SENATE FLOOR VERSION
February 24, 2011
As Amended

SENATE BILL NO. 272 By: Stanislawski of the Senate

and

Armes of the House

[motor vehicle dealers - manufacturer charge backs - effective date - emergency]

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

SECTION 1. AMENDATORY 47 O.S. 2001, Section 565, as last amended by Section 4, Chapter 315, O.S.L. 2008 (47 O.S. Supp. 2010, Section 565), is amended to read as follows:

Section 565. A. The Oklahoma Motor Vehicle Commission may deny an application for a license, or revoke or suspend a license or impose a fine not to exceed Ten Thousand Dollars ($10,000.00) against a manufacturer or distributor or a fine not to exceed One Thousand Dollars ($1,000.00) against a dealer per occurrence that any provision of Sections 561 through 567, 572, 578.1, 579 and 579.1 of this title is violated or for any of the following reasons:

1. On satisfactory proof of unfitness of the applicant in any application for any license under the provisions of Section 561 et seq. of this title;

2. For any material misstatement made by an applicant in any application for any license under the provisions of Section 561 et seq. of this title;

3. For any failure to comply with any provision of Section 561 et seq. of this title or any rule promulgated by the Commission under authority vested in it by Section 561 et seq. of this title;

4. A change of condition after license is granted resulting in failure to maintain the qualifications for license;

5. Being a new motor vehicle dealer or new motor vehicle salesperson who:

a. has required a purchaser of a new motor vehicle, as a condition of sale and delivery thereof, to also purchase special features, appliances, accessories or equipment not desired or requested by the purchaser and installed by the dealer,

b. uses any false or misleading advertising in connection with business as a new motor vehicle dealer or vehicle salesperson,

c. has committed any unlawful act which resulted in the revocation of any similar license in another state,

d. has failed or refused to perform any written agreement with any retail buyer involving the sale of a motor vehicle,

e. has been convicted of a crime involving moral turpitude,

f. has committed a fraudulent act in selling, purchasing or otherwise dealing in new motor vehicles or has misrepresented the terms and conditions of a sale, purchase or contract for sale or purchase of a new motor vehicle or any interest therein including an option to purchase such vehicle, or

g. has failed to meet or maintain the conditions and requirements necessary to qualify for the issuance of a license;

6. Being a new motor vehicle salesperson who is not employed as such by a licensed new motor vehicle dealer;

7. Being a new motor vehicle dealer who:

a. does not have an established place of business,

b. does not provide for a suitable repair shop separate from the display room with ample space to repair or recondition one or more vehicles at the same time, and which is equipped with such parts, tools and equipment as may be requisite for the servicing of motor vehicles in such a manner as to make them comply with

the safety laws of this state and to properly fulfill the dealer's or manufacturer's warranty obligation,

c. does not hold a franchise in effect with a manufacturer or distributor of new or unused motor vehicles for the sale of the same and is not authorized by the manufacturer or distributor to render predelivery preparation of such vehicles sold to purchasers and to perform any authorized post-sale work pursuant to the manufacturer's or distributor's warranty,

d. employs unlicensed salespersons, or employs or utilizes the services of used motor vehicle lots or dealers or other unlicensed persons in connection with the sale of new motor vehicles,

e. does not properly service a new motor vehicle before delivery of same to the original purchaser thereof, or

f. fails to order and stock a reasonable number of new motor vehicles necessary to meet customer demand for each of the new motor vehicles included in the new motor vehicle dealer's franchise agreement, unless the new motor vehicles are not readily available from the manufacturer or distributor due to limited production;

8. Being a factory that has:

a. either induced or attempted to induce by means of coercion or intimidation, any new motor vehicle dealer:

(1) to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities including advertising material which shall not have been ordered by the new motor vehicle dealer,

(2) to order or accept delivery of any motor vehicle with special features, appliances, accessories or equipment not included in the list price of the motor vehicles as publicly advertised by the manufacturer thereof, or

