STATE OF OKLAHOMA

1st Session of the 52nd Legislature (2009)

SENATE BILL 338 By: Bingman

AS INTRODUCED

An Act relating to motor vehicles; creating the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act; providing short title; stating purpose; defining terms; providing violations; providing for termination of certain dealer agreements without cause; providing for certain notice; stating certain provisions do not apply to certain agreements between a single-line dealer and its single-line supplier; prohibiting suppliers from terminating certain agreements without good cause; defining term; stating when good cause shall exist; providing for notice of termination of a dealer agreement by a supplier; providing certain time to cure certain deficiencies; providing termination notice be void upon certain cure; prohibiting termination under certain circumstances; stating when notice and right to cure shall not apply; providing procedures for supplier with contractual authority or an equity ownership interest therein to approve or deny certain request for sale or transfer of a dealer's business; providing procedures for supplier with contractual authority or an equity ownership interest therein to approve or deny certain request for sale or transfer of a dealer's business upon the death of a dealer; stating certain provisions do not apply to certain agreements between a single-line dealer and its single-line supplier; stating certain provisions shall apply to certain dealer agreements between a single-line dealer and its single-line supplier; prohibiting supplier from terminating certain dealer agreements without good cause; defining term; stating when good cause exists; providing procedures for notice of

certain termination; providing certain time to cure certain deficiencies; providing termination notice be void upon certain cure; providing for certain reasonable period of time for certain good cause; stating when notice and right to cure shall not apply; providing procedures for a supplier to consider and make certain determination relating to certain request by a family member upon the death of a dealer; requiring certain agreements relating to succession rights be observed; providing for the acceptance or rejection of certain warranty claims; providing for certain disapproved claims; providing for compensation of certain warranty work; stating what will be deemed to create certain warranty claims; providing for certain audits of warranty claims; stating when certain requirements apply to certain warranty claims and when such claims are unreasonable; providing for certain alternate reimbursement terms and conditions; providing for certain payments to a supplier if certain agreements are cancelled; providing for the title to certain inventory to pass to a supplier; providing for certain payments for certain credit due; providing for certain refusal to repurchase certain inventory; providing for certain payment for certain shipping; providing for the retainage of certain lien; construing language; stating certain repurchase shall not be required under certain circumstances; providing for violations; stating certain actions shall be void; stating what dealer agreements the act shall apply to; stating that provisions of the act shall be supplemental to certain dealer agreements; allowing dealer to pursue certain remedies; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1000 of Title 47, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1001 of Title 47, unless there is created a duplication in numbering, reads as follows:

The Legislature finds and declares that the retail distribution, sales and rental of agricultural, construction, utility, industrial, mining, outdoor power, forestry and lawn and garden equipment, utilizing independent dealers operating under contract with the supplier vitally affects the general economy of this state, the public interest and the public welfare. Therefore, the Legislature has determined that it is necessary to regulate the business relations between the independent dealers and the equipment suppliers as contemplated in the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act and that any action taken in violation of this act will result in a violation of an important public policy of this state.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1002 of Title 47, unless there is created a duplication in numbering, reads as follows:

As used in the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act:

1. "Current net parts cost" means the current net parts price less any trade or cash discounts typically given to the dealer with respect to such dealer's normal, ordinary-course orders of repair parts;

2. "Current net parts price" means, with respect to current parts, the price for repair parts listed in the supplier's price list or catalogue in effect at the time the dealer agreement is cancelled or discontinued, or for purposes of Section 9 of this act, the price list or catalogue in effect at the time the repair parts were ordered. "Current net parts price" means, with respect to superseded repair parts, the price listed in the supplier's price list or catalogue in effect at the time the dealer agreement is cancelled or discontinued for the part that performs the same function and purpose as the superseded part, but is simply listed under a different part number;

3. "Dealer" means any person primarily engaged in the business of:

a. selling or leasing equipment or repair parts therefor to the ultimate consumer thereof, and

b. repairing or servicing equipment;

4. "Dealer agreement" means either an oral or written agreement or arrangement for a definite or indefinite period between a dealer

and a supplier that provides for the rights and obligations of the parties with respect to the purchase or sale of equipment or repair parts. Notwithstanding the foregoing, if a dealer has more than one business location covered by the same dealer agreement, the requirements of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act will be applied to the repurchase of a dealer's inventory at a particular location upon the closing of such location;

