S T A T E O F N E W Y O R K

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2011-2012 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 5, 2011

Introduced by M. of A. GANTT -- read once and referred to the Committee on Transportation

AN ACT to amend the vehicle and traffic law, in relation to warranties and sales incentives and certain technical provisions therein

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 465 of the vehicle and traffic law, as amended by chapter 490 of the laws of 2008, is amended to read as follows:

S 465. Procedures relating to warranties and sales incentives. 1. (A) Every franchisor shall properly fulfill any warranty agreement and/or franchisor's service contract and shall compensate each of its franchised motor vehicle dealers for warranty parts and labor in amounts which reflect fair and reasonable compensation for such work. All warranty claims and/or claims under a franchisor's service contract made by franchised motor vehicle dealers shall be paid within thirty days following their approval. FOR THE PURPOSES OF THIS SECTION, WARRANTY CLAIMS SHALL INCLUDE VOLUNTARY RECALLS ESTABLISHED BY THE FRANCHISOR, AND ANY RECALLS PURSUANT TO 49 U.S.C. 301. For parts reimbursement[,] (other than components, systems, fixtures, appliances, furnishings, accessories and features of a house coach that are designed, used and maintained primarily for nonvehicular residential purposes[,]) and for labor reimbursement, fair and reasonable compensation shall not be less than the price and rate charged by the franchised motor vehicle dealer for like PARTS OR services to non-warranty and/or non-service contract customers.

(B) For purposes of this section, [the price and rate charged by the franchised motor vehicle dealer for parts may be established] THE FRANCHISED MOTOR VEHICLE DEALER MAY ESTABLISH ITS WARRANTY REIMBURSEMENT PRICE AND RATE by submitting to the franchisor one hundred sequential nonwarranty customer-paid service repair orders or the number of sequen-

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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tial nonwarranty customer-paid service repair orders written within a ninety day period, whichever is less, covering repairs, REGARDLESS OF THE REASON FOR THE REPAIRS, made no more than one hundred eighty days before the submission, and declaring the price and rate, including average markup [for] USED BY the franchised motor vehicle dealer as its reimbursement rate.

(C) WITH REGARD TO ANY SUBMISSION BY A FRANCHISED MOTOR VEHICLE DEALER UNDER THIS SECTION, THE FOLLOWING PROVISIONS SHALL APPLY: (I) THE FRANCHISED MOTOR VEHICLE DEALER SHALL DETERMINE THE INDIVIDUAL MARKUP OF EACH QUALIFYING PART LISTED IN THE FRANCHISED MOTOR VEHICLE DEALER'S SUBMISSION, WHICH INDIVIDUAL MARKUPS THE FRANCHISED MOTOR VEHICLE DEALER SHALL THEN AVERAGE, WHICH AVERAGE OF THE INDIVIDUAL MARKUPS SHALL DETERMINE THE "AVERAGE" MARKUP TO BE USED AS THE DEALER'S REIMBURSEMENT RATE; (II) THE DEALER MAY AUTHORIZE ANY EMPLOYEE OR REPRESENTATIVE OF THE DEALERSHIP TO SIGN THE DEALER'S DECLARATION OF A RATE AND TO SUBMIT THE REQUEST FOR REIMBURSEMENT BY A MANUFACTURER AT THAT RATE; (III) IT SHALL BE WITHIN THE DEALER'S SOLE DISCRETION AS TO THE MEANS BY WHICH THE NECESSARY INFORMATION IS PROVIDED TO THE FRANCHISOR TO SUPPORT THE AVERAGE PARTS MARKUP CALCULATION; (IV) ALL MANUFACTURERS SHALL DESIGNATE AN ADDRESS TO WHICH ITS FRANCHISED DEALERS OR REPRESENTATIVES MAY SUBMIT A REQUEST UNDER THIS SECTION, PROOF OF MAILING OR DELIVERY TO SUCH ADDRESS SHALL BE SUFFICIENT EVIDENCE RAISING A PRESUMPTION THAT SUCH REQUEST WAS DELIVERED TO THE MANUFACTURER; AND (V) NOTWITHSTANDING ANYTHING CONTAINED IN THIS SECTION, THE FRANCHISED MOTOR VEHICLE DEALER SHALL INCLUDE IN ITS CALCULATION THOSE NON-WARRANTY CUSTOMER PAID-FOR PARTS OTHERWISE COVERED BY THE FRANCHISOR'S WARRANTY PROGRAM, REGARDLESS OF THE REASON THEY WERE SUPPLIED TO THE NON-WARRANTY CUSTOMER, INCLUDING PARTS ROUTINELY REPLACED AS PART OF REGULAR MAINTENANCE ON A VEHICLE, INCLUDING, BUT NOT LIMITED TO BELTS, BRAKES, BATTERIES, KEYS, TRANSMITTERS AND TRANSMITTER BATTERIES, WINDSHIELD WIPERS, SEALANTS, BULBS, HEADLIGHT AND TAILLIGHT LENSES, FLUIDS, PUMPS, FILTERS AND SIMILAR PARTS PROVIDED, HOWEVER, THE FRANCHISED MOTOR VEHICLE DEALER SHALL NOT BE REQUIRED IN ITS SUBMISSION TO PERFORM ANY OF THE FOLLOWING:

