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Bill Analysis

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Reps. Lundy, Hagan, Luckie, Domenick, Book, Oelslager, Letson, Gardner, Yuko, Pryor

BILL SUMMARY

Terminating, discontinuing, failing to renew, or cancelling a franchise, generally

- Specifically applies the provisions of the New Motor Vehicle Franchisee Law pertaining to the termination, discontinuance, or nonrenewal of a franchise, as amended by the bill, to the *cancellation* of a franchise.
- Lengthens, generally, from 90 to 180 days the prior notice of termination, discontinuance, or nonrenewal that a motor vehicle franchisor must give to a franchisee and applies the 180-day notice requirement to the cancellation of a franchise.
- Applies existing law's circumstances establishing good cause and circumstances not constituting good cause for the termination, discontinuance, or nonrenewal of a franchise to the cancellation of a franchise and adds circumstances that do not constitute good cause for the termination, discontinuance, nonrenewal, or cancellation of a franchise.
- In any hearing on a protest filed pursuant to a written notice of termination, discontinuance, nonrenewal, or cancellation of a franchise, limits the evidence that may be considered to only evidence concerning the grounds the franchisor set forth in the notice.

Terminating, discontinuing, failing to renew, or cancelling a franchise based upon change in ownership, cessation of business operations, or discontinuance of product

- Enacts procedures for the termination, cancellation, discontinuance, or nonrenewal of a franchise by a franchisor based upon a change in ownership, operation, or control of the business, or the termination, suspension, or cessation of business operations, of the manufacturer, factory branch, distributor, or distributor branch, or discontinuance of the sale of a product line, series, brand, or class of vehicles or a change in the distribution system by the manufacturer.
- Requires the franchisor to pay fair and reasonable compensation to the new motor vehicle dealer for at least the items specified in the bill, including the fair market value of the franchise.
- Requires, generally, the manufacturer to pay dealership facilities assistance to a new motor vehicle dealer in an amount that depends on how the facilities are held.
- Provides that a franchise continues in full force and operation notwithstanding a change of an established plan or system of distribution of the motor vehicles offered for sale under the franchise.
- Requires disputes arising between a manufacturer or distributor and a new motor vehicle dealer to be resolved by a court of competent jurisdiction and not by the Motor Vehicle Dealers Board.

Franchisor prohibitions

- Modifies some of the existing prohibitions that apply to a franchisor and enacts new prohibitions relating to:
 - (1) Making certain items equally available to its same line-make franchisees;
 - (2) Reimbursing nonfranchised persons for warranty and recall work;
 - (3) Providing nonfranchised persons certain items that would otherwise be sold by a franchisee;
 - (4) A franchisee operating multiple franchises at the same location or multiple locations;
 - (5) Using a franchisor-owned financial services or leasing company to accomplish what would otherwise be illegal conduct;

- (6) Initiating charge backs;
 - (7) Refusal to pay incentive compensation or payment to the franchisee;
 - (8) Preventing a franchisee from charging consumers legally allowed fees;
 - (9) Changing the capital structure of the franchisee and the means by which the franchisee finances dealership operations;
 - (10) Requiring a change in the dealership's location and alterations to dealership premises;
 - (11) Releasing to a third party certain information concerning the dealership or any information regarding the dealership's customers.
- Prohibits a franchise agreement from requiring the franchisee to pay the franchisor's attorney's fees, waiving any remedy or defense available to the franchisee, or waiving any provision of the Motor Vehicle Dealers Law.
 - Prohibits a franchisor from restricting a franchisee from filing a legal action in a particular forum otherwise available under federal or state law.

Warranty and recall obligations

- Requires a franchisor to fulfill warranty and recall obligations of repairing and servicing motor vehicles and prohibits a franchisor from recovering its franchisee reimbursement costs for parts and labor.

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CONTENT AND OPERATION

Termination, discontinuance, or nonrenewal of a franchise in general

Notice

Existing law

Under existing law, notwithstanding the terms, provisions, or conditions of an existing "franchise," a "franchisor" may not terminate or fail to continue or renew a franchise except for good cause (R.C. 4517.54(A)). (See **COMMENT**.) Each franchisor proposing to terminate, discontinue, or not renew a franchise must send written notice setting forth the specific grounds of the proposed action by certified mail to the "franchisee" (see **COMMENT**) at such time as may be necessary to ensure that the notice is received no later than 90 days before the effective date of the proposed action, or no later than 15 days before the effective date of the proposed action when that action is based upon any of the following (R.C. 4517.54(B)):

- (1) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law;
- (2) Any unlawful business practice after written warning thereof;
- (3) The franchisee has ceased business operations.

