VERMONT

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Agency of Transportation

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To: House Committees on Commerce and Economic Development, on General, Housing and Military Affairs, and on Government Operations
Senate Committees on Economic Development, Housing and General Affairs and on Government Operations

From: Wanda Minoli, Commissioner, Department of Motor Vehicles

Date: December 22, 2021

Subject: Report on amendments to the motor vehicle manufacturers, distributors, and dealers franchising practices act; creation of a direct shipper license

In accordance with Act 63, section 5(b), the Department of Motor Vehicles created an email address to receive proposals for Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act. In accordance with Act 63, section 5(c), the Department of Motor Vehicles has gathered responses.

Four agencies provided proposals for amendments to the motor vehicle manufacturers, distributors, and dealers franchising practices act; creation of a direct shipper license. The agencies are as follows:

- American Consumer Institute Center for Citizen Research
- Consumers for Auto Reliability and Safety (CARS)
- Vermont Vehicle and Automotive Distributors Association (VADA)
- Alliance for Automotive Innovation.

Each proposal is attached to this report for consideration. Common points addressed in the proposals are as follows.

- The high prices dealers charge to manufacturers for parts and labor to address manufacturer recall issues trickles down to the consumer who ultimately must pay the same high prices for general vehicle maintenance and regular vehicle service.
- Allowing manufacturers to sell directly to consumers puts franchise dealers at a competitive disadvantage.
- Constraints manufacturers place on franchise dealers puts franchises at a competitive disadvantage in terms of earning a profit.

December 1, 2021

The Alliance for Automotive Innovation respectfully submits this document to the Vermont Department of Motor Vehicles pursuant to Act 63, of 2021, which directed the Department to solicit feedback on, and proposed amendments to, the Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act, Title 9, Part 4, Chapter 108.

Formed in 2020, the Alliance for Automotive Innovation (Auto Innovators) is the singular, authoritative, and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the United States, as well as major suppliers and other automotive technology companies.

Act 63 made the decision to split the automotive marketplace in Vermont into two groups. These groups compete for the same customers but are now governed by different laws. The first group includes our members, automobile manufacturers that have distributed vehicles in partnership with car dealers pursuant to sales and service agreements (commonly known as franchise contracts). Vermont law regulates almost every aspect of these contracts. The second group is comprised of competitors new market entrants that have never had contractual relationships with dealers. Vermont allows these manufacturers to be unencumbered by the burdens of the state's franchise law.

All automakers should compete under the same set of rules. That is what is best for competitive markets and the consumers who they serve. Auto Innovators has been in favor of laws that require all manufacturers to compete using franchised dealers. Those laws recognize the investments that manufacturers have made in their dealer networks over several decades, and most importantly, they treat all competitors equally. Auto Innovators opposed Act 63 because it did not treat competitors equally. If the Legislature and the Vermont Automobile Dealers Association do not support a rule requiring every manufacturer to compete within the franchise system, then the only fair course of action is for the state to allow every manufacturer the option choose whether it will continue to utilize the franchise system or shift to a direct sale model.

The attached proposed amendments to Chapter 108 would grant that same flexibility to all manufacturers that Act 63 previously reserved only for a select few favored manufacturers. The amendments also address some of the areas of the existing franchise code that unreasonably hinder the ability of automakers to compete.

In considering the changes proposed by Auto Innovators or any other stakeholder, the Legislature should understand that there are many myths about the need for automobile franchise laws.

Myth # 1: *Dealers need protection from their own manufacturers*

Manufacturers and dealers depend on the mutual success of both sides in order to be successful in the franchise system. Auto manufacturers and dealers operate in a competitive marketplace where they compete for the loyalty of the consumer. It is in the interest of the manufacturer to ensure that the dealer – the entity closest to the consumer – is in the best position possible to provide a positive and productive sales and service environment for the consumer, such that they are likely to buy the same brand of vehicle again.

Manufacturers spend billions on the research, design, and production of vehicles to attract customers; it is one of the most competitive marketplaces in our economy. Manufacturers also spend significant resources in both money and time to ensure that dealers succeed in meeting the expectations of the consumer in that competitive market. For example, manufacturers employ personnel to assist dealers in meeting service and sales goals, which include assistance in training new dealers, auto technicians, sales, parts, and finance personnel. Manufacturers also provide financial assistance to dealers with favorable inventory support, advertising money, consumer and dealer incentives, market research, and assistance in making capital improvements to the dealership.

Dealers have been successful in working with manufacturers. Today, they are enjoying a time of record prosperity. As recently noted by *Automotive News*:

> *According to the National Automobile Dealers Association, the average U.S. dealership recorded net pretax profit of $3 million through September. That was more than double the $1.3 million in net pretax profit reported for the first nine months of 2020. And it's already well above the $2.1 million in net pretax profit recorded for the average dealership for all of 2020, which itself was an all-time record annual profit.*[1]

Dealers do not need state governments to intervene on their behalf. Dealers are among the most competent, sophisticated, and hardworking businesspeople among any industry and rely not on the government for their success but on their own ability to compete in the marketplace, and their profitability is evidence of that. Dealers do not need protection from manufacturers because the two have been profitable together and rely upon each other's mutual success to continue to be profitable.

Myth #2: *Franchise law is needed to prevent unreasonable behavior by manufacturers*

Dealer associations will often argue that manufacturers behave unfairly, and thus legislation is necessary to protect local dealers. That argument is flawed for two reasons. First, the threat of harm is illusory. As a 2010 Gonzaga Law Review article explains, it would be irrational for a manufacturer to treat dealers unfairly:

> *Even the perception that a manufacturer is unfair could lead to reduction of the value of the brand as a whole and the value of future and existing dealerships. As a result, dealers would not continue to invest in dealerships and give poor service to customers, outcomes that manufacturers certainly do not want. The fact that there was no shortage of dealer applicants before the passage of the state dealer acts supports that manufacturers were not acting opportunistically towards dealers; otherwise, it would be expected that would-be dealer applicants would be wary of investing in a dealership if it could be taken away on a whim.*[2]

Manufacturers look to partner with those individuals and businesses that will give them the best chance of maintaining or growing market share. Consequently, manufacturers "compete" against one another for the best dealer candidates that can demonstrate and ability to meet its sales and service goals. Likewise, individuals, businesses, and current dealers compete to "win" the franchise of a particular manufacturer because of the potential for significant profit.

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[1] Muller, David. "Average dealership profit on pace to shatter 2020 record, NADA data shows." Automotive News, Nov. 10, 2021. *Available at*: https://www.autonews.com/retail/why-average-dealership-profits-are-setting-new-records.

[2] McMillian, Carla Wong, *What Will it Take to Get You in A New Car Today?* 45 Gonzaga Law Review 67, 90-91 (2010).

Second, the state does not need to protect dealers from the illusory threat of unreasonable treatment of dealers by manufacturers because there are already dispute resolution mechanisms in the contracts that dealers voluntarily sign. Typically, a dealer that is seeking the resolution of a complaint will at first bring the matter to the manufacturer's regional sales or service representative that is assigned to assist the dealership. Other avenues for redress include manufacturer personnel in its US corporate office or to a fellow dealer who serves as a representative on the joint manufacturer-dealer councils that most manufactures utilize. Dealer franchise agreements also typically include arbitration as a low-cost method for resolving disputes. Finally, should all these avenues prove unsuccessful, a dealer has the option of utilizing state and federal courts for a breach of contract action or any other business lawsuits.

Myth #3: *Franchise law is needed to protect consumers*

Franchise laws are not consumer protection laws; they are solely written to benefit automobile retailers. If anything, franchise laws are harmful for consumers because they add cost and make it cumbersome for manufacturers to actively compete for consumers' business.

The Vermont Automobile Dealer Association alleged in its February 16, 2021, testimony that manufacturers have a "disincentive" to pay for repairs made under a manufacturer's warranty. The fact is that manufacturers have both a legal and a practical motivation to see to it that work under warranty is done and done correctly. First, the warranty is governed by the Magnuson-Moss Warranty Act and the Vermont Lemon Law, both of which include obligations on the warrantor and remedies for consumers.[3] [4] Second, customer loyalty is critical in the competitive automobile marketplace. Manufacturers have no incentive to risk losing a lifelong customer. Indeed, manufacturers oftentimes voluntarily pay for "goodwill repairs" on vehicles even though there is no legal obligation to do so. The myth of the opportunistic manufacturer is illogical.

Conclusion

Often the proponents of franchise bills present them to legislators as a choice between local dealers and out-of-state manufacturers. However, it is more often a choice between *consumers and dealers,* as consumers are the ones ultimately forced to pay for these legal mandates that yield higher repair bills and higher purchase prices.

It is in this light that we are appreciative for the opportunity to provide our views for the Legislature's consideration.

Respectfully submitted,

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[3] 15 U.S.C. § 2301 *et seq*.

[4] Vermont Statutes Title 9, Part 4, Chapter 115.

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Ensure Equal Treatment Under Law for All Automakers in Selling Vehicles

EXPLANATION: The amendment highlighted in red below address the problems of unequal treatment in selling vehicles in the state. Vermont law allows some favored manufacturers to sell vehicles directly to consumers, without incurring the inflexibilities and costs of compliance with the franchise code. Competitors in the same marketplace should be treated equally under the law. The Legislature determined when it passed SB 47 that certain manufacturers could both operate dealerships and warranty repair centers, and this was supported by the Vermont Automobile Dealers Association. The Legislature should grant that same flexibility to all manufacturers instead of treating competitors differently. Consumers benefit from companies competing for consumers' business. Manufacturers competing on a level playing field in the eyes of the law would be better for competition than unequal treatment by a bifurcated system of regulation.

