehicle franchisee voluntarily agree to submit the dispute to arbitration or binding alternate dispute resolution at the time the dispute arises;

(D) Provides that in any administrative or judicial proceeding arising from any dispute with respect to the agreements in this section that the franchisor shall be entitled to recover its costs, reasonable attorney's fees and other expenses of litigation from the franchisee; or

(E) Grants the manufacturer an option to purchase the franchise, or real estate or business assets of the franchisee;

(16) to impose unreasonable standards of performance or unreasonable facilities, financial, operating, or other requirements upon a motor vehicle franchisee;

(17) to fail or refuse to sell or offer to sell to all motor vehicle franchisees of a line-make, all models manufactured for that line-make, or requiring a dealer to pay any extra fee; require a dealer to execute a separate franchise agreement, purchase unreasonable advertising displays or other materials, or relocate, expand, improve, remodel, renovate, recondition, or alter the dealer's existing facilities; or provide exclusive facilities as a prerequisite to receiving a model or series of vehicles. However, a manufacturer may require reasonable improvements to the existing facility that are necessary to accommodate special or unique features of a specific model or line. The failure to deliver any such motor vehicle, however, shall not be considered a violation of this section if the failure is due to a lack of manufacturing capacity or to a strike or labor difficulty, a shortage of materials, a freight embargo, or other cause over which the franchisor has no control;

(18) to prevent or attempt to prevent any motor vehicle dealer or any officer, partner, or stockholder of any motor vehicle dealer from transferring any part of the interest of any of them to any other person; provided, however, that no dealer, officer, partner, or stockholder shall have the right to sell, transfer, or assign the franchise or power of management or control without the consent of the manufacturer or distributor unless such consent is unreasonably withheld. Failure to respond within 60 days of receipt of a written request and applicable manufacturer application forms and related reasonable information customarily required for consent to a sale, transfer, or assignment shall be deemed consent to the request. Within 20 days of receipt of notice from the dealer, the manufacturer shall provide the dealer with a copy of all application forms and all other required reasonable information necessary to evaluate the dealer's request;

(19) to provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates this title;

(20) to use a promotional program or device or an incentive, payment, or other benefit, whether paid at the time of sale of the new motor vehicle to the dealer or later, that results in the sale of or offer to sell a new motor vehicle at a lower price, including the price for vehicle transportation, than the price at which the same model similarly equipped is offered or is available to another dealer in the state during a similar time period. This subdivision shall not

prohibit a promotional or incentive program that is available functionally and equally to competing dealers of the same line-make in the state;

(21) to vary the price charged to any of its franchised new motor vehicle dealers located in this state for new motor vehicles based on the dealer's purchase of new facilities, supplies, tools, equipment, or other merchandise from the manufacturer, the dealer's relocation, remodeling, repair, or renovation of existing dealerships or construction of a new facility, the dealer's participation in training programs sponsored, endorsed, or recommended by the manufacturer, whether or not the dealer is dualed with one or more other line-makes of new motor vehicles, the dealer's sales penetration, the dealer's sales volume, the dealer's level of sales or customer service satisfaction, the dealer's purchase of advertising materials, signage, nondiagnostic computer hardware or software, communications devices, or furnishings, or the dealer's participation in used motor vehicle inspection or certification programs sponsored or endorsed by the manufacturer. The price of the vehicle, for purposes of this subdivision, shall include the manufacturer's use of rebates, credits, or other consideration that has the effect of causing a variance in the price of new motor vehicles offered to its franchised dealers located in the state;

(22) to modify a franchise during the term of the franchise or upon its renewal if the modification substantially and adversely affects the new motor vehicle dealer's rights, obligations, investment, or return on investment without giving 60 days' written notice of the proposed modification to the new vehicle dealer unless the modification is required by law, court order, or the board. Within the 60-day notice period, the new vehicle dealer may file with the board and serve notice upon the manufacturer a protest requesting a determination of whether there is good cause for permitting the proposed modification. Multiple protests pertaining to the same proposed modification shall be consolidated for hearing. The proposed modification shall not take effect pending the determination of the matter. The manufacturer shall have the burden of establishing good cause for the proposed modification. In determining whether there is good cause for permitting a proposed modification, the board shall consider any relevant factors, including:

(A) The reasons for the proposed modification.