5. "Dealership" means the retail sale business engaged in by a dealer under a dealer agreement;

6. "Demonstrator" means equipment in a dealer's inventory that has never been sold at retail, but has had its usage demonstrated to potential customers, either without charge or pursuant to a short-term rental agreement, with the intent of encouraging the person to purchase the equipment and which has been authorized for the use by the supplier;

7. "Equipment" means:

a. all-terrain vehicles, regardless of how used, and

b. other machinery, equipment, implements or attachments therefor, used for or in connection with the following purposes:

(1) lawn, garden, golf course, landscaping or grounds maintenance,

(2) planting, cultivating, irrigating, harvesting, and producing of agricultural and/or forestry products,

(3) raising, feeding, tending to or harvesting products from livestock or any other activity in connection therewith, or

(4) industrial, construction, maintenance, mining or utility activities or applications.

Equipment shall not mean trailers or self-propelled vehicles designed primarily for the transportation of persons or property on a street or highway;

8. "Family member" means a spouse, child, son-in-law, daughter-in-law or lineal descendant;

9. "Good cause" has the meaning as set forth in Section 5 or Section 6 of this act, as applicable;

10. "Index" means the United States Bureau of Labor Statistics purchase price index (industry data) for construction machinery, series identification number pcu333120333120 or any successor index measuring substantially similar information;

11. "Inventory" means new equipment, repair parts, data processing hardware or software, and specialized service or repair tools;

12. "Net equipment cost" means the price the dealer actually paid to the supplier for equipment, plus:

a. freight, at truckload rates in effect as of the effective date of the termination of a dealer agreement, if freight was paid by the dealer from the supplier's location to the dealer's location, and

b. reimbursement for labor incurred in preparing the equipment for retail sale or rental, also known as set-up costs, which labor will be reimbursed at the dealer's standard labor rate charged by the dealer to its customers for nonwarranty repair work; provided, however, if a supplier has established a reasonable set-up time, such labor will be reimbursed at an amount equal to the reasonable set-up time in effect as of the date of delivery multiplied by the dealer's standard labor rate;

13. "New equipment" means, for purposes of determining whether a dealer is a single-line dealer, any equipment that could be returned to the supplier upon a termination of a dealer agreement pursuant to Sections 10 and 11 of this act;

14. "Person" means a natural person, corporation, partnership, limited liability company, company, trust or any and all other forms of business enterprise, including any other entity in which it has a majority interest or of which it has control, as well as the individual officers, directors and other persons in active control of the activities of each entity;

15. “Repair parts” means all parts related to the repair of equipment, including superseded parts;

16. “Single-line dealer” means a dealer that has:

a. purchased construction, industrial, forestry and mining equipment from a single supplier constituting seventy-five percent (75%) of the dealer’s new equipment, calculated on the basis of net cost, and

b. a total annual average sales volume in excess of Twenty Million Dollars ($20,000,000.00) for the three (3) calendar years immediately preceding the applicable determination date; provided, however, the twenty-million-dollar threshold will be increased each year by an amount equal to the then-current threshold multiplied by the percentage increase in the Index from January of the immediately preceding year to January of the current year;

17. “Single-line supplier” means the supplier that is selling the single-line dealer construction, industrial, forestry and mining equipment constituting seventy-five percent (75%) of the dealer’s new equipment;

18. “Supplier” means any person engaged in the business of manufacturing, assembly or wholesale distribution of equipment or repair parts. The term “supplier” and the provisions of this act shall be interpreted liberally and will not be limited to

traditional doctrines of corporate successor liability or take into account whether:

a. a successor expressly assumed the liabilities of the supplier, or

b. there has been one or more intermediate successors to the initial supplier.