Prior to the effective date of the proposed action, a franchisee receiving written notice from a franchisor proposing to terminate, discontinue, or not renew a franchise may file a protest with the Motor Vehicle Dealers Board against the franchisor's proposed action. When such a protest has been filed, the Board must inform the franchisor that a timely protest has been filed and that a hearing is required pursuant to R.C. 4517.57 (see "**Hearing procedure for protest**," below). A franchisor is prohibited from terminating, discontinuing, or failing to renew a franchise before the holding of a hearing on any protest, or after the hearing, if the Board determines that good cause does not exist to terminate, discontinue, or not renew the franchise. (R.C. 4517.54(C) and (D).)

Operation of the bill

The bill applies the provisions described above in "**Existing law**" to situations in which the franchisor is *cancelling* the franchise. Under the bill, the written notice of the proposed termination, discontinuation, cancellation, or not renewing is generally

required to be received no later than 180 days before the effective date of the proposed action¹ (rather than 90 days). The notice must be received no later than 90 days (instead of 15 days) before the effective date of the proposed action when the proposed action is based upon any of the criteria described above in paragraph (1), (2), or (3) under existing law. (R.C. 4517.54.)

Good cause for terminating or failing to continue or renew a franchise

Circumstances establishing good cause

Existing law provides that in determining whether good cause has been established by the franchisor for terminating or failing to continue or renew a franchise, the Motor Vehicle Dealers Board must take into consideration the existing circumstances, including, but not limited to the following (R.C. 4517.55(A)):

(1) The amount of retail sales transacted by the franchisee during a five-year period immediately preceding such notice as compared to the business available to the franchisee;

(2) The investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;

(3) The permanency of the franchisee's investment;

(4) Whether it is injurious or beneficial to the public interest for the franchise to be modified or replaced, or the business of the franchisee disrupted;

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee, and is rendering adequate service to the public;

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor required to be performed by the franchisee;

(7) The extent and materiality of the franchisee's failure to comply with the terms of the franchise and the reasonableness and fairness of the franchise terms;

(8) Whether the owners of the new motor vehicle dealer had actual knowledge of the facts and circumstances upon which termination is based;

¹ The proposed action is the termination, discontinuing, or failing to renew a franchise under existing law, or the cancellation of a franchise under the bill.

(9) Whether the proposed termination constitutes discriminatory enforcement of the franchise agreement.

The bill requires the Motor Vehicle Dealers Board to take into consideration the existing circumstances, including, but not limited to the above described circumstances, in determining whether good cause has been established by the franchisor for *cancelling* a franchise (R.C. 4517.55(A)).

Circumstances not constituting good cause

Under existing law, notwithstanding the terms, conditions, or provisions of any franchise or waiver, the following do not constitute sufficient good cause for terminating or failing to continue or renew a franchise (R.C. 4517.55(B)):

(1) Refusal by the franchisee to purchase or accept delivery of any "new motor vehicle" (see **COMMENT**), parts, accessories, or any other commodity or service not ordered by the franchisee;

(2) The fact that the franchisee or the owner of any interest therein, owns, has an investment in, participates in the management of, or holds a license for the sale of the same or any other line-make of new motor vehicle;

(3) The sale, transfer, or issuance of any equity or debenture issue, or the transfer or issuance of any security or shares of stock in a new motor vehicle dealer to any person, whenever the sale, issuance, or transfer does not result in a change in the controlling ownership of the dealership;

(4) A change by the franchisee in the administrative or executive management of the dealership;

(5) Failure of the franchisee to achieve any unreasonable or discriminatory performance criteria.

The bill provides that notwithstanding the terms, conditions, or provisions of any franchise or waiver, the above circumstances do not constitute sufficient good cause for *cancelling* a franchise.