(B) Whether the proposed modification is applied to or affects all new vehicle dealers in a nondiscriminatory manner.

(C) Whether the proposed modification will have a substantial and adverse effect upon the new vehicle dealer's investment or return on investment.

(D) Whether the proposed modification is in the public interest.

(E) Whether the proposed modification is necessary to the orderly and profitable distribution of products by the manufacturer.

(F) Whether the proposed modification is offset by other modifications beneficial to the new vehicle dealer;

(23) to engage in any action which is arbitrary, in bad faith, or unconscionable;

(24) to change the relevant market area set forth in the franchise agreement without good cause. For purposes of this subdivision, good cause shall include changes in the dealer's registration pattern, demographics, customer convenience, and geographic barriers.

§ 4098. LIMITATIONS ON ESTABLISHING OR RELOCATING DEALERS

(a) In the event that a manufacturer seeks to enter into a franchise establishing an additional new motor vehicle dealer or relocating an existing new motor vehicle dealer within or into a relevant market area where the same line-make is then represented, the manufacturer shall in writing first give notice to the transportation board and notify each new motor vehicle dealer in such line-make in the relevant market area of the intention to establish an additional dealer or to relocate an existing dealer within or into that market area. Within 20 days of receiving such notice or within 20 days after the end of any appeal procedure provided by the manufacturer, any such new motor vehicle dealer may file ~~with a court having jurisdiction an action~~ a protest with the board opposing the establishing or relocating of the new motor vehicle dealer. A copy of the protest shall be served on the manufacturer within the 20-day period. When such a protest is filed, ~~the court shall inform the manufacturer that a timely protest has been filed, and that~~ the manufacturer shall not establish or relocate the proposed new motor vehicle dealer until the ~~court~~ board has held a hearing, nor thereafter, if the ~~court~~ board has determined that there is not good cause for ~~not~~ permitting the addition or relocation of such new motor vehicle dealer.

(b) This section does not apply:

(1) to the relocation of an existing dealer within that dealer's relevant market area, provided that the relocation not be at a site within six miles of a licensed new motor vehicle dealer for the same line-make of motor vehicle; or

(2) if the proposed new motor vehicle dealer is to be established at or within two miles of a location at which a former licensed new motor vehicle

dealer for the same line-make of new motor vehicle had ceased operating within the previous two years.

(c) In determining whether good cause has been established for ~~not~~ entering into or relocating an additional new motor vehicle dealer for the same line-make, the ~~court~~ board shall take into consideration the existing circumstances, including, but not limited to:

(1) permanency of the investment of both the existing and proposed new motor vehicle dealers;

(2) growth or decline in population and new car registrations in the relevant market area;

(3) effect on the consuming public in the relevant market area;

(4) whether it is injurious or beneficial to the public welfare for an additional new motor vehicle dealer to be established;

(5) whether the new motor vehicle dealers of the same line-make in that relevant market area are providing adequate competition and convenient customer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel;

(6) whether the establishment of an additional new motor vehicle dealer would increase competition, and therefore be in the public interest; and

(7) the effect that the proposed franchise would have on the stability of existing franchisees in the same line-make in the relevant market area.

(d) At any hearing conducted by the board under this section, the manufacturer seeking to establish an additional new motor vehicle dealership or relocate an existing new motor vehicle dealership shall have the burden of proof in establishing that good cause exists.

§ 4099. CIVIL ACTIONS FOR VIOLATIONS

Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, any consumer who is injured by a violation of this chapter, or any party to a franchise who is so injured in his business or property by a violation of this chapter relating to that franchise, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter, may bring a civil action in a court having jurisdiction to enjoin further violations, and to recover the actual damages sustained by him or her together with the costs of the suit, including a reasonable attorney's fee. An action, filed in a court of competent jurisdiction, that gives rise or could give

rise to a claim or defense under this chapter must be stayed if, within 60 days after the date of filing of the complaint or service of process, whichever is later, a party to the action files a complaint with the board asserting the claims or defenses under this chapter.

