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BILL



ANALYSIS

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Senate Bill 1188 (as introduced 3-22-06)

Sponsor: Senator Bev Hammerstrom

Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 6-14-06

### **CONTENT**

**The bill would amend Public Act 88 of 1989, which regulates watercraft and outboard motor manufacturers, distributors and dealers, to do the following:**

- Revise the requirements for a dealer agreement.**
- Describe the conditions under which a manufacturer could terminate a dealer agreement and the information that would have to be in a written notice of termination.**
- Require a manufacturer to pay compensation to a dealer for terminating an agreement without good cause.**
- Prohibit a manufacturer from taking certain actions with respect to new watercraft dealers, or requiring dealers to take certain actions.**
- Allow a designated family member of a deceased or incapacitated new watercraft dealer to succeed the dealer in ownership under the existing dealer agreement in certain circumstances.**
- Require a manufacturer to notify existing dealers before entering into a dealer agreement establishing or relocating a new watercraft dealer within the relevant market area.**
- Require a manufacturer to supply each of its new watercraft dealers with a schedule of compensation for parts, diagnostic time, work, or service performed pursuant to a warranty.**
- Designate which party would be responsible for damage to a new watercraft.**

- Require a manufacturer to indemnify a new watercraft dealer in certain situations.**
- Allow a manufacturer and a new watercraft dealer to bring an action against the other party for violating the Act.**
- Authorize the Attorney General to commence a civil action to enforce compliance with the Act or to restrain the violation of the Act.**
- Prescribe civil and criminal fines for a violation of the Act.**

The bill also would name the Act the "Watercraft Manufacturer and Dealer Act".

The bill would take effect 30 days after the date it was enacted.

#### Dealer Agreement; Definitions

Under the Act, a manufacturer or distributor may not offer for sale to a new watercraft dealer, and a new or proposed new watercraft dealer may not offer to purchase from a manufacturer, a new watercraft or a new outboard motor without first entering into a written dealer agreement and complying with all other applicable provisions of the Act. Under the bill, a manufacturer, wholesaler, or representative of a manufacturer or wholesaler could not offer to sell a new watercraft to a new watercraft dealer, and a new watercraft dealer could not offer to purchase a new watercraft from a manufacturer, wholesaler, or representative of a manufacturer or wholesaler, without first entering into a written dealer agreement.

The Act requires each dealer agreement to include at least all of the following:

- The territory or market area.
- The period of time covered by the dealer agreement.
- Performance and marketing standards.
- Notice provisions for termination, cancellation, or nonrenewal.
- Obligations in the preparation and delivery of the product and warranty service.
- Disposal obligations upon termination, cancellation, or nonrenewal of inventory, equipment, furnishings, special tools, and required signs acquired within 18 months of the date of termination, cancellation, or nonrenewal.
- Dispute resolution procedures.

Under the bill, a written dealer agreement would have to include at least all of the following:

- A specific term for the agreement.
- That the manufacturer would have to respond promptly and provide adequate information in response to the new watercraft dealer's reasonable inquiries concerning the manufacturer's financial condition.
- That the new watercraft dealer would have to respond promptly and provide adequate information in response to the manufacturer's reasonable inquiries concerning the new watercraft dealer's financial condition.
- That the new watercraft dealer would not be prohibited from selling a new watercraft to a customer who resided outside of the dealer's relevant market area if the customer voluntarily elected to purchase the new watercraft from the dealer.
- That the manufacturer could not appoint another authorized dealer in the relevant market area during the term of the dealer agreement so long as the new watercraft dealer remained in compliance with the dealer agreement.

If a new watercraft dealer entered into a dealer agreement, within 30 days of executing that dealer agreement, the dealer would have to notify every other manufacturer with which it had a dealer agreement of the new dealer agreement.

A provision in a dealer agreement that was contrary to the Act would be unenforceable by a manufacturer.

The Act defines "dealer agreement" as the agreement or contract in writing between a manufacturer or distributor and a new watercraft dealer that purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase and sale of new watercraft or new outboard motors. Under the bill, "dealer agreement" would refer to an agreement or contract in writing between a distributor and a new watercraft dealer; between a manufacturer and a distributor or a watercraft dealer; or between a watercraft importer and a distributor or a new watercraft dealer.

The Act defines "new watercraft dealer" as a person who holds a dealer agreement granted by a manufacturer or distributor for the sale of the manufacturer's or distributor's watercraft or outboard motors, who is engaged in the business of purchasing, selling, exchanging, or servicing new watercraft or new outboard motors, and who has an established place of business. Under the bill, "new watercraft dealer" would mean either of the following:

- A distributor or other person who is a party to a dealer agreement with a manufacturer for the sale or distribution of its watercraft, who is engaged in the business of purchasing, selling, exchanging, or dealing in new watercraft, and who has an established place of business in the State.
- A person who is engaged in the business of purchasing, selling, exchanging, or dealing in new watercraft and purchases, sells, exchanges, or deals in five or more new watercraft in the State in any 12-month period.

