

Legislative Analysis



AUTO FRANCHISE LAW AMENDMENTS

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House Bill 6099

Sponsor: Rep. John Walsh

House Bill 6100

Sponsor: Rep. Roy Schmidt

Committee: Regulatory Reform

Complete to 5-18-10

A SUMMARY OF HOUSE BILLS 6099 & 6100 AS INTRODUCED 4-29-10

Both bills would enact numerous changes to the state's automobile franchise law, 1981 PA 118, MCL 445.1561 et seq.¹

House Bill 6099 (Rep. Walsh)

The bill amends or adds provisions in the act concerning compensation to dealers upon termination of a dealership agreement, determining compensation for goodwill, and the relevant market area of dealerships.

Relevant Market Area

Under the act, before a manufacturer or distributor enters into a dealer agreement establishing or relocating a dealer within the *relevant market area* of another dealer selling the same brands, the manufacturer or distributor must provide the existing dealer with written notice of the proposed new dealership within the existing dealer's relevant market area. The dealer then may bring an action in the circuit court to determine whether there is good cause for establishing or relocating the new dealership within that relevant market area.

The act currently provides that the "relevant market area" of a dealer is a certain radius from the dealership, with the distance either 6 miles or 10 miles, depending whether the county has a population of greater than 25,000 (6 miles) or less than 25,000 (10 miles).²

The bill increases the county population threshold to 250,000 and increases the relevant market area of dealers. In counties with a population of 250,000 or fewer, the relevant market area is a 20-mile radius. In counties with a population exceeding 250,000, the relevant market area is a 10-mile radius.³

¹ As introduced, HB 6099 is identical to SB 1309 (Sen. Gilbert) and HB 6100 is identical to SB 1308 (Sen. Thomas).

² These population and distance thresholds have been in place since the current auto franchise law was enacted in 1981. Based on 1980 county population data, there were 32 counties with a population below 25,000.

³ Based on July 1, 2009 U.S. Census Bureau estimates, these counties include Ottawa, Ingham, Washtenaw, Genesee, Kent, Macomb, Oakland, and Wayne.

Compensation upon Termination of a Dealership Agreement

The act currently provides that when a dealer agreement is terminated by the manufacturer or distributor, dealers shall be provided "fair and reasonable" compensation for vehicle inventory, supplies and parts inventory, equipment, and special tools.

Currently, the amount of compensation for vehicle inventory is based on all new current model year motor vehicle inventory purchased from the manufacture and not materially altered, substantially damaged, or driven for more than 300 miles.⁴ Compensation is also provided for new motor vehicle inventory not of the current model year that also is not materially altered, substantially damaged, or driven for more than 300 miles.

The bill provides, instead, that the compensation paid for vehicle inventory would be based on all new motor vehicle inventory that is not materially altered, substantially damaged, or driven for more than 1,000 miles.⁵

The bill would also require compensation for the goodwill of the dealer as well as any computers, software, and software agreements that the manufacturers required that the dealer obtain for communication of sales, service, warranty, or other information between the dealer and the manufacturer.

Under the act, the compensation paid to the dealer for the vehicle inventory is to be paid, if possible, within 30 days after the effective date of the termination of the agreement, while compensation for other personal property (equipment, special tools, etc.) is to be paid within 90 days of the effective date of the termination of the agreement. Under the bill all compensation is to be paid within 75 days of the effective date of the termination of the agreement.

Computing the Value of the Goodwill of the Dealer

The bill provides that, in determining the amount of compensation paid for the goodwill of the dealer, the amount would be the highest fair market value of that goodwill on the following dates:

- The date the action that resulted in the termination of the dealer agreement became final.
- If the manufacturer is a *predecessor manufacturer*, the date it announced the action that resulted in the termination of the dealer agreement.⁶
- If the manufacturer is a predecessor manufacturer, 12 months before the date that the predecessor announced the action that resulted in the termination of the dealer agreement.

⁴ HB 6099 adds a definition for "current model year", defining it to mean the calendar year in which a termination, cancellation, nonrenewal, or discontinuance of a dealer agreement occurs and the immediately preceding calendar year. The bill, however, eliminates the use of the phrase from the act.

⁵ A "new motor vehicle" is defined in the act to mean a motor vehicle that in the possession of the manufacturer, distributor, or wholesaler, or has been sold only to a new motor vehicle dealer and for which an original title has not been issued.

⁶ The bill defines "predecessor manufacturer" to mean a manufacturer that sells, conveys, or otherwise transfer all or part of its business to a successor manufacturer.

Generally, the amount of compensation would be the amount agreed to by the dealer and the manufacturer within 30 days after the effective date of the termination of the dealer agreement. This amount would be conclusive and binding. If, however, the dealer and the manufacturer are unable to agree on an amount, the amount is based on the value determined by a *valuation accountant*⁷ or *valuation expert*.⁸ If the manufacturer and dealer do not agree on a value within the 30-day time period, a valuation expert selected by the manufacturer and the dealer would evaluate the dealership and determine the fair market value of the goodwill. This amount would be conclusive and binding.

