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BILL ANALYSIS

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Senate Bills 1308 and 1309 (as enacted)
House Bills 6099 and 6100 (as enacted)

Sponsor: Senator Jud Gilbert, II (S.B. 1308)
Senator Buzz Thomas (S.B. 1309)
Representative John Walsh (H.B. 6099)
Representative Roy Schmidt (H.B. 6100)

Senate Committee: Economic Development and Regulatory Reform (S.B. 1308 & 1309)
House Committee: Regulatory Reform

Date Completed: 8-15-11

PUBLIC ACTS 138 and 139 of 2010
PUBLIC ACTS 140 and 141 of 2010

CONTENT

The bills amended Public Act 118 of 1981 (which regulates automobile dealer franchises) to do all of the following:

- **Prohibit a manufacturer from imposing a property use agreement on a dealer.**
- **Revise provisions under which a manufacturer may charge back to a dealer an approved and paid warranty claim.**
- **Allow a manufacturer to conduct certain audits of a dealer.**
- **Add to the Act's list of prohibited activities by a manufacturer.**
- **Revise requirements for a manufacturer's compensation of a dealer upon the termination of a dealer agreement.**
- **Specify procedures for determining compensation for a dealer's fair rental value.**
- **Require compensation for a dealer's goodwill and specify procedures for determining its value.**
- **Redefine "relevant market area".**
- **Redefine "dealer agreement".**

The bills were tie-barred and took effect on August 4, 2010.

Senate Bill 1308

Property Use Agreement

The bill prohibits a manufacturer from requiring a new motor vehicle dealer, a proposed new motor vehicle dealer, or any owner of an interest in a dealership facility to enter into or agree to a property use agreement as a condition of awarding a dealer agreement, adding a line of vehicles or a dealer agreement to an existing dealer, renewing a dealer agreement, approving a relocation of a dealer's place of business, or approving a sale or transfer of a dealership or a dealer agreement.

The prohibition does not apply to a property use agreement if either of the following is offered and accepted for that agreement:

- Monetary consideration.
- Separate and valuable consideration that can be calculated to a sum certain.

If a manufacturer and a new motor vehicle dealer are parties to a property use agreement, the dealer agreement between them is terminated by a manufacturer, by a successor manufacturer, or by operation of law, and the reason for the termination is not a reason described in Section 10(c) of the Act, the property use agreement will terminate and cease to be effective at the time the dealer agreement is terminated.

(Generally, the Act requires a manufacturer to give a new motor vehicle dealer at least 90 days' notice before termination, cancellation, nonrenewal, or discontinuance of any dealer agreement. Under Section 10(c), however, a manufacturer must give not less than 15 days' notice before the termination, cancellation, nonrenewal, or discontinuance of a dealer agreement for any of the following reasons:

- Insolvency of the new motor vehicle dealer, or the filing of a bankruptcy or receivership petition by or against the dealer.
- Failure of the dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days.
- Conviction of the dealer or its principal owners of a crime that is punishable by imprisonment in excess of one year or that involved theft, dishonesty, or false statement.
- Revocation of any license that the dealer is required to have in order to operate a dealership.
- A fraudulent misrepresentation by the dealer to the manufacturer or distributor that is material to the dealer agreement.)

If any provision contained in a property use agreement entered into on or after the bill's effective date is inconsistent with the bill, the provision is voidable at the election of the affected dealer, proposed new dealer, or owner of an interest in the dealership facility.

The bill defines "property use agreement" as an agreement that requires a dealer to establish or maintain exclusive dealership facilities, or that restricts the ability of a new motor vehicle dealer to transfer, sell, lease, or change the use of the place of business. The term includes any similar agreement commonly known as a site control agreement or exclusive use agreement.

Warranty Claims

The Act requires each new vehicle manufacturer to specify in writing to each of its new motor vehicle dealers the dealer's obligations for preparation, delivery, and warranty service on the manufacturer's products. A manufacturer must compensate

a dealer for warranty service required of the dealer by the manufacturer, according to a schedule of compensation for parts, work, and service, and the time allowance for the performance of the work and service. The schedule must include reasonable compensation for diagnostic work, repair service, and labor. A manufacturer must pay a dealer's claim for labor and parts within 30 days after approval, and must approve or disapprove a claim within 30 days after receiving it.