The Act defines "distributor" as a person, resident or nonresident, who in whole or in part offers for sale, sells, or distributes a new watercraft or new outboard motor to a new watercraft dealer or who maintains a factory representative, resident or nonresident, or who controls a person, resident or nonresident, who in whole or in part offers for sale, sells, or distributes a new watercraft or new outboard motor to a new watercraft dealer. The bill would delete

reference to an outboard motor, and would include a watercraft importer.

Currently, "proposed new watercraft dealer" means a person who has an application pending for a new dealer agreement with a manufacturer or distributor. The term does not include a person whose dealer agreement is being renewed or continued. The bill would retain this definition.

The bill would define "watercraft" as any type of watercraft or vessel used or capable of use as a means of transportation on water. The term would not include paddleboats, canoes, kayaks, or water skis or similar devices towed by watercraft. "New watercraft" would mean a watercraft that is in the possession of a manufacturer or wholesaler, or that a manufacturer or wholesaler has sold to a new watercraft dealer, and on which the new watercraft dealer has not issued an original title or transfer document.

#### Termination of a Dealer Agreement

The bill would prohibit a manufacturer from canceling, terminating, failing to renew, or refusing to continue a dealer agreement with a new watercraft dealer unless the manufacturer complied with all of the following:

- Satisfied the notice requirement (described below under "Written Notice of Termination").
- Acted in good faith.
- Had good cause for the cancellation, termination, nonrenewal, or discontinuance.

"Good cause" would mean that there was a failure by the new watercraft dealer to comply with a provision of the dealer agreement, the provision was both reasonable and of material significance to the relationship between the manufacturer and the new watercraft dealer, and the manufacturer first acquired actual or constructive knowledge of the failure not more than two years before the date on which notice was given. Alternatively, if the new watercraft dealer failed to execute effectively a provision of a dealer agreement related to the performance of the new watercraft dealer in sales or service, "good cause" would mean that all of the following had occurred:

- The new watercraft dealer was given written notice by the manufacturer of the failure.
- The notice stated that the notice of failure of performance was provided under the Act.
- The new watercraft dealer was afforded a reasonable opportunity to exert good faith efforts to carry out the dealer agreement.
- The failure or deficiency continued for more than 180 days after the date written notice was given.

The following would not constitute good cause for the termination, cancellation, nonrenewal, or discontinuance of a dealer agreement:

- A refusal of a new watercraft dealer to purchase or accept delivery of any new watercraft parts, or accessories or any other commodity or services not ordered by the dealer.
- The fact that a new watercraft dealer sold or transferred ownership of the dealership or sold or transferred capital stock in it to the dealer's spouse, son, or daughter, if the sale or transfer did not have the effect of a sale or assignment of the dealer agreement or a change in the principal management of the dealership without the manufacturer's prior written consent.
- A change in ownership of a new watercraft dealer's dealership if the Act's requirements for the sale or transfer of a new watercraft dealership were met.

(The last circumstance would not authorize a change in ownership that resulted in a sale or an assignment of the dealer agreement or a change in the principal management of the dealership without the manufacturer's prior written consent.)

Also, good cause would not include the fact that a new watercraft dealer owned, had an investment in, participated in the management of, or held a dealer agreement for the sale of another make or line of new watercraft, or that the new watercraft dealer had established another make or line of watercraft in the same dealership facilities as those of the manufacturer if the new watercraft dealer did both the following:

- Maintained a reasonable line of credit for each make or line of new watercraft.

- Remained in substantial compliance with the terms and conditions of the dealer agreement and with the reasonable facilities' requirements of the manufacturer.

A provision in a dealer agreement that was contrary to these provisions of the Act would not be enforceable.

In any proceeding concerning a termination, cancellation, nonrenewal, or discontinuance of a dealer agreement, the manufacturer would have the burden of proof to show that it had acted in good faith and complied with any notice requirement, and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance.

#### Written Notice of Termination

Under the bill, before a manufacturer or a new watercraft dealer who was a party to a dealer agreement terminated, cancelled, did not renew, or discontinued the dealer agreement, the manufacturer or dealer would have to provide written notice of the termination, cancellation, nonrenewal, or discontinuance to the other party by certified mail.

The notice would have to include the following:

- A statement of intention to terminate, cancel, not renew, or discontinue the dealer agreement.
- A statement of the reason for the termination, cancellation, nonrenewal, or discontinuance.
- The date on which the termination, cancellation, nonrenewal, or discontinuance would take effect.