PROPOSED AMENDMENT: 9 § 4085

(13) "New motor vehicle dealer" means any person 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, is not affiliated by ownership or control with a franchisor, and is engaged in the business of any of the following with respect to new motor vehicles ~~or the parts and accessories for those new motor vehicles~~:

(A) selling, or leasing;

(B) offering to sell, or lease; or

(C) soliciting, or advertising the sale or lease.~~; or.~~

~~(D) offering through a subscription or like agreement.~~

…

(18) "~~Non-franchised~~ ~~z~~Zero-emission vehicle manufacturer-retailer" means a manufacturer that:

(A) ~~only~~ manufacturers zero-emission vehicles, including plug-in electric vehicles as defined in 23 V.S.A. §4(85);

(B) ~~only~~ sells or leases directly to consumers new or used zero-emission vehicles that it manufactures, assembles, or imports for distribution, or vehicles that have been traded in in conjunction with a new zero-emission vehicle sale, or provides service on zero-emission vehicles that it manufactures, assembles, or imports for distribution; and

~~(C) does not currently sell or lease, and has never sold or leased, motor vehicles in Vermont through a franchisee;~~

~~(D) has not sold or transferred a combined direct or indirect ownership interest of greater than 30 percent in such non-franchised zero-emission vehicle manufacturer to a franchisor, subsidiary, or other entity controlled by a franchisor or has not acquired a combined direct or~~

~~indirect ownership interest of greater than 30 percent in a franchisor, subsidiary, or other entity controlled by a franchisor; and~~

(E) is a dealer registered pursuant to 23 V.S.A. chapter 7, subchapter4. A zero-emissions manufacturer-retailer shall be eligible to register as a dealer under 23 V.S.A. chapter 7, subchapter 4.

Proposed Amendment: 9 § 4097

(8)(A) To compete with a new motor vehicle dealer in the same line make operating under an agreement or franchise from the aforementioned manufacturer in the State within the dealer's relevant market area.

(B) For purposes of this subdivision (8), any manufacturer ~~that is not a non-franchised zero-emission vehicle manufacturer~~ competes with a new motor vehicle dealer if it engages in the retail business of any of the following with respect to new motor vehicles ~~or the retail sale of parts and accessories for those new motor vehicles~~ that are not zero-emission vehicles or plug-in electric vehicles as defined in 23 V.S.A. § 4(85) that the manufacturer manufactured, assembled, or imported for distribution:

(i) selling or leasing;

(ii) offering to sell or lease; or

(iii) soliciting or advertising the sale or lease.~~; or~~

~~(iv) offering through a subscription or like agreement.~~

(C) 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 that 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.

(D) A zero emissions manufacturer-retailer shall not be deemed to be competing when operating a dealership that exclusively sells or leases, or offers to sell or lease, or solicits or advertises the sale or lease of zero emission vehicles of a line-make that the manufacturer manufactures, assembles, or imports for distribution.

(E) A manufacturer shall not, however, be deemed to be competing if it engages in the business of offering, through a subscription or like agreement, motor vehicles to retail customers.

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Protecting Consumer Access to Competitive Marketplace for Vehicle Parts

EXPLANATION: The amendment highlighted in red below address the problems of unequal treatment in selling automobile parts and accessories directly to consumers.

Franchise law governs franchise contracts and related agreements about the sale and service of automobiles through dealers. The distribution of manufacturer-branded parts and accessories is distinct. Dealers sell those parts and accessories, but they do not have an exclusive right to that and do not compete alone in that market. Independent auto parts stores and independent repair shops sell manufacturer-branded parts and accessories. SB 47 took the extraordinary step of prohibiting manufacturers from selling parts and accessories if they so choose. If a manufacturer wished to sell parts and accessories to a consumer, there should be no problem with that. The Vermont franchise law harms consumers by limiting their access to parts and accessories.

PROPOSED AMENDMENT: 9 § 4085

(13) "New motor vehicle dealer" means any person 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, is not affiliated by ownership or control with a franchisor, and is engaged in the business of any of the following with respect to new motor vehicles ~~or the parts and accessories for those new motor vehicles~~:

(A) selling, or leasing;

(B) offering to sell, or lease; or

(C) soliciting, or advertising the sale or lease.~~; or.~~

~~(D) offering through a subscription or like agreement.~~

…

(18) "~~Non-franchised~~ ~~z~~Zero-emission vehicle manufacturer-retailer" means a manufacturer that:

(A) ~~only~~ manufacturers zero-emission vehicles, including plug-in electric vehicles as defined in 23 V.S.A. §4(85);

(B) ~~only~~ sells or leases directly to consumers new or used zero-emission vehicles that it manufactures, assembles, or imports for distribution, or vehicles that have been traded in in conjunction with a new zero-emission vehicle sale, or provides service on zero-emission vehicles that it manufactures, assembles, or imports for distribution; and

~~(C) does not currently sell or lease, and has never sold or leased, motor vehicles in Vermont through a franchisee;~~

~~(D) has not sold or transferred a combined direct or indirect ownership interest of greater than 30 percent in such non-franchised zero-emission vehicle manufacturer to a franchisor, subsidiary, or other entity controlled by a franchisor or has not acquired a combined direct or~~

~~indirect ownership interest of greater than 30 percent in a franchisor, subsidiary, or other entity controlled by a franchisor; and~~

(E) is a dealer registered pursuant to 23 V.S.A. chapter 7, subchapter4. A zero-emissions manufacturer-retailer shall be eligible to register as a dealer under 23 V.S.A. chapter 7, subchapter 4.

Proposed Amendment: 9 § 4097

(8)(A) To compete with a new motor vehicle dealer in the same line make operating under an agreement or franchise from the aforementioned manufacturer in the State within the dealer's relevant market area.

(B) For purposes of this subdivision (8), any manufacturer ~~that is not a non-franchised zero-emission vehicle manufacturer~~ competes with a new motor vehicle dealer if it engages in the retail business of any of the following with respect to new motor vehicles ~~or the retail sale of parts and accessories for those new motor vehicles~~ that are not zero-emission vehicles or plug-in electric vehicles as defined in 23 V.S.A. § 4(85) that the manufacturer manufactured, assembled, or imported for distribution:

(i) selling or leasing;

(ii) offering to sell or lease; or

(iii) soliciting or advertising the sale or lease.~~; or~~

~~(iv) offering through a subscription or like agreement.~~

(C) 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 that 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.

(D) A zero emissions manufacturer-retailer shall not be deemed to be competing when operating a dealership that exclusively sells or leases, or offers to sell or lease, or solicits or advertises the sale or lease of zero emission vehicles of a line-make that the manufacturer manufactures, assembles, or imports for distribution.

(E) A manufacturer shall not, however, be deemed to be competing if it engages in the business of offering, through a subscription or like agreement, motor vehicles to retail customers.

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Ensure Consumer Access to Competitive Marketplace on Vehicle Subscriptions.

EXPLANATION: The amendment highlighted in red below address the problems of unequal treatment in offering subscription services to consumers. Vehicle subscriptions are a new vehicle usage model that has been created to meet changing consumer preferences. Market research shows that some consumers may want to avoid the costs associated with owning and maintaining a vehicle, but still want the freedom to use a vehicle of their choice without having to rent or lease one. In return for a subscription fee, the consumer is granted access to a variety of vehicles to use for a certain term. Importantly, as a feature of some of these programs a consumer may be able to select different vehicles to drive for parts of their subscription term – for example, a fuel-efficient vehicle for their regular weekday commute but an all-wheel drive vehicle for the winter months. Typically, the subscription provider pays all insurance, service, and registration costs, while the consumer is usually only responsible for fuel or charging. At present there are a number of different businesses exploring whether this is a viable business model, including both automobile dealers and automakers.

As part of the amendments made to Vermont's franchise laws earlier this year, most automakers would now be prohibited from offering this product to consumers. To specifically eliminate auto manufacturers from this marketplace stifles innovation, and only harms Vermont consumers by potentially eliminating choice and increasing costs.

PROPOSED AMENDMENT: 9 § 4085

(13) "New motor vehicle dealer" means any person 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, is not affiliated by ownership or control with a franchisor, and is engaged in the business of any of the following with respect to new motor vehicles ~~or the parts and accessories for those new motor vehicles~~:

(A) selling, or leasing;

(B) offering to sell, or lease; or

(C) soliciting, or advertising the sale or lease.~~; or.~~

~~(D) offering through a subscription or like agreement.~~

…

(18) "~~Non-franchised~~ ~~z~~Zero-emission vehicle manufacturer-retailer" means a manufacturer that:

(A) ~~only~~ manufacturers zero-emission vehicles, including plug-in electric vehicles as defined in 23 V.S.A. §4(85);

(B) ~~only~~ sells or leases directly to consumers new or used zero-emission vehicles that it manufactures, assembles, or imports for distribution, or vehicles that have been traded in in conjunction with a new zero-emission vehicle sale, or provides service on zero-emission vehicles that it manufactures, assembles, or imports for distribution; and

~~(C) does not currently sell or lease, and has never sold or leased, motor vehicles in Vermont through a franchisee;~~

~~(D) has not sold or transferred a combined direct or indirect ownership interest of greater than 30 percent in such non-franchised zero-emission vehicle manufacturer to a franchisor, subsidiary, or other entity controlled by a franchisor or has not acquired a combined direct or indirect ownership interest of greater than 30 percent in a franchisor, subsidiary, or other entity controlled by a franchisor; and~~

(E) is a dealer registered pursuant to 23 V.S.A. chapter 7, subchapter4. A zero-emissions manufacturer-retailer shall be eligible to register as a dealer under 23 V.S.A. chapter 7, subchapter 4.