The bill specifies that the following additional circumstances do not constitute sufficient good cause for terminating, failing to continue or renew, or cancelling a franchise (R.C. 4517.55(B)(6) to (12)):

(1) A loss of trust by the franchisor absent circumstances or facts that would be a material breach of the franchise agreement and that material breach is known and ratified by the owners of the new motor vehicle dealer;

(2) A change, in whole or in part, of an established plan of distribution or system of distribution of the motor vehicles offered for sale under the franchise. The appointment of a new manufacturer, factory branch, distributor, or distributor branch for motor vehicles offered for sale under the franchise agreement is considered to be a change of an established plan or system of distribution.

(3) A change in ownership, operation, or control of all or any part of the business of the "manufacturer," factory branch, "distributor" (see **COMMENT**), or distributor branch whether by sale or transfer of assets, corporate stock or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law or otherwise;

(4) The termination, suspension, or cessation of a part or all of the business operations of the manufacturer, factory branch, distributor, or distributor branch;

(5) Discontinuance of the sale of the product line or a change in distribution system by the manufacturer whether through a change in distributors or the manufacturer's decision to cease conducting business through a distributor altogether;

(6) The failure of a franchisee to maintain a motor vehicle floor plan line of credit, unless the franchisee fails to maintain a floor plan line of credit for 120 days or longer;

(7) The export of new motor vehicles to a foreign country, absent evidence that the dealer had actual knowledge that the vehicle was purchased for export. There is a rebuttable presumption that a dealer does not have actual knowledge that a vehicle was purchased for export if the vehicle is titled in the United States.

Hearing procedure for protest

Existing law

Upon receiving a notice of protest, the Motor Vehicle Dealers Board must set a time, which must be within 180 days of such order, and place of hearing and send by certified mail a copy of the order to the franchisor, the protesting franchisee or dealer organization, and all individuals and groups that have requested notification by the Board of protests to and decisions of the Board. In any hearing on a protest, the franchisor has the burden of going forward and of persuasion to establish that there is good cause for the franchisor: to establish or relocate an additional motor vehicle dealer; to terminate, discontinue, or not renew a franchise; to fail or refuse to approve a sale or transfer of all or a controlling interest in a franchise; or that recall reimbursement schedules or formulas or the schedules of compensation are reasonable. Only the public members of the Board and the hearing officer designated by the Board may

participate in, deliberate on, hear, consider, or decide any matter filed. The public members must act by majority vote. (R.C. 4517.57.)

Operation of the bill

The bill applies the existing hearing procedures to a protest filed with the Motor Vehicle Dealers Board against a *cancellation* of a franchise (R.C. 4517.57(C)).

It further provides that in any hearing on a protest filed against the termination, cancellation, discontinuance, or nonrenewal of a franchise, the Board must hear evidence concerning only the grounds set forth in the franchisor's written notice proposing to terminate, cancel, discontinue, or not renew the franchise. In any hearing or appeal relating to a protest filed, the Board or court must prohibit the franchisor from offering evidence concerning any grounds not set forth in the notice proposing to terminate, cancel, discontinue, or not renew the franchise. (R.C. 4517.57(F).)

Terminating, cancelling, discontinuing, or failing to renew a franchise based upon change in ownership, cessation of business operations, or discontinuance of product

Notice

Under the bill, each franchisor proposing to terminate, cancel, discontinue, or not renew a franchise based upon any of the following must, unless prohibited by law or regulation, send written notice by certified mail of the proposed action to the franchisee at such time as may be necessary to ensure that the notice is received not later than 12 months before the effective date of the proposed action (R.C. 4517.541(A)):

(1) As a result of any change in ownership, operation, or control of all or any part of the business of the manufacturer, factory branch, distributor, or distributor branch whether by sale or transfer of assets, corporate stock or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law, or otherwise;

(2) The termination, suspension, or cessation of a part or all of the business operations of the manufacturer, factory branch, distributor, or distributor branch;

(3) Discontinuance of the sale of a "product line," series, brand, or class of vehicles (see "**Definitions**," below) or a change in distribution system by the manufacturer, whether through a change in distributors or the manufacturer's decision to cease conducting business through a distributor altogether.

The notice must set forth the specific grounds for the proposed action. If the manufacturer fails to provide notice at least 12 months before the effective date of the

proposed action, the manufacturer is required to pay liquidated damages equal to the value of the franchise as of the date notice was required. (R.C. 4517.541(B).)