The manufacturer or dealer would have to give the notice at least 30 days before the effective date of a termination, cancellation, nonrenewal, or discontinuance for any of the following reasons:

- Insolvency of the other party or the filing of a petition by or against the other party under any bankruptcy or receivership law.
- Failure of the other party to conduct its customary sales and service.
- Conviction of the other party or its principal owners of a misdemeanor that

involved theft, dishonesty, or false statement, or any felony.

- If the terminating party were the manufacturer, revocation of a license that the new watercraft dealer was required to have or loss of authorization to purchase marine engines.

Alternatively, the notice would have to be given at least 180 days before the effective date of a termination, cancellation, nonrenewal, or discontinuance because the manufacturer discontinued production of the new watercraft dealer's product line or discontinued distribution of that product line in the State.

If the provisions described above did not apply, the manufacturer or dealer would have to give the notice at least 180 days before the effective date of the termination, cancellation, nonrenewal, or discontinuance. During this time period, the manufacturer could execute a dealer agreement with another new watercraft dealer and the new watercraft dealer could execute a dealer agreement with another manufacturer.

A notice provision in a dealer agreement that was contrary to the Act's provisions regarding written notice of the termination agreement would not be enforceable.

#### Termination without Good Cause

If a dealer agreement were terminated, cancelled, not renewed, or discontinued by a manufacturer without good cause, the bill would require the manufacturer to pay the new watercraft dealer fair and reasonable compensation for all of the following:

- Each new current model year watercraft purchased from the manufacturer in the dealer's inventory that had not been materially altered or substantially damaged.
- Each new watercraft of the immediately preceding model year purchased from the manufacturer in the dealer's inventory that had not been materially altered or substantially damaged, if that watercraft were purchased from the manufacturer and drafted on the dealer's financing source or paid for within the two-year period before the effective date of the termination, cancellation, nonrenewal, or discontinuance.

- Any electronic or printed parts catalogs or other supplies purchased from the manufacturer within the 18-month period before the effective date of the termination, cancellation, nonrenewal, or discontinuance.
- Any parts inventory purchased from the manufacturer within the 18-month period before the effective date of the termination, cancellation, nonrenewal, or discontinuance, except special order parts.
- Any equipment, furnishings, and signs identifying the watercraft or the manufacturer brand or trade name purchased from the manufacturer in the current model year.

The manufacturer also would have to pay any expenditures by the new watercraft dealer in the current model year for boat show exhibit spaces that were committed to the dealer but not occupied by the dealer and any other expenditures made by the dealer in the current model year in marketing the manufacturer's products based upon future anticipated incentives, holdbacks on boats not refunded by the manufacturer, or similar financial promotions before the cancellation of the agreement.

A manufacturer would have to pay any compensation required for the purchase of watercraft from the current and immediately preceding model years within 30 days after the effective date of the termination, cancellation, nonrenewal, or discontinuance if the new watercraft dealer had met any reasonable requirements of the dealer agreement with respect to the return of the new watercraft inventory. A manufacturer would have to pay any other required compensation within 90 days after the effective date of the termination, cancellation, nonrenewal, or discontinuance if the new watercraft dealer provided clear title to any items of personal property and had met any other reasonable requirements of the dealer agreement with respect to the return of that property.

If a manufacturer did not pay any of the compensation required within the applicable 30- or 90-day time period, interest would have to accrue on the amount due the new watercraft dealer at a rate of 12% per annum from the date the applicable time

period expired to the date the payment was made.

"Fair and reasonable compensation" would mean one of the following:

- For current model year watercraft or watercraft of the immediately preceding model year, an amount that was at least the new watercraft dealer's net invoice cost, freight, and floor plan interest paid by the dealer for the watercraft.
- For any parts inventory, the amount stated in the manufacturer's invoice.
- For any electronic or printed parts catalogs or other supplies, or any equipment, furnishings, and signs identifying the watercraft or the manufacturer brand or trade name, the actual cost to the dealer of personal property purchased from the manufacturer.
- For any expenditures for boat show exhibit spaces, the dealer's actual expenditures.

#### Posttermination Provisions

Under the bill, in addition to the Act's other provisions regarding the termination of dealer agreements, if a dealer agreement were terminated, canceled, not renewed, or discontinued by the manufacturer, the former dealer could continue to purchase parts and accessories from the manufacturer to service customers of the manufacturer's products by submitting a purchase order to the manufacturer. For the first 12 months, the manufacturer would have to sell parts or accessories at its standard dealer rates and according to its standard dealer terms and conditions. Subsequently, the manufacturer would have to sell parts or accessories at its standard retail rates for retail sales of the parts and accessories and according to its standard terms and conditions for retail sales of the parts and accessories.

In addition, the manufacturer or former dealer could not construe a sale of parts or accessories as a waiver of the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement, a continuation of the agreement, or the commencement of a new agreement.

