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HOUSE BILL NO. 1683
AMENDMENT IN THE NATURE OF A SUBSTITUTE
 (Proposed by the House Committee on Transportation
 on)

(Patron Prior to Substitute—Delegate Sewell)

A BILL to amend and reenact §§ 46.2-1569.1 and 46.2-1571 of the Code of Virginia, relating to motor vehicle dealers; recall and warranty costs; right of first refusal.
 on _____)

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-1569.1 and 46.2-1571 of the Code of Virginia are amended and reenacted as follows:

§ 46.2-1569.1. Manufacturer or distributor right of first refusal.

A. Notwithstanding the terms of any franchise agreement, in the event of a proposed sale or transfer of a dealership, the manufacturer or distributor shall be permitted to exercise a right of first refusal to acquire the new vehicle dealer's assets or ownership, if such sale or transfer is conditioned upon the manufacturer's or dealer's entering into a dealer agreement with the proposed new owner or transferee, only if all the following requirements are met:

1. To exercise its right of first refusal, the manufacturer or distributor must notify the dealer in writing within 45 days of its receipt of the ~~completed proposal~~ notice for the proposed sale or transfer *submitted as required by subdivision 3 of § 46.2-1569*;

2. The exercise of the right of first refusal will result in the dealer's and dealer's owner's receiving the same or greater consideration as they have contracted to receive in connection with the proposed change of ownership or transfer; and

3. The manufacturer or distributor agrees to pay the reasonable expenses, including attorney's fees which do not exceed the usual, customary, and reasonable fees charged for similar work done for other clients, incurred by the proposed new owner and transferee prior to the manufacturer's or distributor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed sale or transfer of the dealership or dealership assets. Notwithstanding the foregoing, no payment of such expenses and attorney's fees shall be required if the dealer has not submitted or caused to be submitted an accounting of those expenses within 30 days of the dealer's receipt of the manufacturer's or distributor's written request for such an accounting. Such accounting may be requested by a manufacturer or distributor before exercising its right of first refusal.

B. A manufacturer or distributor shall not exercise or enforce a right of first refusal if (i) the proposed sale or transfer is to a dealer licensed in the United States as a dealer holding a franchise from any manufacturer or distributor licensed as a manufacturer or distributor in the Commonwealth unless the manufacturer or distributor has a formal written program to increase the number of minority dealers and a minority dealer will obtain at least 51 percent ownership and control of the dealership's assets after the exercise of the right of first refusal consistent with subdivision 2 of § 46.2-1572 or (ii) the proposed sale or transfer of the dealership's assets involves the transfer or sale to a member or members of the family of one or more dealer owners, or to a qualified manager or a partnership, limited liability company, corporation, or other entity controlled by such persons.

C. The provisions of clause (i) of subsection B shall not apply to any manufacturer or distributor, together with any of its parents, subsidiaries or affiliates that as of January 1, 2019, (i) produced or distributed at least 1,000 motor vehicles in the immediately preceding 12 months, at least 51 percent of which had a gross vehicle weight rating of at least 16,000 pounds and (ii) was on January 1, 2019 a party, including that party's parents, subsidiaries and affiliates, to federal litigation arising from rights and obligations created by § 46.2-1569.1.

§ 46.2-1571. Recall, warranty, maintenance and sales incentive obligations.

A. Each motor vehicle manufacturer, factory branch, distributor, or distributor branch shall (i) specify in writing to each of its motor vehicle dealers licensed in the Commonwealth the dealer's obligations for preparation, delivery, recall, and warranty service on its products and (ii) compensate the dealer for recall or warranty parts, service, and diagnostic work required of the dealer by the manufacturer or distributor as follows:

1. Compensation of a dealer for recall or warranty parts, service, and diagnostic work shall not be less than the amounts charged by the dealer for the manufacturer's or distributor's original parts, service, and diagnostic work to retail customers for nonwarranty service, parts, and diagnostic work installed or performed in the dealer's service department, ~~and the determination of compensation in accordance with the provisions of this section shall be deemed reasonable due to the substantial number of repair orders reviewed, unless the manufacturer can show that the amounts are not reasonable.~~ All manufacturer or distributor compensated parts, service, diagnostic work, updates to a vehicle accessory or function, or initialization or