Compensation

Except as described in the last paragraph under (6), below, upon the termination, cancellation, discontinuance, or nonrenewal of any franchise by the franchisor based upon the above reasons, or upon a voluntary termination by a franchisee, the bill requires the manufacturer to pay fair and reasonable compensation to the "new motor vehicle dealer" (see **COMMENT**) for at least the following (R.C. 4517.541(C)):

(1) **New motor vehicle inventory**, regardless of model year, that has been acquired from the manufacturer or in trade from another motor vehicle dealer, determined as follows: (a) for each vehicle driven 500 miles or less, the "net cost," or (b) for each vehicle driven more than 500 miles, the net cost reduced by the "net discount value" of each vehicle or, if the vehicle cannot be reduced by the net discount value, the net cost of the vehicle (see "**Definitions**," below).

(2) **Unused, undamaged, and unsold supplies and parts** purchased from the manufacturer or a source recommended or approved by the franchisor, at the new motor vehicle dealer's net acquisition cost, provided such supplies and parts are currently offered for sale by the manufacturer or distributor in its current parts catalogs and are in salable condition;

(3) **Equipment, signs, and furnishings** that have not been altered or damaged and that have been required by the manufacturer or distributor to be purchased by the new motor vehicle dealer from the manufacturer or distributor, or their approved sources as follows:

(a) The manufacturer must purchase from the new motor vehicle dealer each undamaged sign at a fair market price, if (i) the sign bears a common name, trade name, or trademark of the manufacturer, (ii) the manufacturer required that the dealer acquire the sign, and (iii) the sign was acquired by the dealer from the grantor or from a source approved by the manufacturer.

(b) The manufacturer must purchase from the new motor vehicle dealer at a fair market price poles or other hardware used to erect a sign if the manufacturer required that the sign be free standing and not include a trademark or trade name other than that of the manufacturer.

(c) Fair market price is rebuttably presumed to be equal to the new motor vehicle dealer's original cost, reduced by 1/10 of the original cost for each year of ownership.

(4) **Special tools** that have not been altered or damaged and that the manufacturer or distributor required the new motor vehicle dealer to purchase from the manufacturer or distributor, or their approved sources, at whichever of the following value applies:

(a) The new motor vehicle dealer's net acquisition cost, if the item was acquired in the 12 months immediately preceding the effective date of the termination, cancellation, discontinuance, nonrenewal, or voluntary termination;

(b) The greater of the fair market value or 75% of the new motor vehicle dealer's net acquisition cost, if the item was acquired more than 12 but less than 24 months immediately preceding the effective date of the termination, cancellation, discontinuance, nonrenewal, or voluntary termination;

(c) The greater of the fair market value or 50% of the new motor vehicle dealer's net acquisition cost, if the item was acquired 24 or more but less than 36 months immediately preceding the effective date of the termination, cancellation, discontinuance, nonrenewal, or voluntary termination;

(d) The greater of the fair market value or 25% of the new motor vehicle dealer's net acquisition cost, if the item was acquired 36 or more but less than 60 months immediately preceding the effective date of the termination, cancellation, discontinuance, nonrenewal, or voluntary termination;

(e) Fair market value, if the item was acquired 60 or more months immediately preceding the effective date of the termination, cancellation, discontinuance, nonrenewal, or voluntary termination.

(5) The new motor vehicle dealer's **cost of handling, packing, loading, and transporting** an item described in paragraphs (1) to (4), above, for return to the franchisor.

(6) Subject to the following paragraphs, the **fair market value of the franchise** that is at least equivalent to the highest fair market value of the franchise on the following dates: (a) the date the manufacturer announces the action that results in termination, cancellation, discontinuance, nonrenewal, or voluntary termination, (b) the date the action that results in termination, cancellation, discontinuance, nonrenewal, or voluntary termination first became general knowledge, (c) the day 12 months prior to the date on which the notice of termination, cancellation, discontinuance, or nonrenewal is issued, or (d) the date the franchisee provides the franchisor with written notice of the voluntary termination.

If the termination, cancellation, discontinuance, or nonrenewal is due to a manufacturer's change in distributors, the manufacturer may avoid paying fair market value to the dealer if the new distributor or the manufacturer offers the dealer a franchise agreement with terms acceptable to the dealer.