(3) to order or accept delivery of any parts, accessories, equipment, machinery, tools, appliances or any commodity whatsoever, or

b. induced under threat or discrimination by the withholding from delivery to a motor vehicle dealer certain models of motor vehicles, changing or amending unilaterally the dealer's allotment of motor vehicles and/or withholding and delaying delivery of such vehicles out of the ordinary course of business, in order to induce by such coercion any such dealer to participate or contribute to any local or national

advertising fund controlled directly or indirectly by the factory or for any other purposes such as contest, "give-aways" or other so-called sales promotional devices and/or change of quotas in any sales contest; or has required motor vehicle dealers, as a condition to receiving their vehicle allotment, to order a certain percentage of the vehicles with optional equipment not specified by the new motor vehicle dealer; however, nothing in this section shall prohibit a factory from supporting an advertising association which is open to all dealers on the same basis;

9. Being a factory that:

a. has attempted to coerce or has coerced any new motor vehicle dealer to enter into any agreement or to cancel any agreement, or fails to act in good faith and in a fair, equitable and nondiscriminatory manner; or has directly or indirectly coerced, intimidated, threatened or restrained any motor vehicle dealer; or has acted dishonestly, or has failed to act in accordance with the reasonable standards of fair dealing,

b. has failed to compensate its dealers for the work and services they are required to perform in connection

with the dealer's delivery and preparation obligations according to the agreements on file with the Commission which must be found by the Commission to be reasonable, or fail to adequately and fairly compensate its dealers for labor, parts and other expenses incurred by such dealer to perform under and comply with manufacturer's warranty agreements. In determining whether the warranty compensation is adequate and fair, the Commission shall consider the amount that is charged by the dealer or dealers in their areas of responsibility to their nonwarranty work of like kind. All claims made by dealers for compensation for delivery, preparation and warranty work shall be paid within thirty (30) days after approval and shall be approved or disapproved within thirty (30) days after receipt. When any claim is disapproved, the dealer shall be notified in writing of the grounds for disapproval. The dealer's delivery, preparation and warranty obligations as filed with the Commission shall constitute the dealer's sole responsibility for product liability as between the dealer and manufacturer. A factory may reasonably and periodically audit a new motor vehicle dealer to determine the validity of paid claims for

dealer compensation or any charge-backs for warranty parts or service compensation. Audits of warranty payments shall only be for the one-year period immediately following the date of the payment. A manufacturer shall reserve the right to reasonable, periodic audits to determine the validity of paid claims for dealer compensation or any charge-backs for consumer or dealer incentives. Audits of incentive payments shall only be for a one-year period immediately following the date of the payment. A factory shall not deny a claim or charge a new motor vehicle dealer back subsequent to the payment of the claim unless the factory can show that the claim was false or fraudulent or that the new motor vehicle dealer failed to reasonably substantiate the claim by the written reasonable procedures of the factory; provided, however, a manufacturer shall not charge back a dealer upon audit or otherwise for failure of the dealer to substantiate that a purchaser completed title and vehicle registration following taking possession of a new vehicle upon sale if the dealer has written proof of sale of the vehicle, or

c. unreasonably fails or refuses to offer to its same line-make franchised dealers all models manufactured

for that line-make, or unreasonably requires a dealer to pay any extra fee, purchase unreasonable advertising displays or other materials, or remodel, renovate, or recondition the dealer's existing facilities as a prerequisite to receiving a model or series of vehicles. The failure to deliver any such new motor vehicle shall not be considered a violation of the section if the failure is not arbitrary or is due to lack of manufacturing capacity or to a strike or labor difficulty, a shortage of materials, a freight embargo or other cause over which the manufacturer has no control. However, this subparagraph shall not apply to recreational vehicles or limited production model vehicles;

10. Being a factory that establishes a system of motor vehicle allocation or distribution which is unfair, inequitable or unreasonably discriminatory. Upon the request of any dealer franchised by it, a factory shall disclose in writing to the dealer the basis upon which new motor vehicles are allocated, scheduled and delivered among the dealers of the same line-make for that factory;