60 repair of a vehicle part, system, accessory, or function performed by the dealer shall be subject to this
61 subsection. *Diagnostic work shall include all time spent by a technician who meets the manufacturer or*
62 *distributor's qualifications and requirements for the repair work communicating with the manufacturer's*
63 *technical assistance or external manufacturer source in order to complete a warranty repair.* Recall or
64 warranty parts compensation shall be stated as a percentage of markup, which shall be an agreed reasonable
65 approximation of retail markup and which shall be uniformly applied to all of the manufacturer's or
66 distributor's parts unless otherwise provided for in this section. If the dealer and manufacturer or distributor
67 cannot agree on the recall or warranty parts compensation markup to be paid to the dealer, the markup shall
68 be determined by an average of the dealer's retail markup on all of the manufacturer's or distributor's parts as
69 described in subdivisions 2 and 3.

70 2. For purposes of determining recall or warranty parts and service compensation paid to a dealer by the
71 manufacturer or distributor, including body-shop repairs, only retail repair orders, or the retail portion of
72 repair orders containing retail and non-retail operations, shall be considered. For the purposes of this section,
73 "retail" does not include menu-priced parts or services, services and parts used in internal repairs paid by the
74 dealer, group discounts, special event discounts, special event promotions, and insurance-paid repairs.

75 3. Increases in dealer recall or warranty parts and service compensation and diagnostic work
76 compensation, pursuant to this section, shall be requested by the dealer in writing, shall be based on 100
77 consecutive repair orders or all repair orders over a 90-day period, whichever occurs first. If any portion of a
78 retail repair order includes amounts that are not retail, such portion shall be excluded. Compensation for parts
79 shall be stated as a percentage of markup that shall be uniformly applied to all the manufacturer's or
80 distributor's parts. *Compensation for parts used in a recall or similar repair, not including warranty repairs,*
81 *shall be based on the highest price of such parts in the 12 months before the recall or similar repair is*
82 *announced to dealers. If the manufacturer or distributor changes the parts number or similar designation of*
83 *a part, the price of such part established pursuant to this subdivision shall be determined by the price of such*
84 *part before such change.*

85 4. In the case of recall or warranty parts compensation, the provisions of this subsection shall be effective
86 only for model year 1992 and succeeding model years.

87 5. If a manufacturer or distributor furnishes a part to a dealer at no cost for use by the dealer in performing
88 work for which the manufacturer or distributor is required to compensate the dealer under this section, the
89 manufacturer or distributor shall compensate the dealer for the part in the same manner as recall or warranty
90 parts compensation, less the wholesale costs, for such part as listed in the manufacturer's current price
91 schedules. A manufacturer or distributor may pay the dealer a reasonable handling fee instead of the
92 compensation otherwise required by this subsection for special high-performance complete engine assemblies
93 in limited production motor vehicles that constitute less than five percent of model production furnished to
94 the dealer at no cost, if the manufacturer or distributor excludes such special high-performance complete
95 engine assemblies in determining whether the amounts requested by the dealer for recall or warranty
96 compensation are consistent with the amounts that the dealer charges its other retail service customers for
97 parts used by the dealer to perform similar work.

98 6. In the case of service work, manufacturer original parts or parts otherwise specified by the
99 manufacturer or distributor, and parts provided by a dealer either pursuant to an adjustment program as
100 defined in § 59.1-207.34 or as otherwise requested by the manufacturer or distributor, the dealer shall be
101 compensated in the same manner as for recall or warranty service or parts.