§ 4100. APPLICABILITY

The provisions of this chapter shall apply to the conduct of all persons affected by the presumptions of this chapter situated in this state. Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering or advertising for sale of, or has business dealings with respect to, a motor vehicle within the state shall be subject to the provisions of this chapter and the jurisdiction of the courts of this state. Any and all amendments to this chapter shall apply to existing franchise agreements and franchise agreements entered into on or after the effective date of this act.

§ 4100a. AGREEMENTS GOVERNED

(a) All written agreements between a manufacturer or distributor and a motor vehicle dealer shall be subject to the provisions of this chapter, and provisions of such agreements that are inconsistent with this chapter shall be void as against public policy and unenforceable in court or with the board.

(b) Every new selling agreement or amendment made to such agreement between a motor vehicle dealer and a manufacturer or distributor shall include, and if omitted, shall be presumed to include, the following language: "If any provision herein contravenes the valid laws or rules of the state of Vermont, such provision shall be deemed to be modified to conform to such laws or rules; or if any provision herein, including arbitration provisions, denies, or purports to deny access to the procedures, forums, or remedies provided for by such laws or rules, such provision shall be void and unenforceable; and all other terms and provisions of this agreement shall remain in full force and effect."

§ 4100b. ENFORCEMENT; TRANSPORTATION BOARD

(a) The transportation board established in section 3 of title 19 shall enforce the provisions of this chapter.

(b) The board shall adopt rules to implement the provisions of this chapter.

(c) Except for civil actions filed in superior court pursuant to section 4099 of this title, the board shall have the following exclusive powers:

(1) Any person may file a written protest with the board complaining of conduct governed by and in violation of this chapter. The board shall hold a public hearing in accordance with the rules adopted by the board.

(2) The board shall issue written decisions and may issue orders to any person in violation of this chapter.

(d) The parties to protests shall be permitted to conduct and use the same discovery procedures as are provided in civil actions in the superior court.

(e) The board shall be empowered to determine the location of hearings, appoint persons to serve at the deposition of out-of-state witnesses, administer oaths, and authorize stenographic or recorded transcripts of proceedings before it. Prior to the hearing on any protest, but no later than 45 days after the filing of the protest, the board shall require the parties to the proceeding to attend a prehearing conference in which the chair or designee shall have the parties address the possibility of settlement. If the matter is not resolved through the conference, the matter shall be placed on the board's calendar for hearing. Conference discussions shall remain confidential and shall not be disclosed or used as an admission in any subsequent hearing.

(f) Compliance with the discovery procedures authorized by subsection (d) of this section may be enforced by application to the board. Obedience to subpoenas issued to compel witnesses or documents may be enforced by application to the superior court in the county where the hearing is to take place.

(g) Any party to any proceeding under this chapter who recklessly or knowingly fails, neglects, or refuses to comply with an order issued by the board shall be fined a civil penalty not to exceed \$2,500.00. Each day of noncompliance shall be considered a separate violation of such order.

(h) Within 20 days after any order or decision of the board, any party to the proceeding may apply for a rehearing with respect to any matter determined in the proceeding or covered or included in the order or decision. The application for rehearing shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the board shall be taken unless the appellant makes an application for rehearing as provided in this subsection, and when such application for rehearing has been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by the board unless the board for good cause shown allows the appellant to specify additional grounds. Any party to the proceeding may appeal the final order, including all interlocutory orders or decisions, to the superior court within 30 days after the date the board rules on the application for reconsideration of the final order or decision. All findings of the board upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated except for errors of

law. No additional evidence shall be heard or taken by the superior court on appeals from the board.

(i) In cases where the board finds that a violation of this chapter has occurred or there has been a failure to show good cause under section 4089 or 4098 of this title, the superior court, upon petition, shall determine reasonable attorney's fees and costs and award them to the prevailing party.

§ 4100c. FINANCING; VERMONT TRANSPORTATION BOARD FUND

(a) The transportation board fund is established as a special fund in the state treasury for the sole purpose of enforcing this act. The fund shall be revolving, continually appropriated, and nonlapsing. Except as otherwise provided in this chapter, all fees and civil penalties collected pursuant to this chapter shall be paid into the state treasury immediately upon collection and credited to the transportation board fund.