If the manufacturer and the dealer do not agree on a valuation expert within 45 days after the effective date of the termination of the dealer agreement, the manufacturer and dealer would each have to appoint a valuation accountant to conduct an evaluation and determine the fair market value of the goodwill within 60 days of the effective date of the termination of the dealer agreement. If one of them does not choose a valuation accountant within the time required, the value determined by the chosen valuation accountant would be conclusive and binding.

If the valuation accountants chosen by the manufacturer and dealer agree on the fair market value of the goodwill, that amount is conclusive and binding. If the valuation accountants disagree on the value, they choose a third valuation accountant. If the value determined by the third valuation accountant is *greater* than both amounts determined by the manufacturer valuation accountant and the dealer valuation accountant, then the fair market value of the goodwill is the greater of (1) the value determined by the manufacturer valuation accountant or (2) the value determined by the dealer valuation accountant. If the value determined by the third valuation accountant is *less than* both amounts determined by the manufacturer valuation accountant and the dealer valuation accountant, then the fair market value of the goodwill is the lesser of (1) the value determined by the manufacturer valuation accountant or (2) the value determined by the dealer valuation accountant. In other instances, the fair market value of the goodwill is that amount determined by the third valuation accountant. However that value is determined, it is conclusive and binding on the manufacturer and dealer.

Compensation for Fair Rental Value

The act requires that, in addition to the compensation to dealers for vehicle inventory and personal property (special tools, parts inventory, equipment, etc), manufacturers must also compensate dealers for the *fair rental value* of the place of business for a period of one year from the effective date of the termination of the dealer agreement. The bill specifies that this compensation must be paid in equal monthly installments. Additionally, the bill adds a definition for *fair rental value*, defining it to mean (1) if the dealer leases the place of business, the actual rental amount owed by the dealer under the lease agreement or (2) if the dealer owns the place of business, an amount equal to 20% of the property's state equalized value.

⁷ Defined in the bill to mean a certified public accountant qualified by experience and ability to value the goodwill of a new motor vehicle dealer.

⁸ Defined in the bill to mean an independent individual qualified by experience and ability to value the goodwill of a new motor vehicle dealer. A valuation expert could include a valuation accountant.

House Bill 6100 (Rep. Schmidt)

Prohibited Activities

The bill prohibits manufacturers, importers, and distributors from engaging in a variety of activities with respect to dealers and dealer agreements. The bill eliminates references to importers and distributors, and adds the following prohibitions:

- Establishing a system for allocating and distributing vehicles to dealers that is based on unreasonable sales and service standards
- Providing to certain dealers (but not others) specific makes and models of vehicles; incentives for selling vehicles; consumer incentives; or sales and marketing assistance.
- Offering incentives for selling vehicles based on certain performance standards.
- Offering incentives, absent a written agreement, to make material alterations to the dealer's place of business or to construct new facilities.
- Requiring unreasonable improvements to a facility as a condition for entering into or renewing a dealer agreement.
- Authorizing motor vehicle service and repair facilities to perform vehicle service and warranty work.
- Acting capriciously, unconscionably, or not in good faith so as to cause damage to a dealer.
- Imposing unreasonable performance standards or other standards that are not uniformly applied to similarly situated dealers.
- Using a dealer's sales performance to determine the eligibility of the dealer to purchase program vehicles, certified vehicles, or other used vehicles from the manufacturer.
- Requiring dealers to allow certain people (other than in the course of warranty and notice obligations) to use customer information obtained by the dealer.
- Establishing performance standards that are not fair, reasonable, or equitable. (Upon request, manufacturers must provide dealers with information on how the standards were determined.)
- Taking adverse action (refusing vehicles, withholding payments, etc) against a dealer for sales the dealer made to individuals who subsequently export or resell the vehicle, unless the dealer had foreknowledge of the intent export or resell the vehicle.
- Requiring or coercing a dealer to stop selling any competing brands.
- Prohibiting a dealer from locating sales or service of competing brands, if the dealer provides the manufacturer with written notice of such sales.

Successor Manufacturers and Former Dealers

The bill provides that for five years after a *successor manufacturer*⁹ acquires, succeeds to, or assumes any part of the business of a predecessor manufacturer, the successor

⁹ Defined in HB 6099 to mean a manufacturer that acquires, succeeds to, or assumes any part of the business of another manufacturer on or after January 1, 2009, as the result of any of the following: (1) change in ownership, operation, or control of a predecessor manufacturer by sales or transfer of assets, corporate stock or other equity

manufacturer could not enter into a dealer agreement in the relevant market area of a *former dealer*¹⁰ or allow an existing dealer to relocate into the relevant market area of a former dealer for the same brand (of the predecessor manufacturer) included in the former dealer's dealer agreement unless any of the following occur:

- The successor manufacturer first offers a dealer agreement to the former dealer (or, designated family member, if the dealer is deceased or incapacitated)
- The successor manufacturer pays the former dealer (or designated family member) the fair and reasonable compensation of the former dealer for that brand.
- The successor manufacturer establishes, in circuit court, that the former dealer (or designated family member) is not fit for the new dealership because he/she does not have sufficient training, experience, or financial capital, is incompetent or of poor character, or had a poor sales performance under the dealer agreement with the predecessor manufacturer.