Previously, a claim that had been approved and paid could not be charged back to the dealer unless the manufacturer could show that the claim was fraudulent, false, or unsubstantiated. A charge back for false or fraudulent claims could not be made more than two years after payment, and a charge back for unsubstantiated claims could not be made more than 15 months after payment. Under the bill, instead, if a manufacturer has approved and paid a new motor vehicle dealer for a claim, the manufacturer may charge the claim back to the dealer only if one of the following is met:

- The manufacturer shows that the claim is fraudulent or false.
- The manufacturer shows that the claim is unsubstantiated or lacks proper documentation, or shows an improper diagnosis process or improper repair procedure.

A manufacturer may not charge back the amount paid if a claim is found to be false or fraudulent more than two years after payment. A manufacturer may not charge back the amount paid if a claim is found to be unsubstantiated, to lack proper documentation, or to show an improper diagnosis or repair more than 12 months after payment.

The bill also prohibits a manufacturer from denying a claim because of a dealer's incidental failure to comply with a specific claim processing requirement, such as a clerical error, that does not call into question the legitimacy of the claim.

In addition, under the bill, a manufacturer may not charge a claim back to a dealer after the claim is paid unless a representative of the manufacturer first meets in person or by video teleconference or telephone with an officer or employee of

the dealer designated by the dealer, or responds in writing to any dealer written request for information. The bill includes requirements for such a meeting.

Audits

The bill allows a manufacturer to conduct an audit of a new motor vehicle dealer's records relating to a warranty or promotion claim submitted by the dealer. The manufacturer may conduct that audit, however, only in the time periods allowed for warranty or promotional claim chargebacks.

Senate Bill 1309

Relevant Market Area

Under the Act, before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line make is represented, the manufacturer or distributor must notify each new motor vehicle dealer of the same line make in the relevant market area. The dealer may bring a court action for a determination of whether there is good cause for establishing or relocating the proposed new motor vehicle dealer. The manufacturer or distributor may not proceed until the court has made a decision.

The bill changed the definition of "relevant market area". Under the bill, in a county with a population over 150,000, "relevant market area" means the area within a radius of nine miles of the site of the intended place of business. In a county with a population of 150,000 or less, "relevant market area" means the area within a radius of 15 miles of the site of the intended place of business.

Previously, for a proposed new motor vehicle dealer or a dealer who planned to relocate his or her business in a county with a population over 25,000, "relevant market area" meant the area within a radius of six miles of the intended site of the proposed or relocated dealer. For a proposed new motor vehicle dealer or a dealer who planned to relocate his or her business in a county with a population of 25,000 or less, "relevant market area" meant the area within a radius of 10 miles of the intended site, or the county line, whichever was closer.

Successor Manufacturer

Under the Act, as amended by the bills, the term "successor manufacturer" is used in provisions dealing with a property use agreement and compensation for goodwill.

Senate Bill 1309 defines "successor manufacturer" as a manufacturer that acquires, succeeds to, or assumes any part of the business of another manufacturer as the result of any of the following:

- A change in ownership, operation, or control of a predecessor manufacturer by sale or transfer of assets, corporate stock, or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, court-approved sale, operation of law, or any other means.
- Termination, suspension, or cessation of a part or all of the business operations of a predecessor manufacturer.
- Discontinuance of the sale of a product line.
- A change in distribution system by a predecessor manufacturer, whether through a change in distributor or the predecessor manufacturer's decision to cease conducting any business through a particular distributor.

House Bill 6099

The term "dealer agreement" means an agreement or contract in writing between a distributor and a new motor vehicle dealer, between a manufacturer and a distributor or a new motor vehicle dealer, or between an importer and a distributor or a new motor vehicle dealer, that purports to establish the legal rights and obligations of the parties to the agreement or contract. Previously, the definition referred to the parties' legal rights and obligations with regard to the purchase and sale or resale of new and unaltered motor vehicles and accessories for motor vehicles.

Under the bill, the definition refers to an agreement or contract, as described above, that purports to establish the parties' legal rights and obligations and under which the dealer purchases and resells new motor vehicles and conducts service operations. The bill specifies that "dealer agreement" includes the sales and service agreement, regardless of the terminology used to

describe that agreement, and any addenda to the dealer agreement, including all schedules, attachments, exhibits, and agreements incorporated by reference into the dealer agreement.

House Bill 6100

Compensation upon Termination

Under the bill, if a manufacturer terminates, cancels, does not renew, or discontinues a dealer agreement, or if a dealer agreement is terminated, canceled, not renewed, or discontinued as a result of coercion by the manufacturer, the manufacturer must pay the dealer fair and reasonable compensation for certain items. Previously, if a dealer agreement was terminated, canceled, not renewed, or discontinued, the Act required the manufacturer or distributor to pay the new motor vehicle dealer fair and reasonable compensation.