(b) To fund the transportation board fund and to pay the start-up expenses of administration and enforcement of this chapter, the board shall impose an initial start-up fee upon each new motor vehicle dealer of \$200.00 for each dealer license held by that dealer and an initial start-up fee of \$2,000.00 for each line-make of new motor vehicles that a manufacturer sells or distributes within the state. Upon the filing of a protest under this chapter, the protesting party shall pay into the fund a fee of \$1,500.00.

(c) The secretary of the agency of transportation may draw upon the fund established in subsection (a) of this section to pay the expenses of administration and enforcement of this chapter.

(d) The secretary of the agency of transportation shall have the authority to impose an additional operational fee upon any motor vehicle dealer or manufacturer which sells or distributes new motor vehicles within the state in addition to the initial start-up fee imposed pursuant to this section, if the commissioner determines that the imposition of such fee is necessary to fund the ongoing operations of the board solely related to enforcing this chapter.

§ 4100d. STATUTE OF LIMITATIONS

(a) Actions arising out of any provision of this chapter shall be commenced within four years of the date the cause of action accrues; provided, however, that if a person conceals the cause of action from the knowledge of the person entitled to bring it, the period prior to the discovery of the cause of action by the person so entitled shall be excluded in determining the time limited for commencement of the action.

(b) Notwithstanding any provision in a franchise agreement, if a dispute covered by this chapter or any other law is submitted to mediation or

arbitration, the time for the dealer to file a complaint, action, petition, or protest is tolled until the mediation or arbitration proceeding is completed.

§ 4100e. RIGHT OF FIRST REFUSAL

In the event of a proposed sale or transfer of all or substantially all ownership or transfer of all or substantially all dealership assets, and if the franchise agreement has a right of first refusal in favor of the manufacturer, distributor or franchisor, then notwithstanding the terms of the franchise agreement, the manufacturer, distributor, or franchisor shall be permitted to exercise a right of first refusal to acquire the motor vehicle dealer's assets or ownership only if all of the following requirements are met:

(1) In order to exercise the right of first refusal, the manufacturer or distributor shall notify the motor vehicle dealer in writing of its intent to exercise its right of first refusal within the 60-day notice limit provided in subdivision 4097(11) of this title.

(2) The exercise of the right of first refusal will result in the owner of the dealership receiving the same or greater consideration as the owner has contracted to receive in connection with the proposed change of ownership or transfer.

(3) The proposed change in the dealership's ownership or transfer of assets does not involve the transfer or sale to any of the following members of the family of one or more owners:

(A) A designated family member or members, including any of the following members of one or more dealer owners:

(i) The spouse.

(ii) A child.

(iii) A grandchild.

(iv) The spouse of a child or a grandchild.

(v) A sibling.

(vi) A parent.

(B) A manager:

(i) employed by the dealer in the dealership during the previous two years; and

(ii) who is otherwise qualified as a dealer operator.

(C) A partnership or corporation controlled by any of the family members described in subdivision (A) of this subdivision (3).

(D) A trust arrangement established or to be established:

(i) for the purpose of allowing the new vehicle dealer to continue to qualify as such under the manufacturer's or distributor's standards; or

(ii) to provide for the succession of the franchise agreement to designated family members or qualified management in the event of the death or incapacity of the dealer or its principal owner or owners.

(4) The manufacturer or distributor agrees to pay the reasonable expenses, including attorney fees which do not exceed the usual, customary and reasonable fees charged for similar work done for other clients, incurred by the proposed owner or proposed transferee prior to the manufacturer's or distributor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed sale or transfer of the dealership or dealership assets.

§ 4100f. SEVERABILITY

If any provision in this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provisions and applications, and to this end, the provisions of this chapter are severable.

Sec. 2. 19 V.S.A. § 3 is amended to read:

§ 3. TRANSPORTATION BOARD; CREATION; MEMBERS

A transportation board is formed to be attached to the agency of transportation. There shall be seven members of the board, appointed by the governor with the advice and consent of the senate. The governor shall so far as is possible appoint board members whose interests and expertise lie in various areas of the transportation field. The governor shall appoint the chair. The members of the board shall be appointed for terms of three years. Board members may be appointed for two additional three-year terms but shall not be eligible for further reappointment. No more than four members of the board shall belong to the same political party. No member of the board shall:

(1) Have an ownership interest in or be employed by a manufacturer, factory branch, distributor, or distributor branch as defined in chapter 108 of Title 9.

