

Legislative Analysis



AUTO FRANCHISE LAW AMENDMENTS

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House Bill 6099 (Substitute H-1)
Sponsor: Rep. John Walsh

House Bill 6100 (Substitute H-1)
Sponsor: Rep. Roy Schmidt
Committee: Regulatory Reform

Complete to 7-1-10

A SUMMARY OF HOUSE BILLS 6099 & 6100 AS REPORTED FROM COMMITTEE

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 may then 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 would increase the county population threshold to 150,000 and increase the relevant market area of dealers.³ In counties with a population of 150,000 or fewer, the

¹ As introduced, HB 6099 is identical to SB 1309 (Sen. Gilbert) and HB 6100 is identical to SB 1308 (Sen. Thomas). The House Regulatory Reform Committee substitutes are also identical to substitutes for the Senate legislation adopted by the Senate Committee on Economic Development and Regulatory Reform.

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 As introduced, the bill increased the population threshold to 250,000.

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.⁴

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. 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 (of the current model year or the previous model year) that is (1) unsold (2) not materially altered, (3) driven for less than 750 miles, and (4) was purchased from the manufacturer or another dealer of the same brand before the notice of termination was received.⁵

The bill would also require compensation for data processing programs and equipment, including (1) software required by the manufacturer for communicating sales, service, warranty and other information in the two-year period before the dealership agreement is terminated, and (2) any amounts paid or remaining to be paid on any leases of hardware or software used to report data to the manufacturer where the lease is executed before the dealership agreement is terminated, provided the time remaining on the lease is two years or less when the dealership agreement is terminated.

The bill would also require compensation for the net cost of any facilities upgrades required, or recommended in writing, by the manufacturer that were made within two years before the dealership agreement is terminated. The bill would also require compensation for any furnishings required by the manufacturer purchased within two years before the dealership agreement is terminated.

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

⁴ Based on July 1, 2009, U.S. Census Bureau estimates, these counties include Monroe, Jackson, Berrien, St. Clair, Muskegon, Livingston, Saginaw, Kalamazoo, Ottawa, Ingham, Washtenaw, Genesee, Kent, Macomb, Oakland, and Wayne.

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.

bill all compensation is to be paid within 60 days of the effective date of the termination of the agreement.⁶

Compensation for the Goodwill of the Dealer

The bill also requires manufacturers terminating a dealership agreement to pay the dealer "fair and reasonable compensation" for the goodwill of the dealer, if the manufacturer terminates the agreement for any of the following reasons:

- The ownership, operation, or control of all or part of the manufacturer's business changed by sale or transfer of assets, corporate stock, or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, or operation of law.
- All or part of the manufacturer's business operations were terminated, suspended, or ceased.
- The manufacturer discontinued a brand.

If a successor manufacturer offers a dealership agreement to a dealer whose agreement with the predecessor manufacturer is terminated, compensation for goodwill is not required if the successor manufacturer-dealer agreement is "substantially similar" to the terms of the dealer agreement with the predecessor manufacturer.

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 based on the fair market value as of the day prior to termination of the dealer agreement.

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 three *qualified appraisers*.⁷ Within 40 days of the termination of the agreement, the manufacturer and the dealer would each select one qualified appraiser. Those two appraisers would then select the third appraiser. The appraisers would have 90 days from the termination of the dealer agreement to conduct an appraisal of the fair market value. The compensation due to the dealer would be the median value determined by the three appraisers. The costs of conducting the appraisals would be borne equally by the manufacturer and the 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.

⁶ Continuing law provides that if this payment is not made within the time prescribed it shall accrue interest at an annual percentage rate of 12%.

⁷ Defined in the bill as an individual who is qualified by experience and ability to value the goodwill of a business.

The bill provides that the manufacturer and the dealer must make a "good faith effort" to agree to the fair rental value, "taking into consideration the adequacy and desirability of the premises for dealership operations and the fair market value of the premises." The bill provides for a process to determine the fair rental value similar to the process to determine the value of goodwill, by relying on the value as determined by three *qualified real estate appraisers*.⁸

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, 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 provide customer lists or service files to the manufacturer, other than in the course of warranty work, vehicle delivery, safety/recall obligations, or to validate dealer incentives.
- 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.

⁸ Defined to be a general real estate appraiser or a state licensed real estate appraiser regulated under Article 26 of the Occupational Code, 1980 PA 299, MCL 339.2601 et seq.

- Owning a repair facility (except for one that repairs and services manufacturer-owned vehicles).

Property Use Agreements

The bill prohibits (with some exceptions) 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.

Property use agreements could be entered into, if the manufacturer provides the dealer/facility owner with some monetary consideration for the agreement. A property use agreement could not have a term longer than 10 years unless the manufacturer provides additional monetary consideration. A property use agreement ceases when the underlying dealer agreement is terminated. If the dealer terminates the dealer agreement, the dealer would be responsible for repaying a pro-rated share of the monetary consideration received for the property use agreement. Any provision in a property use agreement entered into after the bill's effective date that is inconsistent with the bill would be voidable at the election of the dealer or facility owner.

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.⁹

Audits of Records

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

Warranty Claims

The act generally provides that a manufacturer may not charge back to the dealer the cost of any warranty work that it has approved and paid, unless the manufacturer can show the

⁹ HB 6099 defines "executive manager" to mean an individual employed by a new vehicle 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.

work was fraudulent or unsubstantiated. Warranty work later shown to be unsubstantiated may not be charged back to the dealer more than 15 months after payment was made. The bill reduces the time requirement to 12 months. Additionally, the bill allows the manufacturer to charge back warranty work indicating the use of improper diagnosis processes or repair procedures. The costs for such warranty work could also not be charged back to the dealer more than 12 months after payment.

The bill also specifies that a manufacturer may not deny a claim for payment of warranty work because of the dealer's incidental failure to comply with specific claim processing requirements that do not raise a question as to the legitimacy of the claim.

Before a manufacturer could charge back a claim to the dealer, the manufacturer would have to meet (in person, via video teleconference, or via telephone) with a representative of the dealer, or respond to any written request by the dealer. The manufacturer would have to provide the dealer with a "detailed explanation" (and supporting documentation) for the basis of each claim charged back to the dealer, and afford the dealer a "reasonable period of time" lasting at least 45 days to respond to the chargeback. The failure of a dealer to participate in a meeting with the manufacturer would relieve the manufacturer of any obligation to meet and provide materials to the dealer.

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 direct budgetary impact on the Department of State, which has primary responsibility for regulating automobile dealers and other automobile-related entities, 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.¹⁰ There are a number of

¹⁰ 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

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, and allowing for the succession of dealerships by executive managers.

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■ 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.

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."