

Vermont Vehicle and Automotive Distributors Association

Proposed Strike-all to S.47, An act relating to motor vehicle manufacturers and motor vehicle warranty or service facilities

March 9, 2021 Version 2.0

§ 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. s. 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.

Such term shall include, but shall not be limited to, dealership management systems and customer relations management systems."

(35) "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.

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

(57) "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.

(68) "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.

(79) "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.

(~~8~~10) "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.

(~~9~~11) "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.

(~~10~~12) (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) "Non-franchised Zero Emissions Motor Vehicle Manufacturer" means a manufacturer which:

(A) only manufactures zero-emission motor vehicles, including battery electric vehicles as defined in section 4 of Title 23;

(B) only sells or leases directly to consumers new or used motor vehicles that it manufactures and has never sold or does not sell any line-make of motor vehicles in this state through a franchised new motor vehicle dealer; and

(C) is not affiliated, directly or indirectly, with a franchisor or a subsidiary or other entity controlled by a franchisor.

(114) "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.

(125) "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.

(136) "New motor vehicle dealer" means any person engaged in the business of selling or leasing, offering to sell or lease, soliciting, or advertising the sale or lease of new motor vehicles, offers through a subscription or like arrangement, displays new motor vehicles or otherwise engages in any way, in whole or in part, in the business of selling or leasing new motor vehicles, as well as parts and accessories for those motor vehicles and who holds, or held at the time a cause of action under this chapter accrued, a valid sales and service agreement, franchise, or contract, granted by the manufacturer or distributor for the retail sale of said manufacturer's or distributor's new motor vehicles.

(147) "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.

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

(169) "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.

(1720) "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.

#### **§ 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. Only retail sales not involving (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 no cost, 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 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 dealer warranty or service facility located in the State except:

(1) on an emergency or interim basis or if no qualified applicant has applied for appointment as a dealer in a market previously served by a new motor vehicle dealer of that manufacturer's line-make; ~~or~~

(2) By a non-franchised zero emission vehicle manufacturer as defined in section 4085 of this title that directly owns, operates, and controls, the warranty or service facility subject to the non-franchised zero emission vehicle manufacturer having obtained registration as a new motor vehicle dealer as authorized under section 4097(8) of this chapter.

#### **§ 4096. Unlawful acts by manufacturers or distributors**

It shall be a violation of this chapter for any manufacturer, as defined under this chapter, to require, 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 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 which 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 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.

**§ 4097. Manufacturer violations**

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

. . .

(8) 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 relevant market area or to otherwise engage in the activities of a new motor vehicle dealer as defined in section 4085 of this title—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. It shall not be a violation of this section for a non-franchised zero-emission vehicle manufacturer to engage in the activities of a new motor vehicle dealer as defined in section 4085 of this title subject to the non-franchised zero-emission vehicle manufacturer meeting the registration requirements and obtaining registration as a dealer pursuant to 23 V.S.A. chapter 7, subchapter 4.

. . .

(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.

(possibly place the following registration requirement in section 450a of Title 23)

### **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. The commissioner shall develop an application, which may require any information the Commissioner deems necessary, to confirm that the applicant 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 the same as 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.