102 This section does not apply to compensation for parts such as components, systems, fixtures, appliances,
103 furnishings, accessories, and features that are designed, used, and maintained primarily for nonvehicular,
104 residential purposes. Recall, warranty, and sales incentive audits of dealer records may be conducted by the
105 manufacturer, factory branch, distributor, or distributor branch on a reasonable basis, and dealer claims for
106 recall, warranty, or sales incentive compensation shall not be denied except for good cause, such as
107 performance of nonwarranty repairs, lack of material documentation, fraud, or misrepresentation. A dealer's
108 failure to comply with the specific requirements of the manufacturer or distributor for processing the claim
109 shall not constitute grounds for the denial of the claim or reduction of the amount of compensation to the
110 dealer as long as reasonable documentation or other evidence has been presented to substantiate the claim.
111 The manufacturer, factory branch, distributor, or distributor branch shall not deny a claim or reduce the
112 amount of compensation to the dealer for recall or warranty repairs to resolve a condition discovered by the
113 dealer during the course of a separate repair requested by the customer or to resolve a condition on the basis
114 of advice or recommendation by the dealer. Claims for dealer compensation shall be paid within 30 days of
115 dealer submission or within 30 days of the end of an incentive program or rejected in writing for stated
116 reasons. *The manufacturer, factory branch, distributor, or distributor branch shall allow a dealer to submit a*
117 *claim for rental vehicle reimbursement as required pursuant to subdivision B 5, in 30-day increments, prior*
118 *to the end of the rental vehicle period if the repair for which the rental vehicle is associated is open due to a*
119 *delay in parts or repair information from the manufacturer, factory branch, distributor, or distributor*
120 *branch.* The manufacturer, factory branch, distributor, or distributor branch shall reserve the right to

reasonable periodic audits to determine the validity of all such paid claims for dealer compensation. Any chargebacks for recall or warranty parts or service compensation and service incentives shall only be for the six-month period immediately following the date of the claim and, in the case of chargebacks for sales compensation only, for the six-month period immediately following the date of claim. *The manufacturer, factory branch, distributor, or distributor branch may audit and charge back, pursuant to this paragraph, claims for rental vehicle reimbursement for the six-month period immediately following the date of payment of the claim for the warranty or recall repair associated with such rental.* However, such limitations shall not be effective if a manufacturer, factory branch, distributor, or distributor branch has reasonable cause to believe that a claim submitted by a dealer is intentionally false or fraudulent. For purposes of this section, "reasonable cause" means a bona fide belief based upon evidence that the material issues of fact are such that a person of ordinary caution, prudence, and judgment could believe that a claim was intentionally false or fraudulent. A dealer shall not be charged back or otherwise liable for sales incentives or charges related to a motor vehicle sold by the dealer to a purchaser other than a licensed, franchised motor vehicle dealer and subsequently exported or resold, unless the manufacturer, factory branch, distributor, or distributor branch can demonstrate by a preponderance of the evidence that the dealer should have known of and did not exercise due diligence in discovering the purchaser's intention to export or resell the motor vehicle.

B. It shall be unlawful for any motor vehicle manufacturer, factory branch, distributor, or distributor branch to:

1. Fail to perform any of its recall or warranty obligations, including tires, with respect to a motor vehicle;
2. Fail to assume all responsibility for any liability resulting from structural or production defects;
3. Fail to include in written notices of factory recalls to vehicle owners and dealers the expected date by which necessary parts and equipment will be available to dealers for the correction of defects;
4. Fail to compensate any of the motor vehicle dealers licensed in the Commonwealth for repairs effected by the dealer of merchandise damaged in manufacture or transit to the dealer where the carrier is designated by the manufacturer, factory branch, distributor, or distributor branch;

5. Fail to fully compensate its motor vehicle dealers licensed in the Commonwealth for recall or warranty parts, work, and service pursuant to subsection A either by reduction in the amount due to the dealer or by separate charge, surcharge, or other imposition by which the motor vehicle manufacturer, factory branch, distributor, or distributor branch seeks to recover its costs of complying with subsection A, or for legal costs and expenses incurred by such dealers in connection with recall or warranty obligations for which the manufacturer, factory branch, distributor, or distributor branch is legally responsible or which the manufacturer, factory branch, distributor, or distributor branch imposes upon the dealer. Failure to fully reimburse a dealer for the cost to the dealer of a rental vehicle provided to a customer as required, offered, advertised as available, or agreed to by the manufacturer or distributor shall be considered a violation of this subsection. *A dealer's inability to provide a specified type of vehicle, including line-make, size, or category, from the rental market shall not be grounds to refuse to fully reimburse a dealer under this subdivision.* Failure to provide compensation consistent with this section to a dealer for assistance requested by a customer whose vehicle was subjected to an over-the-air or remote change, repair, or update to any part, system, accessory, or function by the vehicle manufacturer or distributor and performed at the dealership to satisfy the customer shall be considered a violation of this subsection;