(1) LIST ON ANY FORM, SPREADSHEET, OR OTHER COMPILATION THOSE REPAIR ORDERS WHICH DO NOT CONTAIN PARTS THAT THE DEALER IS RELYING ON FOR THE CALCULATION OF THE AVERAGE MARKUP;

(2) INCLUDE IN ANY CALCULATION OF ITS AVERAGE MARKUP TIRES, WHEELS, ANY PARTS OR ITEMS IT ACTUALLY USED OR PROVIDED IN THE REPAIR OF PHYSICAL DAMAGE TO THE BODY OR CHASSIS OF A VEHICLE, INCLUDING, BUT NOT LIMITED TO, BODY PANELS, WINDOWS (GLASS OR OTHER MATERIAL), DOORS, BUMPERS, FENDERS, OR SIMILAR ITEMS, OR THE PAINT OR OTHER FINISHING MATERIALS FOR SUCH ITEMS;

(3) INCLUDE IN ANY CALCULATION OF ITS AVERAGE MARKUP ANY PARTS OR ITEMS ACTUALLY USED OR PROVIDED IN THE COURSE OF STANDARD VEHICLE PREPARATION FOR SALE TO A CUSTOMER;

(4) INCLUDE IN ANY CALCULATION OF ITS AVERAGE MARKUP ANY PARTS ACTUALLY PROVIDED INTERNALLY TO VARIOUS DEPARTMENTS WITHIN THE FRANCHISED MOTOR VEHICLE DEALERSHIP'S BUSINESS; AND

(5) INCLUDE IN ANY CALCULATION OF ITS AVERAGE MARKUP ANY TYPE OF PARTS PROVIDED BY THE FRANCHISOR ONLY AS A MATTER OF "GOODWILL" RATHER THAN IN THE COURSE OF REGULAR WARRANTY SERVICE.

(D) FOR PURPOSES OF THIS SECTION, THE PRICE AND RATE CHARGED BY THE FRANCHISED MOTOR VEHICLE DEALER FOR LABOR MAY BE ESTABLISHED BY SUBMITTING ONE HUNDRED SEQUENTIAL NONWARRANTY CUSTOMER-PAID SERVICE REPAIR ORDERS, OR THE NUMBER OF SEQUENTIAL NONWARRANTY CUSTOMER-PAID SERVICE REPAIR ORDERS, WRITTEN IN THE MONTH PRECEDING THE SUBMISSION, WHICHEVER