The manufacturer is not required to pay fair market value of the franchise if the termination, discontinuance, nonrenewal, or cancellation of the franchise agreement is the result of the voluntary act of the new motor vehicle dealer. Notwithstanding the terms of any contract or agreement, any dealer's termination or resignation may not be deemed to be voluntary if that termination or resignation occurred under the manufacturer's threat of termination, cancellation, discontinuance, or nonrenewal of the franchise.

Time of payment

The manufacturer must pay the fair and reasonable compensation for the items described in "**Compensation**," above, within 30 days of the effective date of termination, cancellation, discontinuance, nonrenewal, or voluntary termination, provided the new motor vehicle dealer is able thereafter to present clear title to the property within a reasonable period of time. The manufacturer must pay or reimburse the dealer for any costs of storing, insuring, and floor planning any of the property from the effective date of termination until the date the property is transported, in addition to transportation charges associated with the manufacturer's repurchase obligations. The manufacturer is prohibited from charging the dealer any handling, restocking, or other similar costs or fees associated with items repurchased by the manufacturer. (R.C. 4517.541(D).)

Dealership facilities assistance

The bill requires dealership facilities assistance to be paid as described in the following paragraphs.

Amount of assistance

If the new motor vehicle dealer is leasing the dealership facilities from the manufacturer or a subsidiary thereof, the manufacturer or subsidiary is required to forgive any future lease obligations. Subject to the following paragraph: (1) if the new motor vehicle dealer is leasing the dealership facilities from a lessor other than the manufacturer, the manufacturer is required to pay the new motor vehicle dealer a sum equivalent to the rent for the unexpired term of the lease or two years' rent, whichever is less, or such longer term as is provided in the franchise agreement between the dealer and manufacturer, (2) if the new motor vehicle dealer owns the dealership facilities, the

manufacturer is required to pay the new motor vehicle dealer a sum equivalent to the reasonable rental value of the dealership facilities for two years.

In order to be entitled to facilities assistance from the manufacturer as described in (1) and (2), above, the new motor vehicle dealer is required to mitigate damages by listing the dealership facilities for lease or sublease with a licensed real estate agent or retail industry broker within 30 days after the effective date of the termination of the franchise and thereafter by reasonably cooperating with the real estate agent or retail industry broker in the performance of the agent's or broker's duties. If the dealer is able to lease or sublease the dealership facilities, the dealer is required to pay the manufacturer the net revenue received from the mitigation up to the total amount of facilities assistance that the dealer has received from the manufacturer. (R.C. 4517.541(E)(1) to (4).)

Partial termination

If the termination relates to fewer than all of the franchises operated by the new motor vehicle dealer at a single location, the amount of facilities assistance that the manufacturer is required to pay the dealer must be based on the proportion of gross revenue received from the sale and lease of new vehicles by the dealer and from the dealer's parts and service operations during the three years immediately preceding the effective date of the termination, or any shorter period that the dealer may have held these franchises, of the line-makes being terminated, in relation to the gross revenue received from the sale and lease of all line-makes of new vehicles by the dealer and from the total of the dealer's and parts and service operations from this location during the same three-year period (R.C. 4517.541(E)(5)).

Time of payment

The manufacturer must pay the dealership facilities assistance within 30 days after the effective date of termination, cancellation, discontinuance, or nonrenewal (R.C. 4517.541(E)(6)).

When dealership facilities assistance is not required

The manufacturer is not required to pay dealership facilities assistance if the termination, cancellation, discontinuance, or nonrenewal of the franchise agreement is the result of the voluntary act of the new motor vehicle dealer. Notwithstanding the terms of any contract or agreement, any dealer's termination or resignation may not be deemed to be voluntary if that termination or resignation occurred under the manufacturer's threat of termination, cancellation, discontinuance, or nonrenewal of the franchise. (R.C. 4517.541(E)(7).)

Continuance of franchise

The bill provides that a franchise continues in full force and operation notwithstanding a change, in whole or in part, of an established plan of distribution or system of distribution of the motor vehicles offered for sale under the franchise. The appointment of a new manufacturer, factory branch, distributor, or distributor branch for motor vehicles offered for sale under the franchise agreement is considered to be a change of an established plan of distribution or system of distribution. (R.C. 4517.541(F).)

Disputes

The bill provides that disputes arising between a manufacturer or distributor and a new motor vehicle dealer must be resolved by a court of competent jurisdiction and not by the Motor Vehicle Dealers Board (R.C. 4517.541).