Proposed Amendment: 9 § 4097

(8)(A) To compete with a new motor vehicle dealer in the same line make operating under an agreement or franchise from the aforementioned manufacturer in the State within the dealer's relevant market area.

(B) For purposes of this subdivision (8), any manufacturer ~~that is not a non-franchised zero-emission vehicle manufacturer~~ competes with a new motor vehicle dealer if it engages in the retail business of any of the following with respect to new motor vehicles ~~or the retail sale of parts and accessories for those new motor vehicles~~ that are not zero-emission vehicles or plug-in electric vehicles as defined in 23 V.S.A. § 4(85) that the manufacturer manufactured, assembled, or imported for distribution:

(i) selling or leasing;

(ii) offering to sell or lease; or

(iii) soliciting or advertising the sale or lease.~~;~~ ~~or~~

~~(iv) offering through a subscription or like agreement.~~

(C) 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 that 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.

(D) A zero emissions manufacturer-retailer shall not be deemed to be competing when operating dealership that exclusively sells or leases, or offers to sell or lease, or solicits or advertises the sale or lease of zero emission vehicles of a line-make that the manufacturer manufactures, assembles, or imports for distribution.

(E) A manufacturer shall not, however, be deemed to be competing if it engages in the business of offering, through a subscription or like agreement, motor vehicles to retail customers.

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Revise Automaker Warranty Payment Calculations and Audits

RATIONALE: Automakers are required to pay auto dealers to perform warranty service for the duration of that warranty. Vermont law also stipulates how much automakers must pay their dealers for this work as part of the franchise code. Automakers are typically the largest volume purchaser of service work at a dealership. Manufacturers provide a steady stream of business for which the dealer does not need to market or have any fear of losing. Yet not only do manufacturers not get a rate discount for the volume of work it provides throughout the year, they are also forced to pay the highest rate that a dealer can calculate.

As the warranty rate calculation is derived from the average of costs charged to a dealer's non-warranty customers, existing law creates an incentive for dealers to charge the highest possible rates that a consumer will bear, so that a dealer can also force the manufacturer to pay this inflated rate.

Automakers already pay dealers rates for parts and labor that are profitable for the dealer. The theory behind this law is that warranty work should be even more profitable for dealers than it already is. This section is the costliest part of the franchise code, and it ensures that both automakers and consumers pay the highest rate the market will sustain, all to the benefit of dealer profit margins. This creates a competitive disadvantage for automakers bound by law to the existing franchise system. The new market entrants are permitted to do repairs at cost at facilities they operate, or they can contract with third parties to do the work at negotiated rates. The amendment highlighted in red below would amend the existing warranty calculation remove the incentive for dealers to over-charge non-warranty customers as a means to receive higher warranty payments from automakers.

Additionally, the existing law caps the period under which an automaker can audit dealer warranty claims to ensure all accounts were paid properly. This amendment would also extend the period from one year to two years for automaker audits.

Finally, this amendment addresses a confusing reference in (d) to recall notices. It requires manufacturers to include the expected date by which parts and equipment will be available at dealerships to remedy the problem, but that information may not be known at the time the recall notice is sent. It is unnecessary for the franchise code to address this because recall notices are governed by federal law (49 CFR § 577.7).

PROPOSED AMENDMENT: 9 § 4086

(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 amounts not less than the 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.

(e) All claims made by new motor vehicle dealers pursuant to this section for labor and parts shall be paid within 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~~ improper, unnecessary, false, or unsubstantiated claims for a period of two years following payment. A manufacturer retains the right to charge back the dealer for fraudulent claims in accordance with the statute of limitations under 12 V.S.A. chapter 23. All claims shall be either approved or disapproved within 45 days after their receipt on forms and in the manner specified by the manufacturer, and any claim not specifically disapproved in writing within 45 days after the receipt shall be construed to be approved and payment must follow within 45 days. No claim that 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~~ two years 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, improper, 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:

(1) on an emergency or interim basis;

(2) 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; or

(3) if the manufacturer is a ~~non-franchised~~ zero-emission vehicle manufacturer-retailer that directly owns, operates, and controls the warranty or service facility that only services zero-emission vehicles, including plug-in electric vehicles as defined in 23 V.S.A. § 4(85).

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Ensure Reasonableness Standard in Facility Renovations

RATIONALE: The franchise business model is at its heart a partnership. An automaker contracts with an independent business to grant it the authority to sell its vehicles, while an auto dealer agrees to conduct their business in the form and process as directed by the automaker for this special privilege. As part of the arrangement, auto dealers agree to certain facility requirements to ensure that the automaker's brand is protected and that a customer gets an experience that the automaker expects regardless of which of the automakers' many dealerships it chooses to enter. That is the agreement that dealers are signing up for to be given their protected status to sell that product.

From time to time, an automaker may want to see its dealer body update their facilities. This could be either for brand image changes, technology changes for selling vehicles, or other reasons. Existing Vermont law requires an automaker to provide added financial justification for these changes, but the standard is illogical. It is based on whether the manufacturer provides written assurance that sufficient supply of vehicles to justify the change. The dealer's profitability is dependent on its selling, servicing, and financing of vehicles, and a manufacturer cannot provide a written assurance of that profitability. Instead, the standard that the franchise law should apply is "reasonableness" because it covers every relevant consideration. The amendment highlighted in red below would specify that an alteration to a facility must meet a standard of reasonableness.

PROPOSED AMENDMENT: 9 § 4096

(9) to change the location of the dealership or to make any substantial alterations to the dealership premises or facilities ~~in the absence of written assurance from the manufacturer or distributor of a sufficient supply of new motor vehicles to justify the change in location or the alterations~~ if the change in location or substantial alteration would be unreasonable.

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Fixing System of Vehicle Allocation

RATIONALE: One of the complex calculations that any automaker must make is how to fairly allocate the vehicles that it manufacturers to the thousands of dealers around the country that order them. It governed by a system known as "turn & earn," which is designed to be the most equitable way of allocating vehicles. This system looks at how many vehicles the dealer has in its inventory and how fast it is selling vehicles. From that, a number of days of vehicle inventory can be calculated. The turn & earn system allows dealers to maintain the same number of days of inventory, and thus be treated fairly, relative to each other.

Current law complicates this equitable system, and requires that inventory be disbursed with a focus on facility size and sales potential in its area. While this sounds like it accomplishes the goal, it could result in inventory going to places where it does not efficiently meet consumer demand. Moreover, it could see some dealers disadvantaged with respect to other dealers. In a year when vehicle supply chains are already strained, it is even more important to work to keep all dealers on an equal footing, as is the goal behind the "turn & earn" model. This amendment highlighted in red below would eliminate this problematic language.

PROPOSED AMENDMENT: 9 § 4097

(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, or parts or accessories to new vehicles as are covered by such franchise, if such vehicle, parts, or 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.

…

Alliance for Automotive Innovation
Suggested changes to the Vermont Franchise Code
Title 9, Part 4, Chapter 108

Delete Existing Right of First Refusal Prohibition

RATIONALE: A Right of First Refusal (ROFR) provision is a common clause in many business-to-business contracts. In the context of automobile franchise law, it is particularly important due to the fact that each dealership point is critical. It is very difficult under franchise laws to add a new point or replace an existing dealer, so manufacturers are very careful with whom they partner. Importantly, ROFR can be used by an automaker to ensure its dealer-body is diverse and inclusive and help ensure historically marginalized or discriminated populations have an equal opportunity to potentially own a store. It can also be used, for example, to protect against a single dealer group owning too dominant a slice of the marketplace in a particular area, which is bad for competition.

Existing Vermont law precludes manufacturers from requiring a dealer consent to a right of first refusal (ROFR) provision within their contractual agreements. But it is clear that the existing law contemplates that ROFR could be used because there is a section dedicated to its use, 9 § 4100e. The amendment highlighted in red below would delete the existing prohibition.

PROPOSED AMENDMENT: 9 § 4097

(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; or

(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.~~

Corporate Welfare: How Automobile Dealership Franchise Regulations Cost Consumers an Additional $48 Billion Annually

Steve Pociask[1]

This ConsumerGram explores the consequences of various state laws written to advantage automobile dealer franchises. Because many of these laws work to increase vehicle costs and set geographic restrictions that limit price competition, they serve to transfer income from the buying public to dealerships. Specifically, this ConsumerGram finds that American consumers collectively pay $47.5 billion more per year on the purchase of new automobiles due to regulations that limit dealership competition. Because there is a host of other dealer-friendly laws being enacted and proposed, the total harm to consumers is likely to be much higher than measured here. This raises a question -- why do state legislatures act to advantage already profitable businesses at the expense of consumers?

Regulation and Protection

Not long after automobiles reached the mass market, manufacturers experimented with different distribution models, eventually settling on dealership franchises as the channel of choice. The resulting contractual arrangements between dealerships and manufacturers were, and still are, mutually beneficial in that both parties require each other to be successful and profitable in order to insure their own success.