IS LESS, COVERING REPAIRS, REGARDLESS OF THE REASON FOR THE REPAIRS, AND DIVIDING THE AMOUNT OF THE DEALER'S TOTAL LABOR SALES FOR RETAIL CUSTOMER REPAIRS BY THE NUMBER OF TOTAL LABOR HOURS THAT GENERATED THOSE SALES, AND DECLARING THE RESULTING AVERAGE LABOR RATE FOR THE FRANCHISED MOTOR VEHICLE DEALER AS ITS REIMBURSEMENT RATE. THE FRANCHISED MOTOR VEHICLE DEALER SHALL NOT USE IN ANY CALCULATION OF ITS LABOR RATE ANY LABOR CONDUCTED IN THE COURSE OF STANDARD VEHICLE PREPARATION FOR SALE TO A CUSTOMER, OR IN THE COURSE OF INTERNAL SERVICE PERFORMED FOR VARIOUS DEPARTMENTS WITHIN THE FRANCHISED MOTOR VEHICLE DEALERSHIP'S BUSINESS.

(E) The reimbursement rate so declared shall go into effect thirty days following the declaration [and]. THE DECLARATION shall be presumed to be [fair and reasonable, however a franchisor may rebut such presumption by showing that such rate so established is unfair and unreasonable in light of the practices of all other franchised motor vehicle dealers in the vicinity offering the same line make.] ACCURATE WHEN SUBMITTED AS SET FORTH UNDER THIS SECTION PROVIDING A DETAILED, COMPLETE, WRITTEN EXPLANATION OF ANY PART OR ITEM INCLUDED OR OMITTED FROM THE DECLARATION CALCULATION THAT IS NOT CONSISTENT WITH THE PROVISIONS OF THIS SECTION TO THE FRANCHISED MOTOR VEHICLE DEALER, WITHIN FIFTEEN DAYS OF RECEIPT BY THE FRANCHISOR OF THE SUBMISSION OR ANY MATERIAL AMENDMENT THERETO ALONG WITH THE RETURN OF THE REPAIR ORDERS UPON WHICH THE MANUFACTURER IS RELYING FOR ITS OBJECTION OR OBJECTIONS. THE FRANCHISOR WAIVES ANY RIGHT TO REBUT THE SUBMISSION IF THE FRANCHISOR FAILS TO PROVIDE THE WRITTEN EXPLANATION DESCRIBED IN THIS PARAGRAPH WITHIN THE FIFTEEN DAY PERIOD FOLLOWING THE MOTOR VEHICLE DEALER'S SUBMISSION. THE FRANCHISED MOTOR VEHICLE DEALER MAY CHOOSE TO CORRECT ITS SUBMISSION BASED UPON THE FRANCHISOR'S WRITTEN REBUTTAL WITHOUT BEING REQUIRED TO MAKE A COMPLETELY NEW SUBMISSION, IF DONE SO WITHIN THIRTY DAYS OF RECEIVING THE FRANCHISOR'S WRITTEN REBUTTAL. ANY SUCH AMENDMENT TO THE INITIAL SUBMISSION WILL RELATE BACK TO THE DATE OF THE INITIAL SUBMISSION AND ANY RESULTING PRICE OR RATE SHALL BE PAID BY THE FRANCHISOR RETROACTIVELY, WITHOUT PENALTY, ON ALL CLAIMS SUBMITTED BY THE FRANCHISED MOTOR VEHICLE DEALER THIRTY DAYS FROM THE DATE OF THE INITIAL SUBMISSION. IF THE FRANCHISED MOTOR VEHICLE DEALER DOES NOT AGREE WITH THE FRANCHISOR'S REBUTTAL, THE PRICE OR RATE SO DECLARED SHALL BECOME EFFECTIVE ACCORDING TO THIS SECTION UNLESS THE FRANCHISOR INSTITUTES AN ACTION PURSUANT TO THIS ARTICLE, CLAIMING THAT THE FRANCHISED MOTOR VEHICLE DEALER HAS VIOLATED THE PROVISIONS OF THIS SECTION, WITHIN THIRTY DAYS FROM THE DATE OF THE FRANCHISEE'S RESPONSE TO THE FRANCHISOR'S REBUTTAL. THE BURDEN OF PROOF IN ANY SUCH ACTION SHALL BE ON THE FRANCHISOR.

