Senate Transportation Committee, 1/20/22

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. This section 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. This section 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, 9 V.S.A. § 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) & 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 it would 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.