The obligations of a supplier hereunder shall consequently apply to any actual or effective successor in interest to a supplier, including, but not limited to, a purchaser of all or substantially all of the assets of a supplier or all or substantially all of the assets of any division or product line of a supplier, any receiver, trustee, liquidator or assignee of the supplier or any surviving corporation resulting from a merger, liquidation or reorganization of the original or any intermediate successor supplier. Purchasers of all, or substantially all, of the inventory of a supplier or a supplier's division or product line will constitute a purchaser of all or substantially all of the supplier's assets; and

19. "Terminate" means to terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealer agreement.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1003 of Title 47, unless there is created a duplication in numbering, reads as follows:

It shall be a violation of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act for a supplier to take any one or more of the following actions:

1. To coerce, compel or require any dealer to accept delivery of any equipment or repair parts which the dealer has not voluntarily ordered, except as required by any applicable law or unless such equipment or repair parts are safety features required by a supplier;

2. To require any dealer to purchase goods or services as a condition to the sale by the supplier to the dealer of any equipment, repair parts or other goods or services; provided, that nothing herein shall prohibit a supplier from requiring the dealer to purchase all repair parts, special tools and training reasonably necessary to maintain the safe operation or quality of operation in the field of any equipment offered for sale by the dealer;

3. To coerce any dealer into a refusal to purchase equipment manufactured by another supplier. However, it shall not be a violation of this section to require separate facilities, financial statements or sales staff for major competing lines so long as the dealer is given at least three (3) years notice of such requirement;

4. To refuse to deliver in reasonable quantities and within a reasonable time, after receipt of the dealer's order, to any dealer having a dealer agreement for the retail sale of new equipment sold or distributed by such supplier, equipment covered by such dealer

agreement specifically advertised or represented by such supplier to be available for immediate delivery. The failure to deliver any such equipment will not be considered a violation of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act if such failure is due to prudent and reasonable restrictions on extensions of credit by the supplier to the dealer, an act of nature, work stoppage or delay due to a strike or labor difficulty, a bona fide shortage of materials, freight embargo, or other cause over which the supplier has no control or a business decision by the supplier to limit the production volume of the equipment;

5. To discriminate, directly or indirectly, in filling an order placed by a dealer for retail sale or lease of new equipment under a dealer agreement as between dealers of the same product line;

6. To discriminate, directly or indirectly, in price between different dealers with respect to purchases of equipment or repair parts of like grade and quality and identical brand, where the effect of such discrimination may be to substantially lessen competition, tend to create a monopoly in any line of commerce or injure, destroy or prevent competition with any dealer who either grants or knowingly receives the benefit of such discrimination; provided, however, different prices may be charged if:

a. such differences are due to differences in the cost of manufacture, sale or delivery of the equipment or repair parts,

b. the supplier can show that its lower price was made in good faith to meet an equally low price of a competitor, or

c. such differences are related to the volume of equipment purchased by dealers;

7. To prevent by contract or otherwise, any dealer from changing its capital structure, ownership or the means by or through which the dealer finances its operations, so long as the dealer gives prior notice to the supplier, and provided the dealer at all times meets any reasonable capital standards agreed to between the dealer and the supplier and imposed on similarly situated dealers, and provided such change by the dealer does not result in a change in the person with actual or effective control of a majority of the voting interests of the dealer; and

8. To require a dealer to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1004 of Title 47, unless there is created a duplication in numbering, reads as follows:

A. A dealer may terminate a dealer agreement without cause. The dealer must give the supplier at least thirty (30) days prior written notice of termination. No supplier may terminate a dealer agreement without good cause. Except as otherwise specifically provided in the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act, "good cause" means the failure by a dealer to substantially comply with essential and reasonable requirements imposed upon the dealer by the dealer agreement, provided such requirements are not different from those requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement. In addition, good cause shall exist whenever:

1. The dealer or dealership has transferred a controlling ownership interest in its business without the supplier's consent;

2. The dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within thirty (30) days after the filing, or there has been a closeout or sale of a substantial part of the dealer's assets related to the business, or there has been a commencement of dissolution or liquidation of the dealer;

3. There has been a deletion, addition or change in dealer or dealership locations without the prior written approval of the supplier;

4. The dealer has defaulted under any chattel mortgage or other security agreement between the dealer and the supplier, or there has been a revocation of any guarantee of the dealer's present or future obligations to the supplier; provided, however, good cause will not exist if a person revokes any guarantee in connection with or following the transfer of such person's entire ownership interest in the dealer unless the supplier requires the person to execute a new guarantee of the dealer's present or future obligations in connection with the transfer of ownership interest;

5. The dealer has failed to operate in the normal course of business for seven (7) consecutive days or has otherwise abandoned its business;

6. The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and supplier;

7. The dealer has engaged in conduct which is injurious or detrimental to the dealer's customers or to the public welfare or the representation or reputation of the supplier's product; or

8. The dealer has consistently failed to meet and maintain the supplier's requirements for reasonable standards and performance objectives, so long as the supplier has given the dealer reasonable standards and performance objectives that are based on the manufacturer's experience in other comparable market areas.