(2) Have an ownership interest in or be a motor vehicle dealer or an employee of a motor vehicle dealer as defined in chapter 108 of Title 9.

(3) Be employed by an association of motor vehicle dealers, manufacturers, or distributors as defined in chapter 108 of Title 9.

Sec. 3. 19 V.S.A. § 5 is amended to read:

§ 5. TRANSPORTATION BOARD; POWERS AND DUTIES

* * *

(d) The board shall:

* * *

(11) enforce all provisions and hear and determine all disputes arising out of 9 V.S.A. chapter 108, the Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act.

(Committee vote: 5-0-0)

Reported favorably with recommendation of amendment by Senator Illuzzi for the Committee on Economic Development, Housing and General Affairs.

The Committee recommends that the bill be amended as recommended by the Committee on Transportation, with the following amendments thereto:

First: In Sec. 1, in 9 V.S.A. § 4091(a), after the words “cancellation of any franchise”, by inserting the following: by the manufacturer, and, after the words “by the franchisee”, by striking out the words “or by mutual agreement”

Second: In Sec. 1, in 9 V.S.A. § 4096(6), after “requirements of the manufacturer,” by striking out the word “and” and after the words “management of the new motor vehicle dealer”, by inserting , and the acquisition is not unreasonable in light of existing circumstances and striking out the words “For the purposes of this act, “reasonable facilities requirements” shall not include a requirement that a motor vehicle dealer establish or maintain exclusive facilities, personnel or display spaces.”

Third: In Sec. 1, in 9 V.S.A. § 4096(6)(B), after “requirements of the manufacturer.” by striking out the word “or” and after “management of the new motor vehicle dealer”, by inserting the words , or that the acquisition is not unreasonable in light of existing circumstances

(Committee vote: 4-0-1)

Reported favorably with recommendation of amendment by Senator Carris for the Committee on Finance.

The Committee recommends that the recommendation of amendment of the Committee on Transportation be amended as follows:

First: In Sec. 1, by striking out 9 V.S.A. § 4100c in its entirety and inserting in lieu thereof the following:

§ 4100c. FINANCING; VERMONT TRANSPORTATION BOARD
SPECIAL FUND

(a) The transportation board special fund is established in the state treasury and shall be administered by the secretary of transportation in accordance with the provisions of subchapter 5 of chapter 7 of Title 32, except that interest earned on the fund shall be retained in the fund. The fund shall be used only for transportation board costs and for administration and enforcement of the provisions of this chapter. The secretary of the agency of transportation may draw upon the fund for authorized payments.

(b) On July 1, 2010, and every two years thereafter, there is imposed a biennial fee upon each new motor vehicle dealer of \$60.00 for each dealer license held by that dealer, and there is imposed upon each manufacturer a biennial fee of \$600.00 for each line-make of new motor vehicles that the manufacturer sells or distributes within this state.

(c) Upon the filing of a protest under this chapter, the protesting party shall pay to the board a filing fee of \$1,500.00.

(d) The transportation board shall administer the fees imposed under this section, and the fees shall be deposited into the transportation board special fund.

Second: By adding a Sec. 1a to read as follows:

Sec. 1a. START-UP FEES FOR INITIAL FUNDING OF THE VERMONT
TRANSPORTATION BOARD SPECIAL FUND

For initial funding of the transportation board special fund created under chapter 108 of Title 9, start-up fees are imposed as follows: On July 1, 2009, there is imposed upon each new motor vehicle dealer a start-up fee of \$200.00 for each dealer license held by that dealer, and there is imposed upon each manufacturer a start-up fee of \$2,000.00 for each line-make of new motor vehicles that the manufacturer sells or distributes within the state. The transportation board shall administer the fees imposed under this section, and the fees shall be deposited into the transportation board special fund.

(Committee vote: 67-1-0)

Reported favorably by Senator Kitchel for the Committee on Appropriations.

(Committee vote: 7-0-0)

ORDERED TO LIE

H. 11

An act relating to the disposition of property upon death, transfer of interest in vehicle upon death, and homestead exemption.