Early on, the automobile manufacturing industry began to consolidate from more than one hundred carmakers, eventually reaching three major domestic producers by the 1920s. Over the ensuing decades, some franchise owners expressed concerns that carmakers had market power that could provide negotiating and operational leverage over small franchised

[1] Steve Pociask is president of the American Consumer Institute, Center for Citizen Research, a nonprofit 501c3 educational and research institute. For more information, visit www.theamericanconsumer.org.

dealerships.[2] Some dealerships also argued that major investments in showrooms and an inventory of cars could tie up capital and make dealerships vulnerable to short term market fluctuations and demands by major manufacturers.

In the decades to follow, states began enacting laws to protect local franchises from alleged abuses by automobile manufacturers. In 1956, a federal law was established to limit manufacturers from terminating dealerships and preventing dealers from being forced to purchase vehicles from manufacturers. When this federal law was enacted, 20 states had already similar laws in place. Since then, state regulatory protections for automobile dealer franchises became the norm. What started as a voluntary agreement between manufacturers and dealerships as their sales channels is now a regulatory requirement.[3]

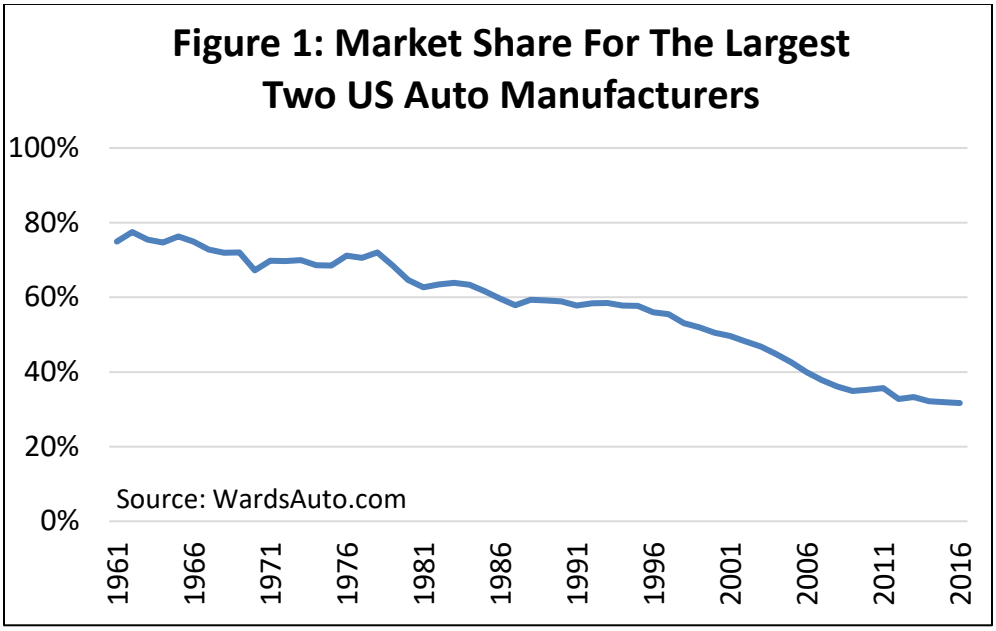
No Evidence of Market Failure to Justify State Regulations

The interdependence between manufacturers and dealerships require that both be successful. Without profitable dealerships, manufacturers cannot sell their products. That was true fifty years ago and that is still true today. This means that there really is no incentive for manufacturers to squeeze dealerships, since that would cause dealers to exit the market and reduce car sales at the financial loss of manufacturers. Moreover, what prospective dealerships would want to enter a market if the prospects for success were low? Given the mutually beneficial relationship between franchises and carmakers, the argument that manufacturers have incentives to exert an unfair advantage over dealerships would appear to be hyperbole by those seeking favorable legislation and not based on sound microeconomic thought.

While some older arguments point to the hypothetical risks from market concentration and high capital-intensity, these arguments lack any empirical support today. For one, the vehicle manufacturing market is no longer concentrated. As **Figure 1** (below) shows, the top two manufacturers have seen their combined market share fall from nearly 80 in the early

[2] Francine Lafontaine and Fiona Scott Morton, "State Franchise Laws, Dealer Terminations, and the Auto Crisis," *Journal of Economic Perspectives*, 24:3, 2010.
[3] "State Franchise Law Carjacks Auto Buyers," Mercatus Center, George Mason University, January 20, 2015.

sixties to 30% today, as nearly twenty foreign manufacturers now successfully compete in the U.S. market. In other words, it is a competitive industry. Moreover, the capital-intensity of industries is a cost of doing business and one that is hardly unique to car dealerships.[4] Most importantly, there is no evidence of market failure to justify government interference.



Welfare for the Rich?

While there is no market failure that would warrant a government remedy, some might portray car dealerships as financially struggling small businesses that urgently need the government's help to succeed. However, the empirical evidence shows that, collectively, dealerships are financially sound, averaging about 30% return on equity for domestics.[5] In fact, there have been a handful of billionaire car dealers, several owning NFL and other major sports teams.[6] Opportunities for high profits is one reason why billionaire Warren Buffett purchased a

[4] Comparing automobile manufacturing to the retail segment "motor vehicles and parts dealers," shows manufacturers spend twice the capital as a percent of value-added output than dealers, according to Gross Product Originating data, Bureau of Economic Analysis at https://www.bea.gov/industry/gdpbyind_data.htm.
[5] "Dealership Financial Profits," National Automobile Dealers Association, Domestic Dealership Profile, November 2017, https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474853576.
[6] "Forbes 400," *Forbes*, at https://www.forbes.com/forbes-400/list/#version:static_industry:Automotive, accessed online on February 4, 2018; and "Billionaires list confirms it: There's money in the car biz," *Automotive News*, March 11, 2013.

car dealership that operates in seven states, making the seller of that transaction yet another billionaire car dealer.[7]

Meanwhile, the automobile manufacturing industry has not managed to reach 8% or more in profits in any year during the last decade, a rate reportedly insufficient to recover its return on capital.[8] Because state laws make little distinction between large and small dealers or between wealthy or less wealthy dealers, the focus of these laws is not to help the "little guy." Instead, dealership-friendly legislation represents welfare for the rich at the expense of consumers because they ultimately push car prices higher.

Government Failure: The Spread of Regulations

Arguments that dealerships need help are weak at best, but the regulations justified by these arguments persist. In fact, despite the lack of empirical evidence support, state legislatures have continued to pass laws favoring dealerships. From 1979 to 2014, laws protecting dealerships from termination increased from 45 states to all 50 states; franchise licensing protection laws for dealers increased from 44 states to 50 states; laws preventing manufacturers from forcing dealers to accept deliveries of vehicles increased from 37 states to 48 states; and exclusive territory protection laws for dealers increased from 27 states to 49 states.[9] Today, all states have passed dealership-friendly franchise regulations, including laws that give automobile dealerships territorial exclusivity and encroachment protections from competition.

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[7] Brendan Coffey, "This Car Dealer Turned Billionaire Got a Little Help from Buffet," *Bloomberg*, September 24, 2015; and Amarendra Bhushan Dhiraj, "5 Billionaire Car Dealers; Would You Buy a Car from Warren Buffett?" *CEOWORLD Magazine*, October 3, 2014.

[8] Rich Parkin, Reid Wilk, Evan Hirsh and Akshay Singh, "2017 Automotive Trends: The Future Will be Rocky for Auto Companies Unable to Improve Returns on Capital," PwC, Strategy& Group, 2018, downloadable at https://www.strategyand.pwc.com/media/file/2017-Automotive-Industry-Trends.pdf.

[9] "State Franchise Law Carjacks Auto Buyers," Mercatus Center, George Mason University, January 20, 2015; and Francine Lafontaine and Fiona Scott Morton, "State Franchise Laws, Dealer Terminations, and the Auto Crisis," *Journal of Economic Perspectives*, 24:3, 2010 (also see an updated appendix accessed on January 20, 2015, at https://assets.aeaweb.org/assets/production/articles-attachments/jep/app/2403_morton_app.pdf).

Territorial exclusivity laws protect dealerships by establishing monopoly market areas that work to reduce intra-brand rivalry. These laws limit market entry and effectively reduce price competition between dealers selling the same brands and models, thereby leading to higher consumer prices and increased dealership profits. By constraining entry and exit, the market is less able to adjust to swings in demand and less able to maximize economies of scale and scope. This adversely effects operational efficiency, and it raises per unit costs and consumer prices.

While the economic theory on entry barriers is clear, so is the empirical evidence. One 2015 econometric study found "relatively strong" intra-brand price effects associated with the geographic distribution of dealerships.[10] For example, the study estimated that the price of a Honda Accord would increase by $220 and by $500 when dealers were 10 and 30 miles apart, respectively. In other words, state laws that protect dealerships by allowing territory exclusivity work to increase consumer prices for new vehicles, as well as increase dealership profitability. Economic theory finds that monopoly performance leads to increased consumer prices and profits, as well as restricted industry output and decreased consumer welfare.[11]

Along with exclusive territories and market entry barriers, as noted earlier, state laws have been in place that constrain dealership termination. Generally, state laws do not consider gross inefficiency or financial conditions as potential grounds for termination. Even when good cause for determination can be found, many states provide dealerships time to remedy shortfalls, making termination difficult and costly for manufacturers. Usually, termination requires manufacturers to buy-back unsold cars, as well as parts, accessories, tools and equipment, which further raises the cost for manufacturers.[12] Because state laws impede

[10] T. Randolph Beard, George Ford, Lawrence Spiwak, "The Price Effects of Intra-Brand Competition in the Automobile Industry: An Econometric Analysis, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Policy Paper No. 48, March 2015.