6. Misrepresent in any way to purchasers of motor vehicles that warranties with respect to the manufacture, performance, or design of the vehicle are made by the dealer, either as warrantor or co-warrantor;

7. Require the dealer to make warranties to customers in any manner related to the manufacture, performance, or design of the vehicle;

8. Shift or attempt to shift to the motor vehicle dealer, directly or indirectly, any liabilities of the manufacturer, factory branch, distributor or distributor branch under the Virginia Motor Vehicle Warranty Enforcement Act (§ 59.1-207.9 et seq.), unless such liability results from the act or omission by the dealer;

9. Deny any dealer the right to return any part or accessory that the dealer has not sold within 12 months where the part or accessory was not obtained through a specific order initiated by the dealer but instead was specified for, sold to and shipped to the dealer pursuant to an automated ordering system, provided that such part or accessory is in the condition required for return to the manufacturer, factory branch, distributor, or distributor branch, and the dealer returns the part within 30 days of it becoming eligible under this subdivision. For purposes of this subdivision, an "automated ordering system" ~~shall be~~ is a computerized system that automatically specifies parts and accessories for sale and shipment to the dealer without specific order thereof initiated by the dealer. The manufacturer, factory branch, distributor, or distributor branch shall not charge a restocking or handling fee for any part or accessory being returned under this subdivision. This subdivision shall not apply if the manufacturer, factory branch, distributor, or distributor branch has available to the dealer an alternate system for ordering parts and accessories that provides for shipment of ordered parts and accessories to the dealer within the same time frame as the dealer would receive them when ordered through the automated ordering system. *Notwithstanding the provisions of this subdivision, the manufacturer,*

182 *factory branch, distributor, or distributor branch shall not deny any dealer the right to return, within 12*
183 *months of the date of purchase, any part or accessory needed to complete a recall or similar repair for*
184 *compensation and the manufacturer, factory branch, distributor, or distributor branch is prohibited from*
185 *deeming such part obsolete or nonreturnable by removing it from current parts codes or catalogs; or*

186 10. When providing a new motor vehicle to a dealer for offer or sale to the public, fail to provide to such
187 dealer a written disclosure that may be provided to a potential buyer of the new motor vehicle of each
188 accessory or function of the vehicle that may be initiated, updated, changed, or maintained by the
189 manufacturer or distributor through over-the-air or remote means, and the charge to the customer at the time
190 of the new motor vehicle sale for such initiation, update, change, or maintenance. A manufacturer or
191 distributor may comply with this subdivision by notifying the dealer that such information is available on a
192 website or by other digital means.

193 C. Notwithstanding the terms of any franchise, it shall be unlawful for any motor vehicle manufacturer,
194 factory branch, distributor, or distributor branch to fail to indemnify and hold harmless its motor vehicle
195 dealers against any losses or damages arising out of complaints, claims, or suits relating to the manufacture,
196 assembly, or design of motor vehicles, parts, or accessories, or other functions by the manufacturer, factory
197 branch, distributor, or distributor branch beyond the control of the dealer, including, without limitation, the
198 selection by the manufacturer, factory branch, distributor, or distributor branch of parts or components for the
199 vehicle or any damages to merchandise occurring in transit to the dealer where the carrier is designated by the
200 manufacturer, factory branch, distributor, or distributor branch. The dealer shall notify the manufacturer of
201 pending suits in which allegations are made that come within this subsection whenever reasonably practicable
202 to do so. Every motor vehicle dealer franchise issued to, amended, or renewed for motor vehicle dealers in
203 Virginia shall be construed to incorporate provisions consistent with the requirements of this subsection.