B. The provisions of this section will not apply to the dealer agreements between a single-line dealer and its single-line supplier.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1005 of Title 47, unless there is created a duplication in numbering, reads as follows:

A. Except as otherwise provided in this section, a supplier must provide a dealer at least one hundred eighty (180) days prior written notice of termination of a dealer agreement. The notice must state all reasons constituting good cause for such termination and must state that the dealer has sixty (60) days in which to cure any claimed deficiency. If the deficiency is rectified within sixty (60) days, the notice will be void. A supplier may not terminate a dealer agreement for the reason set forth in paragraph 8 of Section 5 of this act unless the supplier gives the dealer notice of such action at least two (2) years before the effective date of the action. If the dealer achieves the supplier's requirements for reasonable standards or performance objectives before the expiration of the two-year notice period, the notice will be void and the dealer agreement will continue in full force and effect. The notice and right to cure provisions under this section shall not apply if the reason for termination is for any reason set forth in paragraphs 1 through 8 of Section 5 of this act.

B. If a supplier has contractual authority to approve or deny a request for a sale or transfer of a dealer's business or an equity ownership interest therein, the supplier shall approve or deny such a request within sixty (60) days after receiving a written request from the dealer. If the supplier has neither approved nor denied the request within the sixty-day period, the request will be deemed approved. The dealer's request shall include reasonable financial, personal background, character references and work history information for the acquiring persons. If a supplier denies a request made pursuant to this subsection, the supplier must provide the dealer with a written notice of the denial that states the reasons for the denial. A supplier may only deny a request based on the failure of the proposed transferees to meet the reasonable requirements consistently imposed by the supplier in determining approval of the transfer and/or approvals of new dealers.

C. If a dealer dies and the supplier has contractual authority to approve or deny a request for a sale or transfer of the dealer's business or equity ownership interest therein, the dealer's estate, or such other person with authority to transfer assets of the dealer, will have one hundred eighty (180) days to submit to the supplier a written request for a sale or transfer of the business or equity ownership interest. If the request is timely submitted, the supplier shall approve or deny the request in accordance with subsection B of this section. Notwithstanding anything to the

contrary contained in the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act, any attempt by the supplier to terminate the dealer or the dealership as a result of the death of a dealer will be delayed until there has been compliance with the terms of this section or the one-hundred-eighty-day period has expired, as applicable.

D. The provisions of this section shall not apply to the dealer agreements between a single-line dealer and its single-line supplier.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1006 of Title 47, unless there is created a duplication in numbering, reads as follows:

A. This section will only apply to the dealer agreements between a single-line dealer and its single-line supplier.

B. No supplier may terminate a dealer agreement without good cause. For purposes of Sections 7 and 8 of this act only, "good cause" means failure by a dealer to comply with requirements imposed upon the dealer by the dealer agreement if such requirements are not different from those imposed on other similarly situated dealers. In addition, good cause exists whenever:

1. There has been a closeout or sale of a substantial part of the dealer's assets related to the equipment business, or there has been a commencement of a dissolution or liquidation of the dealer;

2. The dealer has changed its principal place of business or added additional locations without prior approval of the supplier, which shall not be unreasonably withheld;

3. The dealer has substantially defaulted under a chattel mortgage or other security agreement between the dealer and the supplier, or there has been a revocation or discontinuance of a guarantee of a present or future obligation of the dealer to the supplier;

4. The dealer has failed to operate in the normal course of business for seven (7) consecutive days or has otherwise abandoned its business;

5. The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the supplier; or

6. The dealer transfers an interest in the dealership, or a person with a substantial interest in the ownership or control of the dealership, including an individual proprietor, partner or major shareholder, withdraws from the dealership or dies, or a substantial reduction occurs in the interest of a partner or major shareholder in the dealership; provided, however, good cause does not exist if the supplier consents to an action described in this paragraph.