[11] Consumer welfare is an economic measure of consumer benefits. The welfare decrease noted here includes allocative inefficiencies referred to as the *deadweight loss* to society.

[12] Francine Lafontaine and Fiona Scott Morton, "State Franchise Laws, Dealer Terminations, and the Auto Crisis," *Journal of Economic Perspectives*, 24:3, 2010.

dealership entry and exit, market forces are not present to determine the optimal number of competitors in any given market and do not determine the most efficient size of dealership operations – yet another cost facing manufacturers, ultimately recovered in consumer prices.

Besides selling new vehicles and trading used vehicles, dealerships can profit many other ways. Manufacturers' warranties provide guaranteed business to dealerships, as well as providing additional traffic to showrooms. While manufacturers' warranties provide dealerships reimbursement for labor and parts, many state laws allow for high markups on reimbursement. In some cases, these markups can nearly double the price of parts, providing handsome profits to dealerships.[13] While these laws increase the reimbursement costs for manufacturers and ultimately automobile prices, these markups also create an incentive for much higher list prices for parts and services. That, in turn, means that consumers will face much higher prices when going to dealerships for services and repairs not covered under warranty.

The recall business is a "golden opportunity for car dealers to make money."[14] Besides profiting from recall reimbursement by manufacturers, dealers can also profit from additional customer services and additional showroom traffic. Yet, some states are considering laws to eliminate risks and downside to dealers. These laws propose additional payments (or interest fees) from manufacturers to franchises when cars sit on a dealer lots during recalls. These car dealer protections are costly for consumers and call into question why consumers should not be allowed to bypass dealerships altogether when buying new vehicles.

In this regard, most state laws prohibit consumers from buying directly from manufacturers, instead requiring dealerships to be the exclusive sales channel for manufacturers. Regarding prohibitions of direct-to-consumer sales, the FTC staff has written that these state laws are both anticompetitive and bad for consumers:

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[13] Some urge dealerships to increase their markups and lobby state laws for higher reimbursements. See Leonard A. Bellavia, "Get What's Yours: Don't Be Afraid to Seek Higher Factory Repayment for Warranty Parts," *Fixed Ops Journal*, June 2017, p. 43.

[14] Lindsay Chappell, "There is Big Money in the Recall Crisis," *Automotive News*, April 11, 2016.

> *"A fundamental principle of competition is that consumers – not regulation – should determine what they buy and how they buy it. Consumers may benefit from the ability to buy cars directly from manufacturers – whether they are shopping for luxury cars or economy cars. The same competition principles should apply in either case."*[15]

There are other laws that help dealerships at the expense of manufacturers and therefore consumers. Most states forbid manufacturers from forcing new vehicles on dealerships, prohibiting different treatment between dealerships operating within the same state that would otherwise drive out inefficiency, preventing different treatment between dealerships operating in different states, and requiring manufacturer incentives for dealership facility improvements whether improvements are ever made. Again, these provisions are costly for manufacturers, who can only recovery these costs by raising vehicle prices.

Despite the lack of empirical evidence showing market failure, state laws continue to be enacted that favor often well-heeled car dealers at the expense of car buyers. Contrary to the public interest, these state laws work to transfer income from consumers to car dealers.

Evidence of the Impact on Consumer Prices

A study by staff at the Federal Trade Commission (FTC) looked at restrictions on territorial and market entry, and empirically found that these regulations served to reduce competition – pushing up consumer prices in 1978 by 7.63% in markets with increasing populations and 6.14% overall.[16] By the study's admission, these estimates significantly understate the negative impact that regulations have on consumers costs. In addition, this study does not consider the costs of other state laws favoring dealers over consumers and manufacturers, which has grown significantly in the last decades. Also, since 1978, the U.S.

[15] Marina Lao, Debbie Feinstein and Francine Lafontaine, "Direct-to-Consumer Auto Sales: It's Not Just about Tesla," Federal Trade Commission, May 11, 2015.
[16] Robert P. Rogers, "The Effect of State Entry Regulation on Retail Automobile Markets," Federal Trade Commission, Bureau of Economics Staff Report, January 1986.

population has grown substantially, making competitive restrictions on relevant market areas substantially costlier than observed in the study.

Besides ignoring the many different franchise regulations that have been enacted, the political process produces other costs, commonly referred to as *rent-seeking*. Rent-seeking occurs when some economic entities (such as dealerships and manufacturers) expend political and lobbying resources to obtain or prevent economic gains that create no additional wealth or economic benefit for society.[17] While the study acknowledges that they did not include the historical costs associated with "rent-seeking" by dealers and others who spent funds to influence state and local politicians, the decades of accumulating and sweeping legislative activity has undoubtedly led to a massive misallocation of resources away from producing what consumers want.

Since none of these costs were included in the FTC study, its decades old data significantly understates the total costs of franchise regulations on society today. For simplicity, however, we conservatively assume that dealership-friendly regulations impose a modest 7.63% effect on consumer prices, as quantitatively measured in the FTC study.

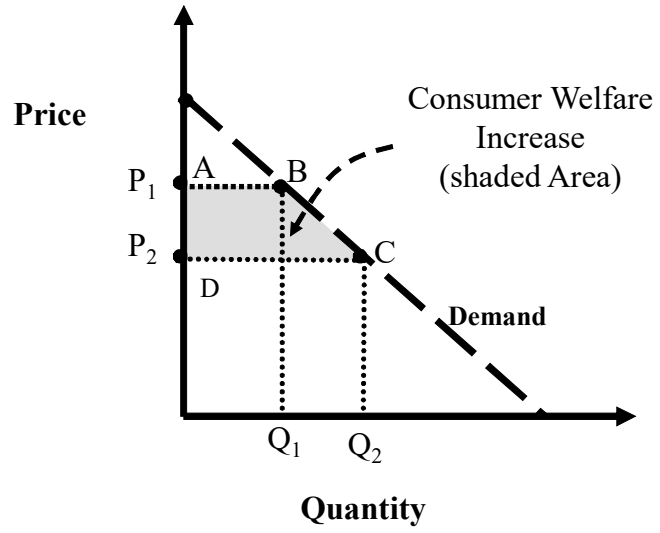
Evidence on Market Performance

Short-run elasticity of demand for new automobiles has been estimated to be in the range of -1.2 to -1.5.[18] Taking the midpoint of this range, we assume the price elasticity to be approximately -1.35. As noted earlier, because these regulations provide dealers the ability to price over cost, removing these regulations would lower new vehicle prices and stimulate consumer demand, thereby increasing consumer welfare.

[17] This is a well-accepted notion in the economics of public choice literature. James Buchanan, Robert Tollison and Gordon Tullock, *Toward a Theory of the Rent-Seeking Society*, College Station: Texas A&M Press, pp. 97–112. 1980.
[18] Patrick L. Anderson, Richard D. McLellan, Joseph P. Overton and Gary L. Wolfram, Nov. 13, 1997, online at http://scholar.harvard.edu/files/alada/files/price_elasticity_of_demand_handout.pdf. Also see James W. Brock, *The Structure of American Industry*, Waveland Press, Oak Grove, IL., thirteen Edition, 2016, Chapter 6.

The benefits of increased consumer welfare resulting from a reduction in territorial regulations can be estimated and is depicted as the shaded trapezoid ABCD in **Figure 2** (below), labeled as the *Consumer Welfare Increase*. This welfare increase can be approximated by the reduction in price resulting from the decrease in state regulations (noted as the decrease from P_1 to $P_{2)}$ and the corresponding increase in demand (noted as the increase from Q_1 to Q_2).

Figure 2: As Price Decreases, Consumer Benefits Increase



Motor Intelligence estimates that manufacturers delivered 17.2 million light vehicles during 2017.[19] Because regulations enable dealerships to price over cost, removing these regulations would lower prices by 7.6% and bring 2 million more vehicles to the U.S. market, based on the price elasticity of demand. Based on the average transaction price for vehicles for December 2017, the 7.6% decrease in price and corresponding 10.3% stimulation in market demand would produce consumer welfare improvement of roughly $47.5 billion per year – all

[19] Motor Intelligence, "U.S. Market Sales: U.S. Market Light Vehicle Deliveries – December 2017, Final Results," January 3, 2018.

from the elimination of territorial exclusivity regulations.[20] The sheer size of potential welfare gains demonstrates the significant costs these regulations impose on consumers.

The Public's Interest

Public policies that impose regulations and taxes on large businesses do not spare consumers the cost. This *ConsumerGram* discusses the many different types of state laws that are designed to help dealerships at the expense of automobile manufacturers and ultimately consumers. While the result of these regulations clearly increases costs for manufacturers, evidence is clear that it also does so for consumers. We find that state laws that establish and protect exclusive territories for dealerships are costing consumers $47.5 billion more per year. Considering the many other dealer-friendly regulations and the continued expansion in protectionist legislation, the estimate presented here should be considered low.

Successful automobile dealerships provide quality services to consumers that fully meet their needs. Success is not dependent on state legislatures for help. It is not the role of regulators to prop up poor performing businesses, particularly since the resulting laws serve only to undermine competition and to lead to reduced consumer benefits. The public policy focus here should be on the public's interest, not the manufacturers and not the dealerships interests.

In conclusion, policymakers need to stem these regulations and stop interfering with mutually agreed upon franchise contracts. These protectionist regulations are anticompetitive and clearly anti-consumer.