If a dealer agreement were terminated, canceled, not renewed, or discontinued by a manufacturer or a dealer, the manufacturer

would be relieved from any obligation contained in the dealer agreement to deliver additional new watercraft to the former dealer and could cancel all outstanding orders for new watercraft, including orders that the former dealer had previously accepted. This would not apply to a new watercraft if the former dealer proved to the manufacturer's satisfaction that the watercraft was the subject of a binding customer order received by the former dealer before the receipt of the required written notice.

For a 12-month period beginning on the effective date of the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement, the former dealer could continue to perform warranty work for customers of the manufacturer's watercraft. The manufacturer would have to reimburse the former dealer for warranty work performed at the rates generally charged by the dealer for like service to retail customers for nonwarranty parts, service, or repairs and according to the standard terms and conditions in effect before the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement.

The manufacturer or former dealer could not construe the performance of warranty work, acceptance by the manufacturer of an order for new watercraft from the former dealer, continued sales of new watercraft to the former dealer, or any other act after termination, cancellation, nonrenewal, or discontinuance of the dealer agreement as a waiver of the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement, a continuation of the agreement, or the commencement of a new agreement.

Any compensation owed by the former dealer to the manufacturer would be due and payable within 30 days after the effective date of the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement.

#### Prohibited Manufacturer Requirements

A manufacturer could not require a new watercraft dealer in the State to do any of the following:

- Order or accept delivery of any new watercraft, part or accessory of a new

watercraft, equipment, or any other commodity not required by law that was not voluntarily ordered by the new watercraft dealer (except for new watercraft delivered under a dealer agreement as part of the annual inventory required by the manufacturer).

- Order or accept delivery of any new watercraft with special features, accessories, or equipment not included in the list price of the new watercraft as publicly advertised by the manufacturer.
- Participate monetarily in any advertising campaign or contest, purchase any promotional material, display devices, or display decorations or materials, or pay or assume directly in connection with the sale of new watercraft any part of the cost of a refund, rebate, or discount made by or lawfully imposed by the manufacturer to or in favor of a retail customer, unless the dealer voluntarily agreed.
- Change the capital structure of the new watercraft dealership or the means by or through which the dealer financed its operation, if the dealership at all times met any reasonable capital standards determined by the manufacturer in accordance with uniformly applied criteria.
- Refrain from participation in the management of, investment in, or acquisition of, any other line of new watercraft or related products, if the dealer maintained a reasonable line of credit for each make or line of watercraft, remained in compliance with reasonable facilities requirements, and did not change the principal management of the dealer.
- Change the location of the new watercraft dealership or make any substantial alteration to the dealership premises, unless the requirement was reasonable.

A manufacturer also could not require a dealer to enter into any purchase agreement with the manufacturer, other than normal program purchase requirements or warranty service agreements, if the manufacturer represented to the dealer that refusing to execute the agreement would cause a termination of the dealer agreement or any other contractual agreement or understanding between the dealer and manufacturer. A notice given in good faith to a dealer of the dealer's violation of any

terms or provisions of a dealer agreement would not violate this provision.

In addition, a manufacturer could not require a dealer to assent prospectively to a release, assignment, novation, waiver, or estoppel that relieved any person from liability imposed by the Act; require that the law of a state other than Michigan govern a dealer agreement; or require referral of any controversy between a new watercraft dealer and a manufacturer to a person other than a court of this State or a Federal court located in Michigan, if the referral were binding on the new watercraft dealer, unless the parties agreed at the time of a controversy to refer the controversy to a Federal court located outside the State or agreed at the time of an arbitration to conduct arbitration either within or outside the State. A provision in a dealer agreement that was contrary to this provision would be unenforceable by a manufacturer.

#### Prohibited Actions by a Manufacturer

The bill would prohibit a manufacturer from adopting, changing, establishing, or implementing a plan or system for the allocation and distribution of new watercraft to new watercraft dealers that was arbitrary or capricious, or modifying an existing plan or system in a way that caused the plan or system to be arbitrary or capricious.

If a manufacturer publicly advertised that a specific model of watercraft was available for immediate delivery in this State, the manufacturer could not refuse to deliver inventory of that watercraft to a new watercraft dealer entitled to sell that watercraft under a dealer agreement, in reasonable quantities and within a reasonable time after receipt of the dealer's order. This would not apply to a failure to deliver watercraft due to an act of God, a work stoppage or delay due to a strike or labor difficulty, a shortage of materials, a lack of manufacturing capacity, a freight embargo, or another cause over which the manufacturer had no control.