C. Except as otherwise provided in this subsection, a supplier shall provide a dealer with at least ninety (90) days written notice of termination. The notice must state all reasons constituting good

cause for such termination and must state that the dealer has sixty (60) days in which to cure any claimed deficiency. If the deficiency is rectified within sixty (60) days, the notice will be void. Notwithstanding the foregoing, if the good cause for termination is due to the dealer's failure to meet or maintain the supplier's requirements for market penetration, a reasonable period of time shall have existed where the supplier has worked with the dealer to gain the desired market share. The notice and right to cure provisions under this subsection shall not apply if the reason for termination is for any reason set forth in paragraphs 1 through 6 of subsection B of this section.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1007 of Title 47, unless there is created a duplication in numbering, reads as follows:

A. This section will only apply to the dealer agreements between a single-line dealer and its single-line supplier.

B. If a dealer dies, a supplier shall have ninety (90) days in which to consider and make a determination on a request by a family member to enter into a new dealer agreement to operate the dealership. If the supplier determines that the requesting family member is not acceptable, the supplier shall provide the family member with a written notice of its determination with the stated reasons for nonacceptance. This section does not entitle an heir,

personal representative or family member to operate a dealership without the specific written consent of the supplier.

C. Notwithstanding the foregoing, if a supplier and dealer have previously executed an agreement concerning succession rights prior to the dealer's death, and if such agreement is still in effect, the agreement shall be observed even if it designates someone other than the surviving spouse or heirs of the decedent as the successor.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1008 of Title 47, unless there is created a duplication in numbering, reads as follows:

A. If a dealer submits a warranty claim to a supplier while the dealer agreement is in effect or within sixty (60) days after the termination of the dealer agreement, if the claim is for work performed before the termination or expiration of the dealer agreement, the supplier must accept or reject such warranty claim by written notice to the dealer within thirty (30) days after the supplier's receipt thereof. If the supplier does not reject the warranty claim in the time period specified above, the claim will be deemed to be accepted. If the supplier accepts the warranty claim, the supplier must pay or credit to dealer's account all amounts owed with respect to the claim to the dealer within thirty (30) days after it is accepted. If the supplier rejects a warranty claim, the supplier must give the dealer written or electronic notice of the grounds for rejection, which reasons must be consistent with the

supplier's reasons for rejecting warranty claims of other dealers, both in their terms and manner of enforcement. If no grounds for rejection are given, the claim will be deemed to be accepted.

B. Any claim which is disapproved by the supplier based upon the dealer's failure to properly follow the procedural or technical requirements for submission of warranty claims may be resubmitted in proper form by the dealer within thirty (30) days of receipt by the dealer of the supplier's notification of the disapproval.

C. Warranty work performed by the dealer shall be compensated in accordance with the reasonable and customary amount of time required to complete the work, expressed in hours and fractions thereof multiplied by the dealer's established customer hourly retail labor rate, which shall have previously been made known to the supplier. Parts used in warranty repair work shall be reimbursed at the current net price plus fifteen percent (15%).

D. For purposes of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act, any repair work or installation of replacement parts performed with respect to the dealer's equipment in inventory or equipment of the dealer's customers at the request of the supplier, including work performed pursuant to a product improvement program (PIP), will be deemed to create a warranty claim for which the dealer shall be paid pursuant to this section.

E. A supplier may audit warranty claims submitted by its dealers for a period of up to one (1) year following payment of the claims, and may charge back to its dealers any amounts paid based upon claims shown by audit to be misrepresented. If a warranty claim is misrepresented, then warranty claims submitted within the three-year period ending with the date a claim is shown by audit to be misrepresented may be audited.

F. The requirements of subsections A, B and C of this section apply to all warranty claims submitted by a dealer to a supplier in which the dealer has complied with the supplier's reasonable policies and procedures for warranty reimbursement. A supplier's warranty reimbursement policies and procedures will be deemed unreasonable to the extent they conflict with any of the provisions of this section.