11. Being a factory that sells directly or indirectly new motor vehicles or services to any retail consumer in the state except through a new motor vehicle dealer holding a franchise for the line-make that includes the new motor vehicle. This paragraph does not

apply to factory sales of new motor vehicles to its employees, family members of employees, retirees and family members of retirees, not-for-profit organizations or the federal, state or local governments. The provisions of this paragraph shall not preclude a factory from providing information to a consumer for the purpose of marketing or facilitating a sale of a new motor vehicle or from establishing a program to sell or offer to sell new motor vehicles through participating dealers;

12. a. Being a factory which directly or indirectly:

(1) owns any ownership interest or has any financial interest in a new motor vehicle dealer or any person who sells products or services to the public,

(2) operates or controls a new motor vehicle dealer, or

(3) acts in the capacity of a new motor vehicle dealer.

b. (1) This paragraph does not prohibit a factory from owning or controlling a new motor vehicle dealer while in a bona fide relationship with a dealer development candidate who has made a substantial initial investment in the franchise and whose initial investment is subject to potential loss. The dealer development candidate can reasonably

expect to acquire full ownership of a new motor vehicle dealer within a reasonable period of time not to exceed ten (10) years and on reasonable terms and conditions. The ten-year acquisition period may be expanded for good cause shown.

(2) This paragraph does not prohibit a factory from owning, operating, controlling or acting in the capacity of a motor vehicle dealer for a period not to exceed twelve (12) months during the transition from one dealer to another dealer if the dealership is for sale at a reasonable price and on reasonable terms and conditions to an independent qualified buyer. On showing by a factory of good cause, the Oklahoma Motor Vehicle Commission may extend the time limit set forth above; extensions may be granted for periods not to exceed twelve (12) months.

(3) This paragraph does not prohibit a factory from owning, operating or controlling or acting in the capacity of a motor vehicle dealer which was in operation prior to January 1, 2000.

(4) This paragraph does not prohibit a factory from owning, directly or indirectly, a minority interest in an entity that owns, operates or

controls motor vehicle dealerships of the same line-make franchised by the manufacturer, provided that each of the following conditions are met:

(a) all of the motor vehicle dealerships selling the motor vehicles of that manufacturer in this state trade exclusively in the line-make of that manufacturer,

(b) all of the franchise agreements of the manufacturer confer rights on the dealer of the line-make to develop and operate, within a defined geographic territory or area, as many dealership facilities as the dealer and manufacturer shall agree are appropriate,

(c) at the time the manufacturer first acquires an ownership interest or assumes operation, the distance between any dealership thus owned or operated and the nearest unaffiliated motor vehicle dealership trading in the same line-make is not less than seventy (70) miles,

(d) during any period in which the manufacturer has such an ownership interest, the manufacturer has no more than three

franchise agreements with new motor vehicle dealers licensed by the Oklahoma Motor Vehicle Commission to do business within the state, and

(e) prior to January 1, 2000, the factory shall have furnished or made available to prospective motor vehicle dealers an offering-circular in accordance with the Trade Regulation Rule on Franchising of the Federal Trade Commission, and any guidelines and exemptions issued thereunder, which disclose the possibility that the factory may from time to time seek to own or acquire, directly or indirectly, ownership interests in retail dealerships;

13. Being a factory which directly or indirectly makes available for public disclosure any proprietary information provided to the factory by a new motor vehicle dealer, other than in composite form to dealers in the same line-make or in response to a subpoena or order of the Commission or a court. Proprietary information includes, but is not limited to, information based on:

a. any information derived from monthly financial statements provided to the factory, and

b. any information regarding any aspect of the profitability of a particular new motor vehicle dealer;

14. Being a factory which does not provide or direct leads in a fair, equitable and timely manner. Nothing in this paragraph shall be construed to require a factory to disregard the preference of a consumer in providing or directing a lead;