A manufacturer would be prohibited from requiring a new watercraft dealer to purchase essential service tools with a purchase price in the aggregate of more than \$7,500 in order to receive a specific model of watercraft without giving the

dealer a good faith written estimate of the number of watercraft of that specific model the manufacturer intended to allocate to that dealer during the model year in which the tool purchase agreement was imposed. This would not apply if the dealer did not request the estimate in writing.

If a new watercraft dealer ordered a new watercraft for a retail customer within 15 days after receiving a written official price increase notification from the manufacturer, and that retail customer purchased that new watercraft, the manufacturer could not apply that price increase to that new watercraft. A sales contract signed by a retail customer and binding on a dealer would be evidence of an order subject to this provision.

If a new watercraft dealer ordered a new current model year watercraft for a retail customer within 30 days after receiving notice of a price reduction of more than \$5 or a cash rebate for that model of watercraft, and that retail customer purchased that new watercraft, the manufacturer could not fail to reduce the price of or provide the rebate for that new watercraft.

A manufacturer would be prohibited from selling a new watercraft directly to a retail customer other than through its new watercraft dealers located in the State. This would not prohibit a manufacturer from providing information to a retail customer for the purpose of marketing or facilitating the sale of a new watercraft or from establishing a program to sell or offer to sell new watercraft through the manufacturer's new watercraft dealers, and would not prohibit sales directly to retail customers in this State if the manufacturer did not have any new watercraft dealers in the State.

A manufacturer would be prohibited from directly or indirectly owning, operating, or controlling a new watercraft dealer, including a new watercraft dealer engaged primarily in performing warranty repair services on watercraft pursuant to the manufacturer's warranty. This prohibition would not apply to either of the following:

- The ownership, operation, or control by a manufacturer of a new watercraft dealer for a period of not more than 24 months during the transition from one owner or operator to another. A circuit court could

extend the 24-month time period for an additional 12 months upon receipt of an application from a manufacturer and a showing of good cause.

- The ownership, operation, or control of a new watercraft dealer by a manufacturer while it was being sold under a bona fide contract or purchase option to the operator of the new watercraft dealer.

A manufacturer could not prevent or attempt to prevent by contract or otherwise a new watercraft dealer from changing its executive management, unless the manufacturer demonstrated that a proposed change of executive management would result in executive management by one or more individuals who were not of good moral character or who did not meet reasonable, preexisting, and equitably applied standards of the manufacturer. If a manufacturer rejected a proposed change in executive management of a new watercraft dealer, the manufacturer would have to give written notice of its reasons to the dealer within 60 days after receiving written notice from the dealer of the proposed change and all related information reasonably requested by the manufacturer. Failure to provide the written notice within the 60-day time period would be approval of the change in executive management by the manufacturer.

In addition, a manufacturer could not do the following:

- Release to a person any business, financial, or personal information that a new watercraft dealer provided to a manufacturer, except under subpoena in an administrative or judicial proceeding to which the new watercraft dealer or the manufacturer was a party, or where the new watercraft dealer had given written consent.
- Deny a new watercraft dealer the right to associate with another new watercraft dealer for any lawful purpose.
- Directly or through a subsidiary, terminate, cancel, fail to renew, or discontinue a lease of a new watercraft dealer's established place of business except for a material breach of the lease.

The provisions regarding price increases or reductions for orders of new watercraft for retail customers would not apply to a price

increase or reduction caused by any of the following:

- The introduction of a new model or new model year of a new watercraft.
- The addition of optional equipment or equipment required by State or Federal law to a new watercraft.
- If a new watercraft or components of a new watercraft were made in another country, revaluation of the U.S. dollar.
- An increase in transportation charges due to an increase in rates charged by a common carrier or transporter.

#### Sale of a Dealership

The Act prohibits a manufacturer or distributor from unreasonably withholding consent to the sale, transfer, or exchange of a dealership to a person who meets the criteria set forth in the dealer agreement. Failure to respond within 60 days of receipt of a written request for the sale, transfer, or exchange of a dealership must be considered consent to the request. Except for a material breach of the lease, a manufacturer or distributor must not terminate, cancel, fail to renew, or discontinue a lease of a new watercraft dealer's place of business.

The bill would delete these provisions.

Under the bill, all of the following would apply to a sale, transfer, or exchange of the ownership of a new watercraft dealership to a person other than a designated family member:

- A manufacturer could not unfairly prevent a new watercraft dealer from receiving reasonable compensation for the value of the new watercraft dealership.
- A manufacturer would have to consent to a sale, transfer, or exchange of the ownership of a new watercraft dealership to a qualified buyer.
- A manufacturer would have to consent to assignment of an existing dealer agreement to, or to execution of a new dealer agreement on the same terms with, the purchaser or other transferee of an existing new watercraft dealership if the purchaser or other transferee were a qualified buyer.