Construction of provisions

None of the provisions described above in "**Terminating, cancelling, discontinuing, or failing to renew a franchise based upon change in ownership, cessation of business operations, or discontinuance of product**" may be construed as prohibiting a manufacturer or distributor from changing, adding, or deleting models, specifications, model names, numbers or identifying marks, or similar characteristics of the new vehicles it markets, provided that the change, addition, or deletion does not result in the termination or discontinuance of a distinct series, line, brand, or class of new vehicle (R.C. 4517.541(H)).

Definitions

The bill defines the following terms for purposes of the provisions described above in "**Terminating, cancelling, discontinuing, or failing to renew a franchise based upon change in ownership, cessation of business operations, or discontinuance of product**" (R.C. 4517.541(I)):

"Discontinuation of a product line, series, brand, or class" includes a reduction in products manufactured or made available for sale through a new motor vehicle that results in a substantial impairment of the viability of the franchise.

"Net cost" means the franchised dealer cost for a new and unsold motor vehicle in a dealer's inventory plus any charges by the manufacturer or distributor for destination, distribution, or delivery, and taxes, less all allowances paid or credited to the franchised dealer by the manufacturer or distributor, and less an amount equal to the diminution in wholesale value caused by damages to the new motor vehicle before the motor vehicle dealer delivers the new motor vehicle to the manufacturer.

"Net discount value" is the net cost multiplied by the total mileage, exclusive of mileage placed on the motor vehicle before it was delivered to a dealer, divided by 100,000.

"Product line" is a line-make produced by a manufacturer.

Franchisor prohibitions

Revised prohibitions

Existing law prohibits any franchisor from doing specified acts notwithstanding the terms, provisions, or conditions of any agreement. The following are among the existing prohibitions and the revisions made by the bill.

Unfair competition

Under existing law, a franchisor is prohibited from selling, leasing, or renting goods or motor vehicles, or rendering any service normally performed and required of franchisees under the franchise agreement with the franchisor, in unfair competition with the franchisee, except that this provision does not apply to a sale, lease, or rental to, or service performed for, an agency of federal, state, or local government.

The bill broadens this prohibition to prohibit a franchisor from selling, leasing, or renting goods or *new or used* (added by the bill) motor vehicles, or rendering any service normally performed and required of franchisees under the franchise agreement with the franchisor, *whether directly or indirectly, or in combination with or through any person, subsidiary, or affiliated entity* (instead of "in unfair competition with the franchisee"), except that this provision does not apply to a sale, lease, or rental to, or service performed for, an agency of federal, state, or local government. In addition, the bill specifies that the prohibition does not prohibit a franchisor from operating a dealership for a time limited to that which is required to wind up all transactions in instances in which a franchisee has been terminated or voluntarily relinquishes its franchise. (R.C. 4517.59(A)(5).)

Unfairly changing a franchisee's allotment of motor vehicles or quota in a sales contest

Existing law prohibits a franchisor from unfairly changing or amending unilaterally a franchisee's allotment of motor vehicles or quota in a sales contest without reasonable cause. The bill instead prohibits a franchisor from unfairly changing or amending unilaterally a franchisee's allotment of motor vehicles or quota (it deletes "in a sales contest"), sales expectancy, or sales penetration (added by the bill) without reasonable cause. (R.C. 4517.59(A)(6).)

Failure to disclose certain information

Under existing law, a franchisor is prohibited from refusing to disclose to any new motor vehicle dealer who handles the same line-make, the manner and mode of distribution of that line-make within the same county. Under the bill, the franchisor is prohibited from refusing to disclose to any new motor vehicle dealer who handles the same line-make, the manner and mode of distribution of that line-make within the same county (existing law) and all contiguous counties for the previous five years. The bill also expands this prohibition to prohibit a franchisor from refusing to disclose to any new motor vehicle dealer who handles the same line-make the allocation by segment of that line-make and the number of units allocated by that line-make to other same line-make dealers within the same county and all contiguous counties for the previous five years. (R.C. 4517.59(A)(15).)

Predatory or discriminatory behavior

Existing law prohibits a franchisor from engaging in any predatory practice or discriminating against any new motor vehicle dealer. The bill includes a specific example: discriminating against a franchisee, as compared to a same line-make franchisee, with regard to motor vehicle allocation, motor vehicle sales expectations, motor vehicle market penetration, motor vehicle planning volume requirements, customer service satisfaction requirements, dealership facility requirements, or dealer capitalization requirements. (R.C. 4517.59(A)(16).)