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[20] "Average New-Car Prices Rise Nearly 4% for January 2018 on Shifting Sales Mix, According to Kelley Blue Book," February 1, 2018, at https://mediaroom.kbb.com/2018-02-01-Average-New-Car-Prices-Rise-Nearly-4-Percent-For-January-2018-On-Shifting-Sales-Mix-According-To-Kelley-Blue-Book.

To: Vermont Department of Motor Vehicles

Re: DMV Public Comments on Act 63, Section 4 of 2021

From: Rosemary Shahan, President, CARS

Date: November 29, 2021

These comments are submitted under the following categories:

- Warranty and predelivery obligations under Section 4086
- Potentially unreasonable standards contained in franchise agreements

Consumers for Auto Reliability and Safety (CARS) appreciates the opportunity to comment in response to the Vermont DMV's request for public comments.

CARS is a national, independent non-profit auto safety and consumer advocacy organization based in Sacramento and dedicated to preventing motor vehicle related fatalities, injuries, and economic losses. For decades, CARS has been in forefront in improving protections for new and used vehicle purchasers and their families and communities from dangerously defective vehicles and from auto sales and financing scams and fraud, in California, other states, and nationally.

As the DMV considers potential amendments to the existing franchise laws, it is important to be cognizant of attempts by auto dealers to evade policies instituted by auto manufacturers and by state laws, in order to protect the public from dangerously defective vehicles that have been recalled by the manufacturers.

Some manufacturers have policies that prohibit franchisees from selling recalled vehicles, particularly vehicles of the same make, and especially when they are advertised and marketed as "factory certified" vehicles. These policies not only reduce the manufacturer's potential liability and

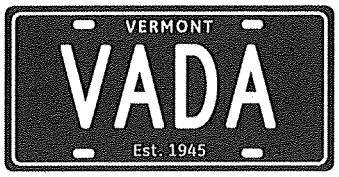
reputational jeopardy by reducing the risks of serious injury and death their customers face, they also help reduce the risks those vehicles pose to their family members, other passengers, and others who share the roads.

Therefore, we urge the DMV and other regulatory and law-making bodies to ensure that any changes to existing law take into account and preserve the important public health and safety benefits and significant cost savings the state of Vermont derives from those policies.

Please also note that *USA Today*, the Center for Public Integrity, and the *Arizona Republic* collaborated in researching, writing, and publishing the following award-winning report, shedding light on the auto dealers' agenda in proposing "license to kill" legislation that has been repeatedly rejected in almost every one of the states where it was introduced, typically under the guise of requiring "disclosure" of safety recall defects – instead of repairs:

"Used car dealers didn't want to fix deadly defects, so they wrote a law to avoid it."

Thank you for your consideration of our views.



Vermont Vehicle & Automotive Distributors Association

December 1, 2021

Commissioner Wanda Minoli
Vermont Department of Motor Vehicles
120 State Street
Montpelier, VT 05603

SUBMITTED VIA DMV WEBSITE PORTAL

RE: Act 63 Comments – VADA's Summary and Proposed Motor Vehicle Franchise Law Amendments & Direct Shippers License Proposal

Dear Commissioner Minoli:

Pursuant to Act 63 of 2021, VADA submits the attached summary of and proposed amendments to the Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act, 9 V.S.A. chapter 108. The summary and amendments also contain a proposal to add a new motor vehicle direct shipping license to Title 23.

Thank you for considering these proposals. We look forward to working with you on these issues during the 2022 session.

Sincerely,

Marilyn Miller
Executive Director

1284 US Route 302-Berlin, Suite 2, Barre, VT 05641
Phone: (802) 461-2655 Fax: (802) 461-2659
Website: www.vermontada.org

Vermont Vehicle and Automotive Distributors Association (VADA)
Summary of Proposed Amendments to Title 9, Chapter 108, Motor Vehicle Manufacturers, Distributors and Dealers Franchise Act
and Proposal to Add Direct Shippers Permit to Title 23
December 1, 2021

1. Facility requirements and vendor requirements – Sections 4096(9), (10) & (11)

The expense of compliance with manufacturer facility upgrades has grown tremendously. In some cases, the manufacturer's facility image plans change every few years and failure to comply can cause a dealer to forego per vehicle incentives which create a competitive disadvantage in vehicle pricing. Section 4096(9) places the burden on the manufacturer to assure the dealer that the manufacturer can provide a sufficient supply of vehicles commensurate with customer demand in the dealer's market to support the facility investment and to demonstrate that the dealer will otherwise obtain a return on the facility investment proposed by the manufacturer. If the dealer chooses to move forward with a facility change, the dealer is provided with a 10-year window of time within which the dealer is considered in compliance with the manufacturer's facility image requirements before being obligated to expend significant capital on a new facility upgrade. New Hampshire has a 15 year grandfather period for facility renovations and New York has 10 year grandfather period for facility renovations. Both states require the manufacturer to demonstrate the reasonableness of any requested facility change. *N.H. Rev. Stat. Ann. § 357-C:3(V)(d); NY VTL Article 16 § 463(2)(c)(3).*

As part of the increasing expense of facility upgrades, the manufacturers require dealers to utilize sole-source suppliers for certain construction materials, renovation items and special tools/equipment. This requirement substantially raises the cost of the facility upgrade. In many cases, there are other lower cost suppliers, some within the State, for these same products. Section 4096(10) prohibits a manufacturer from allowing a dealer to utilize a supplier of the dealer's choosing as long as the product is of like-kind and quality as the product required by the manufacturer. New Hampshire and New York require manufacturers to allow dealers to choose their vendors. *N.H. Rev. Stat. Ann. § 357-C:3(III)(W)(1); NY VTL Article 16 § 463(2)(c)(2).*

In some cases, manufacturers require dealers to purchase expensive special tools and equipment that are not ultimately needed by the dealer to service vehicles. Accordingly, Section 4096(11) is added to require that the manufacturer demonstrate that the dealer will receive a reasonable return on the dealer's investment in the special tools and equipment.

2. Warranty and predelivery obligations – Section 4086

Since first requiring manufacturers to compensate motor vehicle dealers for warranty work at the equivalent of the market-based retail repair rates charged by the dealer, the manufacturers have made it difficult for dealers to obtain the proper increase to their warranty reimbursement rates. The revisions to section 4086(c) clarify the formula used for establishing the dealer's retail labor and parts rate, including using "shall" instead of "may," making the statutory method for retail rate calculation mandatory. Section 4086(e) address the issue of how a dealer is to be reimbursed for handling the part used in a warranty repair which is provided at no cost, or less than its normal price, to the dealer. NH, NY & MA all use "shall" instead of "may," to mandate the retail rate calculation. These states, as most

do, provide a list of routine maintenance items which are to be excluded from calculations and address parts shipped at no cost to the dealer. *N.H. Rev. Stat. Ann. § 357-C:5; NY VTL Article 16 § 465; M.G.L.A. Ch. 93B, § 9.*

The revision to section 4086(h) is to reduce the audit look-back period for a manufacturer from 18 to 12 months for incentive and reimbursement programs. This is to protect both the manufacturer and the dealer from an audit of incentive monies paid which results in such a large chargeback that it devastates the financial position of the dealership. Sales and other incentives have become such a large part of the compensation paid by manufacturers to dealers that if a mistake has been made as to an eligible incentive claim, a manufacturer's discovery of the dealer's mistake for potentially hundreds of claims over an 18 month period can result in a charge back which could destroy the financial viability of the dealership. Reducing the look-back period to 12 months will allow the manufacturer and dealer to discover errors in the claims submission process before the incentive amounts at issue become too great. New Hampshire limits audit and charge back to a nine-month period, New York and Massachusetts limit it to one year. *N.H. Rev. Stat. Ann. § 357-C:5(III)(d)(2-3); NY VTL Article 16 § 465; M.G.L.A. Ch. 93B, § 9(c).* Similarly, section 4086(f) reduces the look-back period for an audit by the manufacturer of dealer warranty labor and parts claims from two to one year.

3. Unreasonable Standard – Section 4097(16)

The revisions to this section clarify that the prohibition on unreasonable standards applied to a motor vehicle dealer by a manufacturer include standards applied in relation to compliance with the franchise agreement as well as any manufacturer program. The revisions also make clear that failing to take into consideration a dealer's individual market circumstances in applying those standards is considered unreasonable. New York prohibits the application of unreasonable standards to a dealer. *NY VTL Article 16 § 463(2)(gg).*

4. **Consumer Data** – Sections 4085(3), 4085(4) & 4097(25)

New motor vehicle dealers gather data from both potential customers and actual sales and service customers that includes non-public personal information as well as sensitive information related to the purchase and financing of the vehicle. This proposal creates a definition of "consumer data" and places limitations on a manufacturer's access and use of consumer data obtained from a dealer. It further requires the manufacturer to indemnify the dealer for any damage or penalties sought from the dealer for a violation of the law by the manufacturer or its vendors in using consumer data. A number of states have enacted similar provisions including Arizona, California, Florida, Georgia, Missouri, Oregon and Virginia.

5. **New Motor Vehicle Direct shippers license** – Proposed new section 23 V.S.A. § 450b

The requirements in Vermont associated with a registered dealer selling vehicles to residents of this State apply only to dealers selling from a physical location within the State. The purpose of the registration process is to ensure that the dealer is educated and trained to complete the proper documentation for the sale and financing of new motor vehicles, has no criminal background, has adequate dealership sales and service facilities and is authorized by a new motor vehicle manufacturer to perform the pre-delivery preparation of the vehicle. With the advent of the sale of new motor vehicles over the Internet from entities located outside of the State, the State can no longer only

regulate the sale of new motor vehicles through its dealership registration process to achieve these goals.