G. A dealer may choose to accept alternate reimbursement terms and conditions in lieu of the requirements of subsections A, B and C of this section if there is a written dealer agreement between the supplier and the dealer that requires the supplier to compensate the dealer for warranty labor costs either as:

1. A discount in the pricing of the equipment to the dealer; or

2. A lump-sum payment to the dealer that is made to the dealer within ninety (90) days of the sale of the supplier's new equipment. The discount or lump sum must be no less than five percent (5%) of the suggested retail price of the equipment.

If the requirements of this subsection are met and alternate terms and conditions are in place, subsections A, B and C of this section do not apply and the alternate terms and conditions are enforceable. Nothing contained in this subsection shall be deemed to effect the supplier's obligation to reimburse the dealer for parts in accordance with subsection C of this section.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1009 of Title 47, unless there is created a duplication in numbering, reads as follows:

A. Whenever any dealer enters into a dealer agreement with a supplier and either the supplier or the dealer desires to cancel, not renew or otherwise discontinue the dealer agreement, the supplier shall pay to the dealer or credit to the dealer's account, if the dealer has outstanding any sums owing the supplier, unless the dealer should desire to keep such equipment or repair parts:

1. A sum equal to one hundred percent (100%) of the net equipment cost of all new, unsold, undamaged equipment, one hundred percent (100%) of the net equipment cost of all unsold, undamaged demonstrators, less a downward adjustment to reflect a reasonable allowance for depreciation due to usage of such demonstrators, which adjustment will be based on published industry rental rates to the extent the rates are available, and ninety percent (90%) of the current net parts prices on new, unsold, undamaged repair parts, that had previously been purchased from the supplier and held by the

dealer on the date that the dealer agreement terminates or expires. Notwithstanding anything to the contrary contained herein, demonstrators with less than fifty (50) hours, for machines with hour meters, of use will be considered new, unsold, undamaged equipment subject to repurchase under this paragraph;

2. A sum equal to five percent (5%) of the current net parts price of all repair parts returned to compensate the dealer for the handling, packing and loading of such repair parts for return to the supplier; provided, however, the five percent (5%) will not be paid or credited to the dealer if the supplier elects to perform the handling, packing and loading of the repair parts itself;

3. The fair market value of any specific data processing hardware or software that the supplier required the dealer to acquire or purchase to satisfy the requirements of the supplier, including computer equipment required and approved by the supplier to communicate with the supplier. Fair market value of property subject to repurchase pursuant to this paragraph will be deemed to be the acquisition cost thereof, including any shipping, handling and set-up fees, less straight line depreciation of the acquisition cost over three (3) years. If the dealer purchased data processing hardware or software that exceeded the supplier's minimum requirements, the acquisition cost of the data processing hardware or software will be deemed to be the acquisition cost of hardware or

software of similar quality that did not exceed the minimum requirements of the supplier; or

4. A sum equal to seventy-five percent (75%) of the net cost, including shipping, handling and set-up fees, of all specialized service or repair tools previously purchased pursuant to requirements of the supplier within fifteen (15) years prior to the date of the applicable notification of termination of the dealer agreement. The specialized service or repair tools must be unique to the supplier's product line and must be complete and in good operating condition.

B. Upon the payment or allowance of credit to the dealer's account of the sums required by this section, the title to all inventory purchased hereunder shall pass to the supplier making such payment, and the supplier shall be entitled to the possession of the inventory. All payments or allowances of credit due dealers shall be paid or credited within ninety (90) days after receipt by the supplier of property required to be repurchased hereunder. Any payments or allowances of credit due dealers that are not paid within the ninety-day period will accrue interest at the maximum rate allowed by law. The supplier may withhold payments due under this subsection during the period of time in which the dealer fails to comply with its contractual obligations to remove any signage indicating that the dealer is an authorized dealer of the supplier.

C. If any supplier refuses to repurchase any inventory covered under the provisions of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act after cancellation, nonrenewal or discontinuance of the dealer agreement, the supplier will be civilly liable to the dealer for one hundred ten percent (110%) of the amount that would have been due for the inventory if the supplier had timely complied with the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act, any freight charges paid by the dealer, interest accrued, and the dealer's actual costs of any court or arbitration proceeding, including costs for attorney fees and costs for arbitrators.