The bill requires fair and reasonable compensation to be paid for each vehicle in the dealer's inventory that meets all of the following:

- The vehicle is new, undamaged, not materially altered, and unsold.
- The vehicle is a current model year vehicle or a vehicle from the model year preceding the current model year.
- The vehicle was purchased from the manufacturer or another dealer of the same line make in the ordinary course of business before the dealer received notice of the termination, discontinuance, cancellation, or nonrenewal.
- The vehicle has less than 750 miles registered on the odometer.

Previously, the items for which compensation was required included all new current model year motor vehicle inventory that had not been materially altered, substantially damaged, or driven for more than 300 miles, and all new motor vehicle inventory not of the current model year that met those criteria and were purchased from the manufacturer and drafted on the dealer's financing source or paid for within 120 days of the effective date of the termination, cancellation, or nonrenewal. The bill deleted that provision.

The bill also requires compensation for data processing programs, software, and equipment that a manufacturer required a terminated new motor vehicle dealer to obtain or purchase for communication of sales, service, warranty, or other information between the dealer and the manufacturer; that the terminated dealer used exclusively for the make or line of vehicle and location covered by the terminated dealer agreement to manage or report data to the manufacturer; and that either was purchased by the dealer within two years before the date of the termination, discontinuance, cancellation, or nonrenewal of the dealer agreement, or leased by the dealer before the effective date of the termination. In the case of leased data processing programs, software, or equipment, however, a manufacturer is responsible only for the amounts remaining to be paid or paid in advance on the dealer's lease for a period that does not exceed two years.

In addition, the bill requires payment of compensation for the net cost of the following:

- Any upgrades or alterations made by a terminated new motor vehicle dealer to the dealership facilities, if the manufacturer required them and they were made within two years before the effective date of the termination of the dealer agreement.
- Any furnishings the manufacturer required a terminated new motor vehicle dealer to purchase within two years before the effective date of the termination.

In determining fair and reasonable compensation for the net cost of upgrades, alterations, or furnishings, the manufacturer may offset any amounts it paid to subsidize or otherwise assist the dealer in making the upgrades or alterations or buying the furnishings.

Previously, compensation for new motor vehicle inventory had to be paid, if possible, within 30 days after termination, cancellation, nonrenewal, or discontinuance. Compensation for items of personal property had to be paid within 90 days. If compensation for new motor vehicle inventory and personal property was not made within 90 days, interest accrued on all

amounts due the new motor vehicle dealer at an annual rate of 12%.

Under the bill, instead, a manufacturer must pay the compensation for new motor vehicle inventory and items of personal property within 60 days. If compensation is not made within the required 60-day period, interest will accrue at a rate of 6% per annum.

Fair Rental Value

Previously, upon termination, cancellation, nonrenewal, or discontinuance of a dealer agreement, the manufacturer had to pay a new motor vehicle dealer a sum equal to the current fair rental value of the dealer's established place of business for one year from the effective date of termination, cancellation, nonrenewal, or discontinuance, or the remainder of any lease, whichever was less. Under the bill, the manufacturer must pay that amount in equal monthly installments for one year.

The bill also requires the manufacturer and dealer to make a good faith effort to agree to the fair rental value of the premises, taking into consideration the adequacy and desirability of the premises for dealership operations and the fair market value of the premises. If the manufacturer and dealer agree on the fair rental value within 30 days after the effective date of the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement, that valuation will be conclusive and binding.

If the manufacturer and dealer cannot agree on the fair rental value within 30 days, the value must be determined by three qualified real estate appraisers, selected as described in the bill. Within 150 days after the termination, cancellation, nonrenewal, or discontinuance, each of the appraisers must complete an appraisal of the fair rental value of the premises, and the median appraisal will be the fair rental value for purposes of compensation. The manufacturer and the dealer each will be responsible for 50% of the costs of the appraisals.

Compensation for Goodwill

In addition to the payment of compensation described above, the bill requires a manufacturer to pay the dealer fair and reasonable compensation for the goodwill of

the dealer if the manufacturer terminates, cancels, does not renew, or discontinues a dealer agreement for any of the following reasons:

- The ownership, operation, or control of all or part of the manufacturer's business changes, whether by sale or transfer of assets, corporate stock, or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, or operation of law.
- All or part of the manufacturer's business operations are terminated or suspended or cease.
- The manufacturer discontinues a line make.