The manufacturer would have to respond in writing to a request for consent to a sale or other transfer of a new watercraft



dealership, or an assignment of an existing dealer agreement or execution of a new dealer agreement, within 30 days after receiving written request for consent from the new watercraft dealer. Failure to respond to a request for consent within the 30-day period would be consent.

As used above, "qualified buyer" would mean a purchaser or other transferee of an existing new watercraft dealership that met the manufacturer's financial and business criteria as generally applied by the manufacturer in qualifying new watercraft dealers. These criteria could include the business experience, moral character, financial qualifications, and criminal record of the purchaser or transferee. The manufacturer would have the burden of proving that a prospective purchaser or transferee was not a qualified buyer.

#### Dealership Succession

Current Provisions. The Act defines "designated successor" as one or more persons nominated by the new watercraft dealer, in a written document filed by the dealer with the manufacturer or distributor at the time the dealer agreement is executed, to succeed the dealer in the event of his or her death or incapacity.

A designated successor of a deceased or incapacitated new watercraft dealer may succeed the dealer in the ownership or operation of the dealership under the existing dealer agreement if the designated successor gives the manufacturer or distributor written notice of his or her intention to succeed to the dealership within 60 days after the dealer's death or incapacity and agrees to be bound by all of the terms and conditions of the dealer agreement. A manufacturer or distributor may refuse to honor the existing dealer agreement with the designated successor for good cause or criteria agreed to in the existing dealer agreement.

The manufacturer or distributor may request from a designated successor the personal and financial data necessary to determine whether the existing dealer agreement should be honored. Upon request, the designated successor must supply the personal and financial data.

Within 60 days after receiving the notice of the designated successor's intent to succeed the dealer or within 60 days after receiving the requested personal and financial data, whichever occurs later, if a manufacturer or distributor believes that good cause or other criteria exist for refusing to honor the succession, the manufacturer or distributor may serve upon the designated successor notice of its refusal to approve the succession.

If a designated successor is not able to succeed the new watercraft dealer because of the designated successor's death or legal incapacity, the dealer, within 60 days after that death or incapacity, must execute a new document nominating a designated successor.

Proposed Provisions. The bill would delete the provisions described above. Under the bill, a designated family member of a deceased or incapacitated new watercraft dealer could succeed the dealer in the ownership or operation of the dealership under the existing dealer agreement if the designated family member gave the manufacturer written notice of his or her intention to succeed the dealer within 120 days after the dealer's death or incapacity, agreed to be bound by all of the terms and conditions of the dealer agreement, and met the current criteria generally applied by the manufacturer in qualifying new watercraft dealers. A manufacturer could refuse to honor the existing dealer agreement with the designated family member only for good cause.

The bill would define "designated family member" as the designated successor nominated by a new watercraft dealer in a written document filed by the dealer with a manufacturer. If the dealer did not file that document, the term would mean any of the following, if applicable:

- A spouse, child, grandchild, parent, brother, or sister of a deceased new watercraft dealer who had otherwise been designated in writing by a deceased dealer to succeed the dealer in the new watercraft dealership.
- The appointed and qualified personal representative and the testamentary trustee of a deceased new watercraft dealer.

- A spouse, child, grandchild, parent, brother, or sister of a deceased new watercraft dealer who was entitled to inherit the dealer's ownership interest in the new watercraft dealership under the terms of the dealer's will or who was entitled to inherit under the law of intestate succession of the State.
- A person appointed by a court as the legal representative of the property of an incapacitated new watercraft dealer.

A manufacturer could request that a designated family member provide any personal and financial data that was reasonably necessary to determine whether he or she met the requirements for succession. The designated family member would have to supply the data promptly.

If a manufacturer believed that good cause existed, it could refuse to approve the succession of a designated family member. The manufacturer would have to notify the designated family member of its refusal within 60 days after receiving of the requested personal and financial data.

A manufacturer's notice of refusal would have to state the specific grounds for refusing to approve the succession and that discontinuance of the agreement would take effect not less than 90 days after the date the notice was served. If a notice of refusal were not given within the 60-day period, the dealer agreement would continue in effect and would be subject to termination only as otherwise permitted by the Act.

The succession provisions would not preclude a new watercraft dealer from designating any person his or her successor in a written instrument filed with a manufacturer. If a written instrument were filed with a manufacturer, that instrument would determine the succession rights to the ownership and operation of the dealership.

#### New or Relocating Dealership

Under the bill, before a manufacturer entered into a dealer agreement establishing or relocating a new watercraft dealer within a relevant market area where another dealer sold the same make, model, or size range of new watercraft for the manufacturer, the manufacturer would have to give written notice to each new watercraft dealer of the same make, model, or size range of

watercraft in the relevant market area of its intention to establish an additional dealer or relocate an existing dealer within that market area.