(F) The franchised motor vehicle dealer shall not request a change in the reimbursement rate more often than twice in each calendar year.

(G) A FRANCHISOR WHO FAILS TO REIMBURSE WARRANTY AND LABOR CLAIMS ESTABLISHED PURSUANT TO THIS SECTION SHALL BE LIABLE TO THE FRANCHISED MOTOR VEHICLE DEALER FOR ALL SUCH CLAIMS AT THE PRICE AND RATE SUBMITTED BY THE FRANCHISEE FROM THE TIME SUCH SUBMISSION WAS MADE. IN ADDITION, ANY FRANCHISOR WHO FAILS TO SO REIMBURSE SUCH CLAIMS SHALL BE SUBJECT TO A PENALTY OF FIVE HUNDRED DOLLARS PER CLAIM PAYABLE TO THE FRANCHISED MOTOR VEHICLE DEALER. AN ADDITIONAL PENALTY OF ONE THOUSAND DOLLARS PER CLAIM SHALL BE PAYABLE TO THE FRANCHISED MOTOR VEHICLE DEALER FOR EACH SUCCESSIVE TEN DAY PERIOD THEREAFTER IN WHICH THE CLAIM IS NOT REIMBURSED AS REQUIRED BY THIS SECTION. IN ORDER TO ENSURE TIMELY PAYMENT OF CLAIMS SUBMITTED UNDER THIS SECTION, A FRANCHISED MOTOR VEHICLE DEALER MAY, BEGINNING UPON THE EXPIRATION OF THE THIRTY DAY PERIOD ESTABLISHED BY THIS SECTION, WITHHOLD ANY PAYMENTS OWED TO A FRANCHISOR EQUAL TO THE

CLAIMS MADE BY THE FRANCHISED MOTOR VEHICLE DEALER, PLUS THE PENALTY, UNTIL THE FRANCHISOR MAKES WARRANTY AND LABOR REIMBURSEMENT PURSUANT TO THIS SECTION. ANY DEALER WHO EXERCISES SUCH RIGHT SHALL NOT BE DEEMED IN DEFAULT OF ANY OBLIGATIONS UNDER THE FRANCHISE OR ANY OTHER AGREEMENT WITH THE MANUFACTURER OR ANY SUBSIDIARY OR AFFILIATE OF THE MANUFACTURER.

(H) In establishing the PARTS REIMBURSEMENT OR THE labor reimbursement rate, the franchisor shall not require a franchised motor vehicle dealer to establish said rate by a methodology, or by requiring information, that is unduly burdensome or time consuming to provide[, including, but not limited to, a transaction by transaction calculation].

(I) IN NO EVENT MAY A FRANCHISOR REQUIRE A DEALER TO ACCEPT REIMBURSEMENT FOR PARTS BASED ON THE FRANCHISOR'S SUGGESTED LIST PRICE (WHETHER CALLED MSRP OR KNOWN BY ANY OTHER DESIGNATION) IN LIEU OF DETERMINING AND REIMBURSING A DEALER AT THE DEALER'S AVERAGE MARKUP PURSUANT TO THIS SECTION.