Property Use Agreements

The bill prohibits manufacturers from requiring dealers (existing or proposed) or the owners of a dealership facility to enter into a property use agreement as a condition for entering into a dealer agreement, adding brands at a dealership, renewing an existing dealer agreement, approving the relocation of a dealership, or approving the sale or transfer of ownership of dealership or dealer agreement. Any voluntary property use agreement terminates upon the termination of a dealer agreement.

A property use agreement would be (1) an agreement that requires the dealer to maintain exclusive dealership facilities, (2) an agreement that restricts the ability of a dealer or the property owner (if the property is leased) from selling, transferring, leasing, or changing the use of the property, or (3) a similar agreement known as a site control agreement or exclusive use agreement.

Continuity - Designated Family Members and Executive Managers

The act permits designated family members of a deceased or incapacitated dealer to continue owning and operating a dealership under the existing dealer agreement, if the designated family member provides the manufacturer with written notice within 120 days after the dealer's death or incapacitation and agrees to comply with the terms of the dealer agreement and otherwise qualifies for a dealer agreement. The bill deletes references to distributors, and allows a dealer agreement to remain in effect under the ownership or operation of an executive manager.¹¹

interest, (2) a termination of part or all of the business operations of the predecessor manufacturer, (3) discontinuance of the sale of a product line, or (4) a change in distribution system by a predecessor manufacturer.

¹⁰ Defined in HB 6099 to mean a new motor vehicle dealer that entered into a dealer agreement with a predecessor and (1) the dealer entered into a termination agreement or deferred termination agreement with the predecessor or a successor manufacturer, or (2) the dealer agreement was terminated or otherwise ended.

¹¹ HB 6099 defines "executive manager" to mean an individual employed by dealer in an executive capacity and who has a written employment agreement with the dealer that includes a right to purchase a controlling interest in the dealership at a future time or upon the death or incapacity of the dealer. Under the act a "designated family member" may include a person designated by the dealer as his/her successor.

Audits of Records

The bill permits manufacturers to conduct audits of the records of dealers pertaining to the warranty claims and sales promotions.

Liability for Costs

The act provides that a manufacturer that violates the act is liable for all court costs and reasonable attorney's fees incurred by the dealer. The bill, instead, specifies that the manufacturer is liable for the actual amount of expenses incurred by the dealer, including court costs, amounts paid for depositions or transcripts, expert witness fees, and the dealer's actual attorney fees, as determined by the court.

FISCAL IMPACT:

The bills would have no budgetary impact on the Department of State, which has primary responsibility for regulating automobile dealers, as the act imposes no regulatory requirements on the department. Overall, the bills would have an indeterminate impact on state and local units of government, depending on how the bills affect the number and location of automobile dealerships in the state, particularly in light of the recent efforts of Chrysler and General Motors to close dealerships as they reorganize under bankruptcy protection.¹² There are a number of provisions under the bills impacting the location of automobile dealers. These provisions include expanding the relevant market area of dealers, imposing restrictions on the methods manufacturers can use to force dealers to improve their facilities, restricting the ability of manufacturers to impose certain property use (site control) agreements, allowing for the succession of dealerships by executive managers, and restricting the location of dealerships (under a successor manufacturer) in the relevant market area of former dealers.

Fiscal Analyst: Mark Wolf

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

¹² For discussion of the closing of dealerships as part of the restructuring, see the hearing of U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, 12 June 2009, [<http://energycommerce.house.gov>] and the hearing of the U.S. Senate, Committee on Commerce, Science, and Transportation, 3 June 2009, [<http://commerce.senate.gov/public>]. See, also, the hearing on the economic impact of dealership closing on rural communities by the U.S. House of Representatives, Committee on Small Business, Subcommittee on Rural Development, Entrepreneurship, and Trade, 16 September 2009, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:52262.pdf]. See, also, Bill Canis and Michaela D. Platzer, *U.S. Motor Vehicle Industry Restructuring and Dealership Terminations*, Congressional Research Service, R40712 (August 7, 2009), available publicly at, [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1672&context=key_workplace]. Additionally, the U.S. Treasury Special Inspector General for the Troubled Asset Relief Program is currently reviewing the processes employed by Chrysler and GM to determine which dealers are to be closed. The special inspector general's April 20, 2010 quarterly report to Congress notes the objective of the review is to "determine whether GM and Chrysler developed and followed a fair, consistent, reasonable, and documented approach; to understand the role of the Federal Government in these decisions; and to review the cost savings or other benefits to GM and Chrysler."