D. The supplier and dealer will each pay fifty percent (50%) of the costs of freight, at truckload rates, to ship any equipment or repair parts returned to the supplier pursuant to the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act.

E. Notwithstanding any provision to the contrary in the uniform commercial code adopted by this state, the dealer will retain a first and prior lien against all inventory returned by the dealer to the supplier under the provisions of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act until the dealer is paid all amounts owed by the supplier for the repurchase of such inventory required under the provisions of the Fair

Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act.

F. The provisions of this section shall not be construed to affect in any way any security interest which the supplier may have in the inventory of the dealer, and any repurchase hereunder shall not be subject to the provisions of the bulk sales law or to the claims of any secured or unsecured creditors of the supplier or any assignee of the supplier until such time as the dealer has received full payment or credit, as applicable, due hereunder.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1010 of Title 47, unless there is created a duplication in numbering, reads as follows:

The provisions of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act shall not require the repurchase from a dealer of:

1. Any repair part which is in a broken or damaged package; provided, however, the supplier will be required to repurchase a repair part in a broken or damaged package, for a repurchase price that is equal to eighty-five percent (85%) of the current net price for the repair part, if the aggregate current net price for the entire package of repair parts is Seventy-five Dollars ($75.00) or higher;

2. Any repair part which because of its condition is not resalable as a new part without repackaging or reconditioning;

3. Any inventory for which the dealer is unable to furnish evidence, satisfactory to the supplier, of clear title, free and clear of all claims, liens and encumbrances;

4. Any inventory which the dealer desires to keep, provided the dealer has a contractual right to do so;

5. Any equipment or repair parts which are not in new, unsold, undamaged, complete condition, subject, however, to the provisions of this act relating to the demonstrators;

6. Any equipment delivered to the dealer prior to the beginning of the thirty-six-month period immediately preceding the date of notification of termination;

7. Any equipment or repair parts which were ordered by the dealer on or after the date of notification of termination;

8. Any equipment or repair parts which were acquired by the dealer from any source other than the supplier unless such equipment or repair parts were ordered from, or invoiced to the dealer by, the supplier; or

9. Any equipment or repair parts which are not returned to the supplier within ninety (90) days after the later of:

a. the effective date of termination of a dealer agreement, and

b. the date the dealer receives from the supplier all information, documents or supporting materials required by the supplier to comply with the supplier's

return policy; provided, however, this paragraph will not be applicable to a dealer if the supplier did not give the dealer notice of the ninety-day deadline at the time the applicable notice of termination was sent to the dealer.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1011 of Title 47, unless there is created a duplication in numbering, reads as follows

If any supplier violates any provision of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act, a dealer may bring an action against such supplier in a court of competent jurisdiction for damages sustained by the dealer as a consequence of the supplier's violation, including, but not limited to, damages for lost profits, together with the actual costs of the action, including the dealer's attorney and paralegal fees and costs of arbitrators, and the dealer also may be granted injunctive relief against unlawful termination. The remedies set forth in this section shall not be deemed exclusive and shall be in addition to any other remedies permitted by law.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1012 of Title 47, unless there is created a duplication in numbering, reads as follows:

An attempted waiver of a provision of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act

or application of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act shall be void. Any provision in a dealer agreement that purports to elect the application of the law of a state other than this state shall be void. Any provision in a dealer agreement that requires a dealer to pay attorney fees incurred by a supplier shall be void.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1013 of Title 47, unless there is created a duplication in numbering, reads as follows:

The provisions of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act shall apply to all dealer agreements now in effect which have no expiration date and are a continuing contract, and all other dealer agreements entered into or renewed after November 1, 2009. All other dealer agreements shall be governed by the law as it existed prior to the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 16-1014 of Title 47, unless there is created a duplication in numbering, reads as follows:

The provisions of the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers and Dealers Act shall be supplemental to any dealer agreement between the dealer and the supplier which provides the dealer with greater protection. The dealer can elect to pursue its contract remedy or the remedy provided by state law,

or both, and an election by the dealer to pursue such remedies shall not bar its right to exercise any other remedies that may be granted at law or in equity.

SECTION 16. This act shall become effective November 1, 2009.

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