Within 30 days after receiving the notice, or within 30 days after the end of any appeal procedure provided by the manufacturer, a new watercraft dealer could bring a declaratory judgment action in the circuit court for the county in which the new watercraft dealer was located to determine whether there was good cause for establishing an additional dealer or relocating an existing dealer within the plaintiff's relevant market area. If a declaratory judgment action were filed, the manufacturer could not establish the additional dealer or relocate the existing dealer until the court had rendered a decision on the matter. The court would have to give the action precedence over all other civil matters on its docket.

In determining whether good cause existed, the court would have to take into consideration the existing circumstances, including all of the following:

- Permanency of the investment.
- Effect on the retail new watercraft business and the consuming public in the relevant market area.
- Whether it was injurious or beneficial to the public welfare.
- Whether the new watercraft dealers of the same make, model, or size range in that relevant market area were providing adequate competition and convenient retail customer care for the watercraft of that make, model, or size range in the market area, considering the adequacy of watercraft sales, availability of qualified service personnel, and other factors determined by the court.
- Whether the establishment of the additional new watercraft dealer or relocation of the existing dealer would promote competition.
- Growth or decline of the population and the number of new watercraft registrations in the relevant market area.
- The effect on the additional or relocating dealer of a denial of its relocation into the relevant market area.

These provisions would not apply to the relocation of a new watercraft dealer within two miles of its established place of

business. They also would not apply to the reopening or replacement in a relevant market area of a dealership that had been closed within the preceding year, if the established place of business of the reopened or replacement dealer were within two miles of the established place of business of the closed dealership.

#### Compensation Schedule

The bill would require a manufacturer to provide each of its new watercraft dealers with a schedule of compensation it would have to pay the dealer for parts, diagnostic time, work, or service performed pursuant to a warranty and a time allowance for the performance of any work or service unless a flat rate was established. The manufacturer would have to pay compensation to a dealer for diagnostic time, warranty work, parts used, or service performed that was the same as the rates generally charged by the dealer for like service to retail customers for nonwarranty parts, service, or repairs. If the schedule of compensation required the manufacturer to compensate the new watercraft dealer for a specific type of warranty work at an established flat rate, that rate could not fall below 90% of the rate charged by the dealer for nonwarranty work of the same kind.

The manufacturer or dealer would have to establish reasonable and adequate time allowances for the diagnosis and performance of warranty work and service.

A manufacturer could not fail to do any of the following:

- Perform any warranty obligation.
- Include in a written notice of a factory recall to new watercraft owners and dealers the date by which the manufacturer expected any necessary parts and equipment would be available to dealers for the correction of the defects.
- Compensate a new watercraft dealer in this State for a repair performed pursuant to a recall.

All of the following would apply to a claim made to a manufacturer by a new watercraft dealer for labor or parts:

- The dealer would have to submit the claim on the claim form generally used by

the manufacturer and provide all of the information it usually required.

- The manufacturer in writing would have to approve, disapprove, or request more information about the claim within two days after receiving the claim and information.
- If a manufacturer did not specifically disapprove of a claim in writing within the two-day period, the claim would be considered approved and the manufacturer would have to pay the amount of the claim to the dealer.
- A manufacturer could not charge a claim that it had approved and paid back to the dealer unless the manufacturer could demonstrate both that the claim was fraudulent, false, or unsubstantiated, and that the manufacturer paid the claim within six months before the charge back to the dealer.
- The manufacturer would have to pay the claim within 30 days after the warranty work was completed.
- The dealer would have to maintain all records of any warranty repair for at least 12 months after the warranty claim was paid.

A manufacturer would have to compensate a new watercraft dealer for sales or service promotion events, programs, or activities sponsored by the manufacturer in accordance with the manufacturer's established guidelines for those events, programs, or activities. All of the following would apply to a claim made by a new watercraft dealer for compensation for a promotion event, program, or activity:

- The dealer would have to submit the claim on the claim form generally used by the manufacturer and provide all of the information it usually required.
- The manufacturer in writing would have to approve or disapprove the claim within 30 days after receiving the claim and information.
- If a manufacturer did not specifically disapprove of a claim in writing within the 30-day period, the claim would be considered approved and the manufacturer would have to pay the amount of the claim to the dealer.
- A manufacturer could charge a claim that it had approved and paid back to the dealer, if the charge back occurred within six months after the end of the promotion

event, program, or activity, or after it paid the claim, whichever was later.

- The manufacturer would have to pay a claim within 10 days after the claim was approved or within 30 days after a claim was considered approved.

Within three years after the effective date of a dealer agreement, the manufacturer would have to act as a single source of contact for the new watercraft dealer for all of the manufacturer's component part product warranties. This would not apply to a warranty for engine-related parts or components.