In order to continue to ensure the health, safety and financial well-being of the residents of this State, this new section would require that any entity delivering a new vehicle to a resident within this State demonstrate that they are a properly licensed new motor vehicle dealer, in good standing, in another state. The properly licensed dealers seeking a direct shipper's license would also demonstrate that they are not affiliated with a franchised motor vehicle manufacturer so as to prevent a franchised motor vehicle manufacturer from engaging in the activities of a franchised new motor vehicle dealer and competing directly with its own franchised dealers within the State in violation of Vermont law. A non-franchised zero emission motor vehicle manufacturer is not required to obtain a new motor vehicle direct shippers license because existing law (Act 63 of 2021) requires it to be registered as a dealer in Vermont. We are not aware of another state that is doing this.

6. **Competition with Dealers (Subscriptions, the Retail Sale of Parts & Software and Hardware Upgrades)** Sections 4085(15), 4085 (21) & 4097(8)

Act 63 of 2021 clarified that 9 V.S.A. § 4097(8) prohibited a franchised motor vehicle manufacturer from engaging in many of the activities reserved to a licensed motor vehicle dealer including the sale or lease of a vehicle but delayed for one year a prohibition on a manufacturer offering subscription programs and the sale of parts to the retail consumer. VADA fully supports Act 63 but proposes to add a definition of the term "subscription" in 9 V.S.A. § 4085(21) for clarification. New Hampshire and Massachusetts have subscription programs in their respective definition provisions. *N.H. Rev. Stat. Ann. § 357-C:1(VIII, XII, XXVII); M.G.L.A. Ch. 93B, § 1.* VADA further proposes to add that a manufacturer shall not engage in the retail sale of parts and accessories "to the end user" to be clear that the prohibition does not prevent the manufacturer from selling parts at wholesale or to vendors that are not the end users of the parts and accessories.

VADA also proposes in Section 4085(15) (definition of "new motor vehicle dealer") and Section 40975(8)(B) (Prohibited Acts by Manufacturers) the addition of "software and hardware upgrades" to the vehicle. The reason for this is that manufacturers have begun to equip vehicles which options which, if not purchased at the time of the initial retail sale, can be "turned on" at a later date. The manufacturers are reaching out directly to customers seeking payment in exchange for having these functions turned on. This is another area where the manufacturer is inserting itself into the retail transaction in place of the franchised dealer which bargained for the right to engage the retail customer in the sale of the manufacturer's products.

7. Civil Actions for Violations – Sections 4099 & 4100b

Sections 4099 and 4100b, which provide a dealer the right to seek redress for a violation by a manufacturer of the motor vehicle franchise laws, does not provide clarity on which party has the burden of proof in such an action. It is customary in virtually all states that the manufacturer have the burden of proof in such an action so that revision has been made to both sections.

Vermont Vehicle and Automotive Distributors Association

Proposed Amendments to Title 9, Chapter 108, Motor Vehicle Manufacturers, Distributors and Dealers Franchising and Proposal To Add Direct Shippers Permit to Title 23
December 1, 2021

Sec. 1. Title 9, Chapter 108, shall be amended to read:

* * *

§ 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 19 V.S.A. § 3.

(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) "Consumer data" means 'nonpublic personal information' as such term is defined in 15 U.S.C. § 6809(4) as it exists on the effective date of this section, that is:

a. Collected by a dealer; and

b. Provided by the dealer directly to a manufacturer or third party acting on behalf of a manufacturer. Such term shall not include the same or similar data obtained by a manufacturer from any source other than the dealer or dealer's data management system.

(4) "Data management system" means a computer hardware or software system that:

a. Is owned, leased, or licensed by a dealer, including a system of web-based applications, computer software, or computer hardware;

b. Is located at the dealership or hosted remotely; and

c. Stores and provides access to consumer data collected or stored by a dealer.

The term shall include, but shall not be limited to, dealership management systems, any third party add-on to the dealership's website and customer relations management systems."

(5~~3~~) "Dealership facilities" means the real estate, buildings, fixtures, and improvements that have been devoted to the conduct of business under the franchise by the new motor vehicle dealer.

(6~~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 th0e 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.

(7~~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.

(8~~6~~) "Franchise" means all agreements and contracts between any new motor vehicle manufacturer, written or otherwise, and any new motor vehicle dealer that relate to the operation of the franchise and purport to fix the legal rights and liabilities of the parties to such agreements or 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 new 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, that enters into or is currently a party to a franchise with a new motor vehicle dealer.

(9~~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.

(10~~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 9A V.S.A. § 1-201(b)(20) of the Uniform Commercial Code.

(11~~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.

(12~~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, that is controlled by the manufacturer.

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

(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.

(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.

(13~~11~~) "Motor vehicle" means every vehicle intended primarily for use and operation on the public highways that is self-propelled, not including farm tractors and other machines and tools used in the production, harvesting, and care of farm products.

(14~~12~~) "New motor vehicle" means a vehicle that has been sold to a new motor vehicle dealer and that 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.

(15~~13~~) "New motor vehicle dealer" means any person 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 the manufacturer's or distributor's new motor vehicles, is not affiliated by ownership or control with a franchisor, and is engaged in the business of any of the following with respect to new motor vehicles or the parts and accessories for those new motor vehicles:

(A) selling or leasing;

(B) offering to sell or lease;

(C) soliciting or advertising the sale or lease; ~~or~~

(D) offering through a subscription or like agreement~~.~~ or;

(E) offering or selling software and hardware upgrades or changes to vehicle function and features.

(16~~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, 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.

(17~~15~~) "Person" means every natural person, partnership, corporation, association, trust, estate, or any other legal entity.

(18~~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.

(19~~17~~) "Motor home" means a motor vehicle that is primarily designed to provide temporary living quarters, built into as an integral part of, or permanently attached to, a self-propelled motor vehicle chassis or van. The vehicle must contain at least four of the following facilities: cooking; refrigeration or ice box; self-contained toilet; heating or air conditioning, or both; a potable water supply system, including a sink and faucet; separate 110-125 volt electrical power supply or an LP gas supply, or both.

(20~~18~~) "Non-franchised zero-emission vehicle manufacturer" means a manufacturer that:

(A) only manufacturers zero-emission vehicles, including plug-in electric vehicles as defined in 23 V.S.A. § 4(85);

(B) only sells or leases directly to consumers new or used zero-emission vehicles that it manufactures or vehicles that have been traded in in conjunction with a new zero-emission vehicle sale;

(C) does not currently sell or lease, and has never sold or leased, motor vehicles in Vermont through a franchisee;

(D) has not sold or transferred a combined direct or indirect ownership interest of greater than 30 percent in such non-franchised zero-emission vehicle manufacturer to a franchisor, subsidiary, or other entity controlled by a franchisor or has not acquired a combined direct or indirect ownership interest of greater than 30 percent in a franchisor, subsidiary, or other entity controlled by a franchisor; and

(E) is a dealer registered pursuant to 23 V.S.A. chapter 7, subchapter 4.

(21) "Subscription" means the conveyance of, or exchange of interest in, a new or used vehicle for use during a period in exchange for compensation, other than a short-term basis by a licensed rental company as defined under 32 V.S.A. § 8902(9) & (10).

§ 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 amounts not less than the 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 and/or labor shall~~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 for parts and/or the labor rate. The average percentage markup and/or labor rate 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. All ~~Only~~ retail sales shall be considered in calculating the average percentage markup, except (i) warranty repairs, (ii) ~~not involving~~ state inspection, (iii) ~~not involving~~ routine maintenance, including, but not limited to, the replacement of bulbs, fluids, filters, batteries, and belts that are not provided in the course of, or related to, a repair ~~such as changing the oil and oil filter~~, (iv) factory special events, specials, or promotional discounts for retail customer repairs, (v) parts sold, or repairs performed, at wholesale, (vi) factory-approved goodwill or policy repairs or replacements, (vii) repairs with aftermarket parts, when calculating the retail parts rate, but not the retail labor rate, (viii) repairs on aftermarket parts, (ix) replacement of or work on tires, including alignments and wheel or tire rotations, (x) repairs of motor vehicles owned by the dealer or an employee thereof at the time of the repair, (xi) engine and/or transmission assemblies, (xii) vehicle reconditioning, (xiii) items that do not have individual part numbers including, but not limited to, nuts, bolts and fasteners, and (xiv)~~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. A manufacturer shall not require, influence or attempt to influence a dealer to implement or change the prices for which it sells parts or labor in retail customer repairs. A manufacturer shall not implement or continue a policy, procedure or program to any of its dealers in the state for compensation which is inconsistent with this subsection. ~~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 at the rates set forth in paragraph (c).

(e) If a manufacturer furnishes a part or component to a dealer, at less than its normal and customary price, including but not limited to the price previously reflected in the manufacturer's parts catalogue, to use in performing repairs under a recall, campaign service action or warranty repair, the manufacturer shall compensate the dealer for the part or component in the same manner as warranty parts compensation under this section by compensating the dealer the average markup on the cost for the part or component as listed in the manufacturer's price schedule less the cost for the part or component.

(fe) All claims made by new motor vehicle dealers pursuant to this section for labor and parts shall be paid within 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~~ one year following payment. All claims shall be either approved or disapproved within 45 days after their receipt on forms and in the manner specified by the manufacturer, and any claim not specifically disapproved in writing within 45 days after the receipt shall be construed to be approved and payment must follow within 45 days. No claim that 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.