204 D. On any new motor vehicle, any uncorrected damage or any corrected damage exceeding three percent
205 of the manufacturer's or distributor's suggested retail price as defined in 15 U.S.C. §§ 1231 -1233, as
206 measured by retail repair costs, must be disclosed to the dealer in writing prior to delivery. Factory
207 mechanical repair and damage to glass, tires, and bumpers are excluded from the three percent rule when
208 properly replaced by identical manufacturer's or distributor's original equipment or parts. Whenever a new
209 motor vehicle is damaged in transit, when the carrier or means of transportation is determined by the
210 manufacturer or distributor, or whenever a motor vehicle is otherwise damaged prior to delivery to the new
211 motor vehicle dealer, the new motor vehicle dealer shall:

212 1. Notify the manufacturer or distributor of the damage within three business days from the date of
213 delivery of the new motor vehicle to the new motor vehicle dealership or within the additional time specified
214 in the franchise; and

215 2. Request from the manufacturer or distributor authorization to replace the components, parts, and
216 accessories damaged or otherwise correct the damage, unless the damage to the vehicle exceeds the three
217 percent rule, in which case the dealer may reject the vehicle within three business days.

218 E. If the manufacturer or distributor refuses or fails to authorize correction of such damage within 10 days
219 after receipt of notification, or if the dealer rejects the vehicle because damage exceeds the three percent rule,
220 ownership of the new motor vehicle shall revert to the manufacturer or distributor, and the new motor vehicle
221 dealer shall have no obligation, financial or otherwise, with respect to such motor vehicle. Should either the
222 manufacturer, distributor, or the dealer elect to correct the damage or any other damage exceeding the three
223 percent rule, full disclosure shall be made by the dealer in writing to the buyer and an acknowledgement by
224 the buyer is required. If there is less than three percent damage, no disclosure is required, provided the
225 damage has been corrected. Predelivery mechanical work shall not require a disclosure. Failure to disclose
226 any corrected damage within the knowledge of the selling dealer to a new motor vehicle in excess of the three
227 percent rule shall constitute grounds for revocation of the buyer order, provided that, within 30 days of
228 purchase, the motor vehicle is returned to the dealer with an accompanying written notice of the grounds for
229 revocation. In case of revocation pursuant to this section, the dealer shall accept the vehicle and refund any
230 payments made to the dealer in connection with the transaction, less a reasonable allowance for the
231 consumer's use of the vehicle as defined in § 59.1-207.11. Nothing in this section shall be construed to
232 exempt from the provisions of this section damage to a new motor vehicle that occurs following delivery of
233 the vehicle to the dealer.

234 F. If there is a dispute between the manufacturer, factory branch, distributor, or distributor branch and the
235 dealer with respect to any matter referred to in subsection A, B, or C, either party may petition the
236 Commissioner in writing, within 30 days after either party has given written notice of the dispute to the other,
237 for a hearing. The decision of the Commissioner shall be binding on the parties, subject to rights of judicial
238 review and appeal as provided in Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2. However, nothing contained in
239 this section shall give the Commissioner any authority as to the content or interpretation of any
240 manufacturer's or distributor's warranty. A manufacturer, factory branch, distributor, or distributor branch
241 may not collect chargebacks, fully or in part, either through direct payment or by charge to the dealer's
242 account, for recall or warranty parts or service compensation, including service incentives, sales incentives,

243 other sales compensation, surcharges, fees, penalties, or any financial imposition of any type arising from an
244 alleged failure of the dealer to comply with a policy of, directive from, or agreement with the manufacturer,
245 factory branch, distributor, or distributor branch until 40 days following final notice of the amount charged to
246 the dealer following all internal processes of the manufacturer, factory, factory branch, distributor, or
247 distributor branch. Within 30 days following receipt of such final notice, the dealer may petition the
248 Commissioner, in writing, for a hearing. If a dealer requests such a hearing, the manufacturer, factory branch,
249 distributor, or distributor branch may not collect the chargeback, fully or in part, either through direct
250 payment or by charge to the dealer's account, until the completion of the hearing and a final decision of the
251 Commissioner concerning the validity of the chargeback.