Beginning two years after the bill's effective date, a manufacturer would have to give each of its new watercraft dealers a parts and components manual, and include an owners manual for each new watercraft delivered to a new watercraft dealer.

#### Watercraft Damage

The bill specifies that a new watercraft dealer would be solely responsible for any damage to a new watercraft that occurred after it accepted the watercraft from the carrier or transporter and before delivery to the ultimate purchaser, that was not the result of a latent or hidden defect or was not reasonably observable at the time it accepted the watercraft. A new watercraft dealer would accept a new watercraft when it signed a delivery receipt for the watercraft. A provision in the dealer agreement regarding responsibility for damage to a new watercraft before it was accepted by a new watercraft dealer that was contrary to the bill would be unenforceable by a manufacturer.

The manufacturer would be solely responsible for any damage to a new watercraft that occurred before delivery to the carrier or transporter. A provision in a dealer agreement regarding damage to a new watercraft prior to delivery to the carrier or transporter that was contrary to the bill would be unenforceable by a manufacturer.

A new watercraft dealer would be responsible for damage to a new watercraft that occurred while the new watercraft was in the possession of the carrier or transporter only if the dealer selected the method of transportation, mode of

transportation, and the carrier or transporter. If not, the manufacturer would be responsible for damage to the new watercraft.

A new watercraft dealer could refuse to accept a damaged new watercraft by giving the manufacturer written notice within 10 business days after the watercraft was delivered to the dealer. If a new watercraft dealer refused to accept a new watercraft, the manufacturer would have to credit the dealer's account for the invoice cost to the dealer, plus freight and interest, within 10 business days after receiving the notice from the dealer.

#### Indemnity

The bill would require a manufacturer to indemnify a new watercraft dealer for a judgment for damages or settlement agreed to in writing by the manufacturer, and for the court costs and reasonable attorney fees of the new watercraft dealer, if the complaint, claim, or action were based solely on a defect or defects occurring in the manufacture, construction, assembly, or design of a new watercraft or parts or accessories other than outboard motors and trailers, the selection by the manufacturer of parts or components for the watercraft, any damage to the new watercraft, parts, or accessories occurring in transit to the dealer if the carrier or transporter were designated by the manufacturer, or another function or action of the manufacturer that was beyond the dealer's control.

If the complaint, claim, or action contained independent allegations against the dealer, the manufacturer would have to pay only that portion of the costs, fees, and judgment or settlement that was directly related to the manufacture, assembly, or design of the watercraft, parts, or accessories, or other functions of the manufacturer beyond the dealer's control.

A manufacturer would not be required to indemnify a new watercraft dealer if the dealer had not given the manufacturer reasonable written notice of the complaint, claim, or action.

An indemnification provision in a dealer agreement that was contrary to these provisions would be unenforceable by a manufacturer.

### Action for Damages or Other Relief

Under the bill, if a manufacturer terminated, cancelled, failed to renew, or discontinued a dealer agreement without good cause, a new watercraft dealer could bring an action against the manufacturer to recover actual damages reasonably incurred as a result of the termination, cancellation, nonrenewal, or discontinuance.

A manufacturer that violated the Act would be responsible for all damages sustained by a new watercraft dealer as a result of the violation and for court costs and reasonable attorney fees incurred by the dealer. A new watercraft dealer that violated the Act would be responsible for all damages sustained by a manufacturer as a result of the violation and for court costs and reasonable attorney fees incurred by the manufacturer.

A manufacturer or new watercraft dealer could bring an action for declaratory judgment for determination of any controversy arising under the Act. A manufacturer or new watercraft dealer also could apply to the circuit court to obtain appropriate injunctive relief against termination, cancellation, nonrenewal, or discontinuance of a dealer agreement or any other violation of the Act. The court could grant injunctive relief or a temporary restraining order without bond.

### Enforcement

The Attorney General could commence a civil action in the circuit court for the county in which a violation occurred to enforce compliance with the Act or to restrain the violation of the Act. In a civil action for a violation of the Act, in addition to any other relief granted, the circuit court could assess a civil fine of up to \$5,000 per day for each day the violation continued.

A person who violated the Act would be guilty of a misdemeanor punishable by a maximum fine of \$5,000 per day for each day the violation continued.

MCL 445.541 et al.

Legislative Analyst: J.P. Finet

### **FISCAL IMPACT**

The bill would have an indeterminate fiscal impact on local government. There are no data to indicate how many offenders would be convicted of a misdemeanor for violating the Act. According to the Michigan Boating Industries Association website, there are more than 400 marine businesses in Michigan, but not all of these businesses would be subject to the penalty. Local governments would incur the costs of misdemeanor enforcement, probation, and incarceration in local facilities, which vary by county. Additional penal fine revenue would benefit public libraries.

Fiscal Analyst: Bill Bowerman  
Lindsay Hollander

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.