New prohibitions

The bill enacts a series of new prohibitions. Under the bill, notwithstanding the terms, provisions, or conditions of any agreement, franchise, or waiver, no franchisor may do any of the following (R.C. 4517.59(A)(8), (13), (14), and (17) to (25)):

(1) Fail or refuse to make equally available to its same line-make franchisees all motor vehicles, motor vehicle parts, or other products manufactured for that line-make at the same price, including discounts, rebates, incentives, or other payments or allowances affecting the net price. Under this prohibition, a franchisor has not made the motor vehicle, motor vehicle part, or other product available to all line-make franchisees if the franchisor does any of the following: (a) requires a franchisee to "remodel, renovate, or recondition" (includes the requirement that a franchisee purchase or lease unreasonably expensive advertising or promotional displays or other similar materials) the dealer's existing dealership facilities as a prerequisite to receiving the model, part, or product, (b) requires a franchisee to pay an additional fee to receive any model, part, or product within a franchisor's line-make, or (c) requires a franchisee to accept additional inventory to receive any model, part, or product within a franchisor's line-make.

(2) Provide reimbursement to any nonfranchised individual or entity for labor and parts used to fulfill warranty and recall work;

(3) Directly sell, distribute, or otherwise make available to any nonfranchised individual or entity any original equipment manufacturer motor vehicle parts, accessories, or other commodities that would otherwise be sold by a franchised dealer;

(4) Prohibit a franchisee from operating a franchise in conjunction with the franchise of another line-make of new motor vehicles at the same address and in the same dealership facility building;

(5) Prohibit a franchisee from operating a franchise of the same line-make of new motor vehicles at two or more locations regardless of whether the markets served by the locations are contiguous;

(6) Use any financial services company or leasing company owned in whole or part or controlled by the manufacturer or distributor to accomplish what would otherwise be illegal conduct on the part of the manufacturer or distributor pursuant to the franchisor prohibitions section, R.C. 4517.59. This section does not limit the right of the financial services or leasing company to otherwise engage in regular financial services or leasing business practices.

(7) Initiate a charge back without an audit or perform an audit to confirm a warranty repair, sales incentive, or rebate more than six months after the date of the repair or purchase, provided that these limitations are not effective in the case of a fraudulent claim;

(8) Refuse to pay a franchisee for sales incentives, service incentives, rebates, or other forms of incentive compensation, reduce the amount to be paid to the dealer, or charge a dealer back subsequent to the payment of the claim unless it can be shown that any of the following apply: (a) the claim was false or fraudulent, (b) the repairs were not properly made or were unnecessary to correct the defective condition, (c) the dealer failed to reasonably substantiate the claim in accordance with the written requirements of the manufacturer in effect at the time the claim arose, or (d) the dealer, with intent to do so, sold a new motor vehicle for export to a foreign country; there is a rebuttable presumption that a dealer does not intend to export a vehicle to a foreign country if the motor vehicle is titled in the United States.

No refusal to pay sales incentives, service incentives, rebates, or other forms of incentive compensation, no reduction in the amount to be paid to the dealer, and no charge back subsequent to the payment of a claim may be made until the dealer has had notice and an opportunity to participate in all franchisor internal appeal processes as

well as all available legal processes. If a charge back is the subject of adjudication, internal appeal, mediation, or arbitration, no charge back may be made until, in the case of an adjudication or legal action, a final appealable order has been issued.

No otherwise valid reimbursement claims may be denied, delayed, or restricted once properly submitted within manufacturers' submission guidelines unless the denial, delay, or restriction is the direct result of a material defect in the claim that affects the claim's validity. At the time submitted, the claim acts as an immediate automatic credit against future billings. Clerical errors or omissions or a different level of technician technical certification or the dealer's failure to subscribe to any manufacturer's computerized training programs are not material defects. Any ambiguity or inconsistency in submission guidelines is construed against the drafter. Any failure by a dealer to exercise its rights to reimbursement under R.C. 4517.59 does not create a waiver of these rights. Any unreasonable denial, delay, or restriction of a valid reimbursement claim subjects the manufacturer to interest in accordance with R.C. 1343.03(A) until paid.