(J) IN NO EVENT SHALL ANY FRANCHISOR RETALIATE OR THREATEN TO RETALIATE AGAINST A DEALER FOR EXERCISING ITS RIGHTS UNDER THIS SECTION OR UNDER ANY OTHER SECTION OF THIS ARTICLE. RETALIATION SHALL INCLUDE, BUT NOT BE LIMITED TO, THREATENING TO CONDUCT, OR CONDUCTING, AN AUDIT OF DEALERSHIP RECORDS, THREATENING TO WITHHOLD, OR WITHHOLDING, PRODUCTS, ALLOCATIONS, OR BENEFITS FROM ANY DEALER, OR IMPOSING ADDITIONAL COSTS OR PENALTIES ON ANY DEALER THAT THE MANUFACTURER DOES NOT IMPOSE ON EVERY DEALER EITHER WITHIN OR WITHOUT THE STATE.

(K) A FRANCHISOR MAY NOT OTHERWISE RECOVER FROM A FRANCHISED MOTOR VEHICLE DEALER THE FRANCHISOR'S COSTS FOR REIMBURSING A FRANCHISED MOTOR VEHICLE DEALER FOR WARRANTY PARTS AND LABOR CLAIMS.

2. All warranty or sales incentive claims shall be either approved AND PAID or disapproved [within], WITHIN A REASONABLE AMOUNT OF TIME. A REASONABLE AMOUNT OF TIME SHALL BE:

(A) NO LESS THAN thirty days after [their] receipt[. When any such claim is disapproved the franchised motor vehicle dealer shall be notified in writing of its disapproval within said period. Each such notice shall state the specific grounds upon which the disapproval is based. Failure to disapprove a claim within thirty days shall be deemed approval] BY THE FRANCHISOR OF A WARRANTY CLAIM; AND

(B) NO LESS THAN FIVE BUSINESS DAYS FROM THE DATE UPON WHICH THE FRANCHISED MOTOR VEHICLE DEALER PROVIDES NOTICE TO THE FRANCHISOR CERTIFYING THE COMPLETION OF A SALE WHICH QUALIFIES UNDER A SALES INCENTIVE PROGRAM. A SALE SHALL BE CONSIDERED COMPLETED UPON DELIVERY OF THE VEHICLE TO THE CUSTOMER.

3. No franchisor shall conduct an audit or charge back any warranty or sales incentive payment or otherwise hold a franchised motor vehicle dealer liable for charges more than one year, or five years in the case of fraud, after the date the franchisor made such payment to the dealer.

4. A franchisor shall not charge a dealer back subsequent to the payment of a warranty or sales incentive claim unless a representative of the franchisor has met in person at the dealership, or by telephone, with an officer or employee of the dealer designated by the dealer and explained in detail the basis for each of the proposed charge backs and thereafter given the dealer's representative a reasonable opportunity at the meeting, or during the telephone call, to explain the dealer's position relating to each of the proposed charge backs. In the event the dealer was selected for audit or review on the basis that some or all of the dealer's claims were viewed as excessive in comparison to average, mean or aggregate data accumulated by the franchisor, or in relation to

claims submitted by a group of other franchisees, the franchisor shall, at or prior to the meeting or telephone call with the dealer's representative, provide the dealer with a written statement containing the basis or methodology upon which the dealer was selected for audit or review.

5. A franchisor shall not deny or charge back a payment for warranty work claimed by the dealer unless the franchisor satisfies its burden of proof that the dealer did not make a good faith effort to comply with the reasonable written procedures of the franchisor or that the dealer did not actually perform the work.

6. A franchisor shall not deny or charge back a sales incentive payment made to a dealer unless the claim was materially false or fraudulent or that the dealer failed to reasonably substantiate the claim either in accordance with the manufacturer's reasonable procedures.

7. After all internal dispute resolution processes provided through the franchisor have been resolved, the franchisor shall give notice to the dealer of the final amount of a proposed warranty or sales incentive charge back. If the dealer institutes an action pursuant to this article within thirty days of receipt of such notice, the proposed charge back shall be stayed, without bond, during the pendency of such action and until the final judgment has been rendered in an adjudicatory proceeding or action as provided in section four hundred sixty-nine of this article.

S 2. This act shall take effect immediately.