15. Being a factory which used the customer list of a new motor vehicle dealer for the purpose of unfairly competing with dealers;

16. Being a factory which prohibits a new motor vehicle dealer from relocating after a written request by such new motor vehicle dealer if:

a. the facility and the proposed new location satisfies or meets the written reasonable guidelines of the factory, and

b. the proposed new location is within the area of responsibility of the new motor vehicle dealer pursuant to Section 578.1 of this title;

17. Being a factory which prohibits a new motor vehicle dealer from adding additional line-makes to its existing facility, if, after adding the additional line-makes, the facility satisfies the written reasonable facility guidelines of the factory; and

18. Being a factory that increases prices of new motor vehicles which the new motor vehicle dealer had ordered for retail consumers

prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a retail consumer shall constitute evidence of each such order, provided that the vehicle is in fact delivered to the customer. Price differences applicable to new models or series motor vehicles at the time of the introduction of new models or series shall not be considered a price increase for purposes of this paragraph. Price changes caused by any of the following shall not be subject to the provisions of this paragraph:

a. the addition to a motor vehicle of required or optional equipment pursuant to state or federal law,

b. revaluation of the United States dollar in the case of foreign-made vehicles or components, or

c. an increase in transportation charges due to increased rates imposed by common or contract carriers.

B. Notwithstanding the terms of any franchise agreement, in the event of a proposed sale or transfer of a dealership, the manufacturer or distributor shall be permitted to exercise a right of first refusal to acquire the assets or ownership interest of the dealer of the new vehicle dealership, if such sale or transfer is conditioned upon the manufacturer or dealer entering into a dealer agreement with the proposed new owner or transferee, only if all the following requirements are met:

1. To exercise its right of first refusal, the factory must notify the dealer in writing within sixty (60) days of receipt of the completed proposal for the proposed sale transfer;

2. The exercise of the right of first refusal will result in the dealer and the owner of the dealership receiving the same or greater consideration as they have contracted to receive in connection with the proposed change of ownership or transfer;

3. The proposed sale or transfer of the assets of the dealership does not involve the transfer or sale to a member or members of the family of one or more dealer owners, or to a qualified manager or a partnership or corporation controlled by such persons; and

4. The factory agrees to pay the reasonable expenses, including attorney fees which do not exceed the usual, customary and reasonable fees charged for similar work done for other clients incurred by the proposed new owner and transferee prior to the exercise by the factory of its right of first refusal in negotiating and implementing the contract for the proposed sale or transfer of the dealership or dealership assets. Notwithstanding the foregoing, no payment of expenses and attorney fees shall be required if the proposed new dealer or transferee has not submitted or caused to be submitted an accounting of those expenses within thirty (30) days of receipt of the written request of the factory for such an

accounting. The accounting may be requested by a factory before exercising its right of first refusal.

C. Nothing in this section shall prohibit, limit, restrict or impose conditions on:

1. Business activities, including without limitation the dealings with motor vehicle manufacturers and the representatives and affiliates of motor vehicle manufacturers, of any person that is primarily engaged in the business of short-term, not to exceed twelve (12) months, rental of motor vehicles and industrial and construction equipment and activities incidental to that business, provided that:

a. any motor vehicle sold by that person is limited to used motor vehicles that have been previously used exclusively and regularly by that person in the conduct of business and used motor vehicles traded in on motor vehicles sold by that person,

b. warranty repairs performed by that person on motor vehicles are limited to those motor vehicles that it owns, previously owned or takes in trade, and

c. motor vehicle financing provided by that person to retail consumers for motor vehicles is limited to used vehicles sold by that person in the conduct of business; or

2. The direct or indirect ownership, affiliation or control of a person described in paragraph 1 of this subsection.

SECTION 2. This act shall become effective July 1, 2011.

SECTION 3. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

COMMITTEE REPORT BY: COMMITTEE ON BUSINESS & COMMERCE, dated 2-17-11 - DO PASS, As Amended and Coauthored.