(9) Prevent, attempt to prevent, prohibit, coerce, or attempt to coerce, any new motor vehicle dealer from charging any consumer any fee allowed to be charged by the dealer under Ohio law;

(10) Require, coerce, or attempt to coerce any Ohio new motor vehicle dealer to change the capital structure of the new motor vehicle dealer or the means by or through which the new motor vehicle dealer finances the operation of the dealership provided that: (a) the new motor vehicle dealer at all times must meet any reasonable capital standards determined by the manufacturer in accordance with uniformly applied criteria, and (b) no change in the capital structure may cause a change in the principal management or have the effect of a sale of the franchise without the consent of the manufacturer or distributor; and further provided that the manufacturer or distributor may not unreasonably withhold consent;

(11) Require, coerce, or attempt to coerce any Ohio new motor vehicle dealer to change location of the dealership, or to make any substantial alterations to the dealership premises or facilities, when to do so would be unreasonable, or without written assurance of a sufficient supply of new motor vehicles so as to justify the location change or alterations, in light of the current market and economic conditions;

(12) Require or request a franchisee to waive any requirements of the franchisor prohibitions section (existing law, but expanded as a result of the amended and new prohibitions).

The bill prohibits a franchisor from releasing to a third party any information concerning the dealership or any information regarding the dealership's customers that has been provided by the franchisee to the franchisor, unless agreed to by both parties or unless required by law.

The bill also prohibits a franchise agreement from requiring the franchisee to pay the attorney fees of a franchisor, waive any remedy or defense available to the franchisee, or waive any other provisions of the Motor Vehicle Dealers Law. In addition, the bill prohibits a franchisor from restricting a franchisee from filing a legal action in a particular forum otherwise available under federal or state law. (R.C. 4517.59(B) and (C).)

Penalty for revised and new prohibitions

A provision of continuing law makes a violation of either the revised or new prohibitions described above a fourth degree misdemeanor (R.C. 4517.99, not in the bill).

Warranty and recall obligations

Under existing law, each franchisor is required to compensate each of its franchisees for labor and parts used to fulfill warranty and recall obligations of repair and servicing at rates not less than the rates charged by the franchisee to its retail customers for like service and parts for nonwarranty work.

The bill additionally requires each franchisor to fulfill warranty and recall obligations of repairing and servicing motor vehicles, including all parts and components manufactured for installation in any motor vehicle. The bill prohibits a franchisor from otherwise recovering its costs for reimbursing a franchisee for parts and labor. (R.C. 4517.52 and a conforming change in R.C. 4517.59(A)(11).)

COMMENT

The Motor Vehicle Dealers Law defines the following terms (R.C. 4517.01, not in the bill):

(C) "New motor vehicle" means a motor vehicle, the legal title to which has never been transferred by a manufacturer, remanufacturer, distributor, or dealer to an ultimate purchaser.

....

(K) "New motor vehicle dealer" means any person engaged in the business of selling at retail, displaying, offering for sale, or dealing in new motor vehicles pursuant to a contract or agreement entered into with the manufacturer, remanufacturer, or distributor of the motor vehicles.

....

(R) "Manufacturer" means a person who manufactures, assembles, or imports motor vehicles, including motor homes, but does not mean a person who only assembles or installs a body, special equipment unit, finishing trim, or accessories on a motor vehicle chassis supplied by a manufacturer or distributor.

....

(T) "Distributor" means any person authorized by a motor vehicle manufacturer to distribute new motor vehicles to licensed new motor vehicle dealers, but does not mean a person who only assembles or installs a body, special equipment unit, finishing trim, or accessories on a motor vehicle chassis supplied by a manufacturer or distributor.

....

(V) "Franchise" means any written agreement, contract, or understanding between any motor vehicle manufacturer or remanufacturer engaged in commerce and any motor vehicle dealer that purports to fix the legal rights and liabilities of the parties to such agreement, contract, or understanding.

(W) "Franchisee" means a person who receives new motor vehicles from the franchisor under a franchise agreement and who offers, sells, and provides service for such new motor vehicles to the general public.

(X) "Franchisor" means a new motor vehicle manufacturer, remanufacturer, or distributor who supplies new motor vehicles under a franchise agreement to a franchisee.

HISTORY

ACTION

DATE

Introduced

11-10-09

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