If a successor manufacturer offers a dealer agreement to a dealer whose agreement with the manufacturer is terminated, canceled, not renewed, or discontinued and the terms of the proposed agreement are substantially similar to the terms offered by the successor manufacturer to other new motor vehicle dealers of the same line make, the manufacturer that terminated, canceled, did not renew, or discontinued the dealer agreement is not required to pay any compensation for the dealer's goodwill. Otherwise, the manufacturer and dealer must make a good faith effort to agree on fair and reasonable compensation of the dealer's goodwill, based on its fair market value on the day before the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement. If the parties agree on fair and reasonable compensation within 30 days, the agreement will be conclusive and binding.

If the manufacturer and the dealer cannot agree on fair and reasonable compensation of the dealer's goodwill within 30 days, the amount of compensation must be determined by three qualified appraisers using the same process as described above for determining fair rental value.

Prohibited Activities

Under the Act, a manufacturer may not require any new motor vehicle dealer in Michigan to do certain things. Previously, a manufacturer could not require a dealer to refrain from participation in the management of, investment in, or the acquisition of, any other line of new motor

vehicles or related products, provided that the dealer maintained a reasonable line of credit for each make or line of vehicle, remained in compliance with reasonable facilities requirements, and made no change in the dealer's principal management.

Under the bill, instead, if a dealer maintains a reasonable line of credit for each make or line of vehicle, remains in compliance with minimum space requirements and reasonable facilities requirements, remains in substantial compliance with capital requirements, and does not make a change in the dealer's principal management, a manufacturer may not require the dealer to refrain from participation in the management of, investment in, or the acquisition of, any other line of new motor vehicles or related products at or in any of the following:

- At a location different from the location used by the dealer for the sale or service of new motor vehicles or related products of the manufacturer.
- In facilities at the same location as, but separated from, the facilities used by the dealer for the sale or service of new motor vehicles or related products of the manufacturer.
- In the same facilities used by the dealer for the sale or service of new motor vehicles or related products of the manufacturer, unless the manufacturer otherwise objects based on other reasonable business considerations.

The Act lists activities that a manufacturer is prohibited from doing with respect to new motor vehicle dealers. The bill added the following to the list of prohibited activities:

- Offering incentives, rebates, bonuses, or similar benefits based on certain standards.
- Requiring unreasonable improvements to a facility.
- Authorizing a service and repair facility to do warranty repairs and recall work, unless the work meets certain criteria.
- Owning a service and repair facility, except a facility for the repair of manufacturer-owned vehicles.
- Engaging in capricious or unreasonable conduct that materially affects a new motor vehicle dealer and causes damage to the dealer.

- Imposing unreasonable standards of performance or requiring performance standards that are not applied uniformly to other similar dealers.
- Using or considering a dealer's sales performance in determining the dealer's eligibility for certain vehicles or programs.
- Requiring a new motor vehicle dealer to provide its customer lists or service files to the manufacturer, except for certain purposes.
- Establishing a performance standard or program that is not fair, reasonable, and equitable.

In addition, under the bill, if a new motor vehicle dealer sold or leased a new motor vehicle to a customer that exported the vehicle to a foreign country or resold the vehicle, the manufacturer may not refuse to do any of the following, unless it proves that the dealer knew or reasonably should have known about the customer's intent to export or resell the vehicle:

- Allocate, sell, or deliver new motor vehicles to the dealer.
- Charge back or withhold payments or other things of value for which the dealer otherwise is eligible under a sales promotion, program, or contest.
- Prevent a new motor vehicle dealer from participating in any sales promotion, program, or contest.
- Take or threaten to take any other adverse action against a dealer including reducing vehicle allocations or terminating or threatening to terminate a dealer agreement.

Also, if a new motor vehicle dealer was a party to a dealer agreement on the bill's effective date, and the dealer agreement provides for the sale of a competing line make of new motor vehicles at the same place of business where the manufacturer's line make is sold, the manufacturer may not require or otherwise coerce the new motor vehicle dealer to remove the sale or servicing of new motor vehicles of that competing line make from that place of business.

MCL 445.1574a et al. (S.B. 1308)
445.1565 & 445.1566 (S.B. 1309)
445.1562-445.1564 (H.B. 6099)
445.1571-445.1574 (H.B. 6100)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills will have no impact on the Department of State and an indeterminate impact on the State and local units of government. The bills will have an indeterminate impact on property tax revenue depending on the number of dealerships affected.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.