(g~~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.

(h~~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~~ one year 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~~.

(i~~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.

(j~~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:

(1) on an emergency or interim basis;

(2) 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; or

(3) if the manufacturer is a non-franchised zero-emission vehicle manufacturer that directly owns, operates, and controls the warranty or service facility.

* * *

§ 4096. Unlawful acts by manufacturers or distributors

Notwithstanding the terms of any franchise or other agreement with the manufacturer, ~~I~~it shall be a violation of this chapter for any manufacturer, as defined under this chapter, to require, attempt to require, coerce, or attempt to coerce any new motor vehicle dealer in this State:

* * *

(9) To change the location of the dealership or to make any substantial alterations to the dealership premises or facilities in the absence of written assurance from the manufacturer or distributor of a sufficient supply of new motor vehicles commensurate with customer demand in the market to justify the change in location or the alterations and written assurance from the manufacturer or distributor that the new motor vehicle dealer will be able, in the ordinary course of business as conducted by such new motor vehicle dealer, to earn a reasonable return on the total investment in the change in location or the alterations and the full return of the total investment within ten (10) years. Except as necessary to comply with a health or safety law, or to comply with a technology requirement which is necessary to sell or service a motor vehicle that the new motor vehicle dealer is authorized or licensed by the manufacturer to sell or service, a dealer that completes a facility construction or renovation pursuant to factory requirements shall not be required to construct a new facility or renovate the existing facility for ten (10) years during which time the dealer will be considered in compliance with any new facility program for purposes of being entitled to all incentive or bonus payments offered to same line-make dealers.

(10) To purchase goods or services for the construction, renovation, or improvement of the new motor vehicle dealer's facility or essential tools and equipment to service vehicles from a vendor chosen by the manufacturer if goods or services available from other sources are of substantially similar quality and design and comply with all applicable laws; provided, however, that such goods are not subject to the manufacturer's intellectual property or trademark rights and the new motor vehicle dealer has received the manufacturer's approval, which approval may not be unreasonably withheld. Nothing in this subparagraph may be construed to allow a new motor vehicle dealer to impair or eliminate a manufacturer's intellectual property, trademark rights or trade dress usage guidelines.

(11) To purchase essential tools and equipment to service vehicles if the manufacturer cannot demonstrate that the new motor vehicle dealer will receive a reasonable return on investment required to purchase the essential tools and equipment.

§ 4097. Manufacturer violations

Notwithstanding the terms of any franchise or other agreement with the manufacturer, ~~I~~it shall be a violation of this chapter for any manufacturer defined under this chapter:

* * *

[Subdivision (8) effective until July 1, 2022; see also subdivision (8) effective July 1, 2022 .]

(8)(A) To compete with a new motor vehicle dealer operating under an agreement or franchise from the aforementioned manufacturer in the State.

(B) For purposes of this subdivision (8), any manufacturer that is not a non-franchised zero-emission vehicle manufacturer competes with a new motor vehicle dealer if it engages in the business of any of the following with respect to new motor vehicles:

(i) selling or leasing;

(ii) offering to sell or lease; or

(iii) soliciting or advertising the sale or lease.

(C) 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 that 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.

[Subdivision (8) effective July 1, 2022; see also subdivision (8) effective until July 1, 2022 .]

(8)(A) To compete with a new motor vehicle dealer operating under an agreement or franchise from the aforementioned manufacturer in the State.

(B) For purposes of this subdivision (8), any manufacturer that is not a non-franchised zero-emission vehicle manufacturer competes with a new motor vehicle dealer if it engages in the business of any of the following with respect to new motor vehicles or the retail sale of parts and accessories to the end user for those new motor vehicles:

(i) selling or leasing;

(ii) offering to sell or lease;

(iii) soliciting or advertising the sale or lease; ~~or~~

(iv) offering through a subscription or like agreement~~.~~ or;

(v) offering or selling software and hardware upgrades or changes to vehicle function and features.

(C) 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 that 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.

* * *

(16) To impose unreasonable standards of performance or unreasonable facilities, financial, operating, or other requirements upon a motor vehicle franchisee, whether as part of the franchise or a separate program. It shall be considered unreasonable for a manufacturer to fail to

take into account all circumstances relevant to a new motor vehicle dealer's local market circumstances in imposing standards of performance.

* * *

(25) With respect to consumer data, to:

A. Fail to comply with, and shall not cause a new motor vehicle dealer to violate, any applicable restrictions on reuse or disclosure of consumer data established by federal or state law;

B. Fail to provide a written statement to the new motor vehicle dealer upon request describing the established procedures adopted by such manufacturer or third party acting on behalf of the manufacturer which meet or exceed any federal or state requirements to safeguard the consumer data, including, but not limited to, those established in the Gramm-Leach-Bliley Act, 15 U.S.C. 6801, et seq.;

C. Fail to, upon the written request of the new motor vehicle dealer, provide a written list of the consumer data obtained from the dealer and all persons to whom any consumer data has been provided by the manufacturer or a third party acting on behalf of a factory during the preceding six months. The dealer may make such a request no more than once every six months. The list must indicate the specific fields of consumer data which were provided to each person;

D. Require that a new motor vehicle dealer grant the manufacturer or a third party acting on behalf of a manufacturer direct or indirect access to such dealer's data management system to obtain consumer data. A manufacturer or a third party acting on behalf of a manufacturer must permit a dealer to furnish consumer data in a widely accepted file format, such as comma delimited, and through a third-party vendor selected by the dealer. However, a manufacturer or a third party acting on behalf of a manufacturer may access or obtain consumer data directly from a dealer's data management system with the express written consent of the dealer. The consent must be in the form of a standalone written document that is executed by the dealer principal/operator, and may be withdrawn by the dealer upon 30 days' written notice to the manufacturer as applicable. Such consent shall not be required as a condition to a new motor vehicle dealer's participation in an incentive program unless such consent is necessary to obtain consumer data to implement the program; and

E. Shall indemnify the dealer for any third-party claims asserted against or damages incurred by the new motor vehicle dealer to the extent caused by access to, use of, or disclosure of consumer data in violation of this section by the manufacturer or a third party to whom the manufacturer has provided consumer data.

F. Nothing contained in this Section shall limit the ability of the manufacturer to require that the dealer provide, or use in accordance with the law, such customer information related solely to such manufacturer's own vehicle makes to the extent necessary to do any of the following:

(1) Satisfy any safety or recall notice obligations or other legal notice obligations on the part of the manufacturer;

(2) Complete the sale and delivery of a new motor vehicle to a customer;

(3) Validate and pay customer or new motor vehicle dealer incentives; or

(4) Submit to the factory claims for any services supplied by the new motor vehicle dealer for any claim for warranty parts or repair.

G. Fail to provide any benefit or incentive to a new motor vehicle dealer resulting from the dealership's refusal to give the manufacturer, or a third party acting on behalf of a manufacturer access, to all or parts of the dealer's data management system.

* * *

§ 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 or her 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 that 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. In any such action, the manufacturer shall have the burden of proof that no violation of this chapter occurred. 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.

* * *

§ 4100b. Enforcement; Transportation Board

(a) The Transportation Board established in 19 V.S.A. § 3 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. Settlement communications shall remain confidential, shall be exempt from public inspection and copying under the Public Records Act, shall not be disclosed, and shall not be 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 manufacturer that is a party to a proceeding under this chapter, shall have the burden of proof that no violation of this chapter occurred.

(h) 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.

(~~ih~~) 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 the 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.

(j~~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.

* * *

Sec. 2. 23 V.S.A. § 450b is added to read:

§ 450b. New Motor Vehicle Direct Shipper

A. A person who is licensed or registered in their state of domicile as a franchised new motor vehicle dealer, and which is not affiliated by ownership or control with a manufacturer, distributor, factory branch, factory representative, distributor branch or distributor representative

as defined in section 4085 of title 9, may register for a new motor vehicle direct shipper license which will permit that person to sell and ship a new motor vehicle directly to any person, association or entity who is a resident of this State. The commissioner shall develop an application, which may require any information the Commissioner deems necessary, including an attestation from the applicant that it is a licensed new motor vehicle dealer in another state in good standing and is operating a physical dealership facility in another state. Only a person holding a new motor vehicle direct shipper license may ship a new motor vehicle from out of the State to a person, association or entity who is a Vermont resident. A motor vehicle dealer or a non-franchised zero emissions motor vehicle manufacturer, registered in this State under 23 V.S.A. chapter 7, subchapter 4, shall not be required to obtain a new motor vehicle direct shipper license to ship a new motor vehicle to a person, association or entity who is a Vermont resident. Any person who ships less than 12 new motor vehicles per year from out of the State to a person, association or entity who is a Vermont resident shall not be required to obtain a new motor vehicle direct shipper license. The registration fee for a new motor vehicle direct shipper shall be no more than any fee required to register as a new motor vehicle dealer in this State.

B. It shall be unlawful for common or permit carriers, operators of trucks, buses or other conveyances or out-of-state manufacturers or suppliers to make delivery of any new motor vehicle from outside of this State to any person, association or entity within the state unless the delivery is made by a person registered in this state as a motor vehicle dealer or a new motor vehicle direct shipper.

C. A person that sells and ships a new motor vehicle directly to any person, association or entity who is a resident of this State without holding a new motor vehicle direct shipper license shall be subject to the penalties in 23 V.S.A. § 475. The commissioner may also seek an injunction to prevent the person from shipping motor vehicles into the state.