Pending Action: Third reading of the bill.

CONFIRMATIONS

The following appointments will be considered by the Senate, as a group, under suspension of the Rules, as moved by the President *pro tempore*, for confirmation together and without debate, by consent thereby given by the Senate. However, upon request of any senator, any appointment may be singled out and acted upon separately by the Senate, with consideration given to the report of the Committee to which the appointment was referred, and with full debate; and further, all appointments for the positions of Secretaries of Agencies, Commissioners of Departments, Judges, Magistrates, and members of the Public Service Board shall be fully and separately acted upon.

Susan D. Plausteiner of Brownsville – Member of the Vermont Economic Development Authority – By Sen. Maynard for the Committee on Finance. (1/21)

Rachel Schumacher of North Bennington – Member of the Vermont Economic Development Authority – By Sen. Hartwell for the Committee on Finance. (1/21)

Steven J. Bourgeois of Swanton – Member of the Vermont Economic Development Authority – By Sen. Carris for the Committee on Finance. (1/28)

Thomas Pelletier of Montpelier – Member of the Vermont Housing Finance Agency – By Sen. Cummings for the Committee on Finance. (1/28)

Neale F. Lunderville of Burlington – Secretary of the Agency of Administration – By Sen. Flanagan for the Committee on Government Operations. (2/17)

Neale F. Lunderville of Burlington – Secretary of the Agency of Administration – By Sen. Flanagan for the Committee on Government Operations. (2/17)

Michael Welch of St. Johnsbury – Member of the Valuation Appeals Board – By Sen. McCormack for the Committee on Finance. (2/18/09)

David R. Coates of Colchester – Member of the Vermont Municipal Bond Bank – By Sen. Carris for the Committee on Finance. (2/18/09)

Sonia D. Alexander of Wilmington – Member of the Valuation Appeals Board – By Sen. Hartwell for the Committee on Finance. (2/25/09)

Paulette Thabault of South Burlington – Commissioner of the Department of Banking, Insurance, Securities and Health Care Administration – By Sen. Cummings for the Committee on Finance. (3/3/09)

Kathryn T. Boardman of Shelburne – Member of the Vermont Municipal Bond Bank – By Sen. Maynard for the Committee on Finance. (3/4/09)

John D. Burke of Castleton – Member of the Public Service Board – By Sen. Maynard for the Committee on Finance. (3/24/09)

Kenneth Linsley of Danville – Member of the Vermont Educational and Health Buildings Financing Agency – By Sen. Maynard for the Committee on Finance. (3/26/09)

Gary Moore of Bradford – Member of the Vermont State Colleges Board of Trustees – By Sen. Starr for the Committee on Education. (3/31/09)

Linda R. Milne of Montpelier – Member of the Vermont State Colleges Board of Trustees – By Sen. Doyle for the Committee on Education. (3/31/09)

Mark Young of Orwell – Member of the University of Vermont Board of Trustees – By Sen. Giard for the Committee on Education. (3/31/09)

Donald Collins of Swanton – Member of the State Board of Education – By Sen. Brock for the Committee on Education. (3/31/09)

Matthew F. Valerio of Proctor – Defender General – By Sen. Mullin for the Committee on Judiciary. (4/3/09)

Joseph C. Benning of Lyndonville – Chair, Human Rights Commission - By Sen. Sears for the Committee on Judiciary. (4/3/09)

Shelley J. Gartner of Rutland – Magistrate, Vermont Family Court - By Sen. Nitka for the Committee on Judiciary. (4/3/09)

Mary Gleason Harlow of Clarendon – Magistrate, Vermont Family Court – By Sen. Campbell for the Committee on Judiciary. (4/3/09)

Christine A. Hoyt of Tunbridge – Magistrate, Vermont Family Court – By Sen. Campbell for the Committee on Judiciary. (4/3/09)

INFORMATION NOTICE

The following item was recently received by the Joint Fiscal Committee:

JFO #2371 — \$825,845.40 grant from the Federal Emergency Management Agency (FEMA) to the Agency of Transportation. These grant funds will provide federal disaster assistance for damages to public facilities (state, local,

and non-profit) in Bennington and Windsor counties caused by the December 12, 2008 ice storm. [*JFO received 3/26/09*]