

BILL ANALYSIS

S.B. 529
By: Huffman
Licensing & Administrative Procedures
Committee Report (Unamended)

BACKGROUND AND PURPOSE

The relationship between motor vehicle manufacturers/distributors and their franchised dealers is governed by the franchise agreement between the parties and state law. Given the economic and financial conditions the retail automobile industry has experienced in the past two years, including the bankruptcy of major automobile manufacturers and the loss of over 100 franchised dealerships in the state, the law needs to be updated to address certain practices which continue to threaten the viability of Texas's franchised dealerships and the industry.

S.B. 529 amends current law relating to the regulation of motor vehicle dealers, manufacturers, distributors, and representatives.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

ANALYSIS

SECTION 1. Amends Section 2301.002, Occupations Code, by adding Subdivision (27-a) to define "property use agreement."

SECTION 2. Amends Section 2301.359, Occupations Code, by amending Subsection (e) and by adding Subsections (g), (h), and (i), as follows:

(e) Deletes existing text providing that it is unreasonable for a manufacturer or distributor to reject a prospective transferee who is of good moral character and who meets the written, reasonable, and uniformly applied standards or qualifications, if any, of the manufacturer or distributor relating to the prospective transferee's business experience and financial qualifications.

(g) Authorizes a manufacturer or distributor, in determining whether to approve an application filed under Subsection (a), to consider:

(1) the prospective transferee's financial and operational performance as a franchised dealer, if the prospective transferee is or has been a franchised dealer;

(2) the prospective transferee's moral character; or

(3) the extent to which a prospective transferee satisfies any criteria developed by the manufacturer or distributor and made available to the prospective transferee, specifically to determine the business experience and financial qualifications of a prospective transferee.

(h) Authorizes a manufacturer or distributor to consider the criteria developed under Subsection (g)(3) only if the criteria are in writing, are reasonable, and are uniformly applied in similar situations.

(i) Provides that it is unreasonable for a manufacturer or distributor to reject a prospective transferee who is of good moral character and who satisfies the criteria developed under Subsection (g)(3).

SECTION 3. Amends Section 2301.465(b), Occupations Code, as follows:

(b) Requires a manufacturer, distributor, or representative, notwithstanding the terms of any franchise, after the termination of a franchise, to pay to a franchised dealer or any lienholder, in accordance with the interest of each, certain amounts for certain items, including the depreciated value of computer software that was recommended and required in writing by the manufacturer, distributor, or representative. Makes a nonsubstantive change.

SECTION 4. Amends Subchapter J, Chapter 2301, Occupations Code, by adding Section 2301.4651, as follows:

Sec. 2301.4651. ADDITIONAL PAYMENT TO FRANCHISED DEALER IN CERTAIN SITUATIONS. (a) Provides that this section applies to a manufacturer, distributor, or representative that:

(1) terminates or discontinues a franchise by any means without complying with Section 2301.453 (Termination or Discontinuance of Franchise); or

(2) regardless of whether the manufacturer, distributor, or representative complies with Section 2301.453, terminates or discontinues a franchise by discontinuing a line-make, ceasing to do business in this state, or changing the distributor or method of distribution of its products in this state.

(b) Requires a manufacturer, distributor, or representative to whom this section applies, in addition to the duties placed on a manufacturer, distributor, or representative by Section 2301.465, to pay to the franchised dealer the following amounts as applicable:

(1) either:

(A) the dealer's construction costs for a new dealership completed in the two years preceding the date of the termination or discontinuance described by Subsection (a); or

(B) if the dealer does not have any costs described by Paragraph (A), the fair monthly rental value of the dealership payable in cash each month beginning on the first day of the first month following the date of the termination or discontinuance described by Subsection (a) and ending on the earlier of the first anniversary of the termination or discontinuance date, or the date on which the dealer no longer owns the dealership;

(2) the dealer's costs for upgrading or substantially altering a dealership if the upgrades or alternatives were completed or added in the two years preceding the date of the termination or discontinuance described by Subsection (a); and

(3) an amount equal to the value of the goodwill associated with the franchise as it existed on the day before the earlier of the date of the termination or discontinuance described by Subsection (a), or the date on which the manufacturer, distributor, or representative announced its intention to terminate or discontinue the franchise in a manner described by Subsection (a).

(c) Requires a franchised dealer receiving money under Subsection (b)(1)(B) to make a reasonable effort to earn income from a dealership after a termination or discontinuance described by Subsection (a), and inform the manufacturer, distributor, or representative of the dealer's efforts under Subdivision (1) and of any income earned from the dealership.

(d) Requires that the amounts to be paid under Subsection (b)(1) or (2) to the dealer by a manufacturer, distributor, or representative be based on the percentage of the total square footage of the dealership attributable to sales, service, and parts suggested by a manufacturer or distributor and allocated to the franchise being terminated or discontinued at the time of the termination or discontinuance.

(e) Requires a franchised dealer receiving money under Subsection (b)(1) or (2) to mitigate damages by listing the dealership for lease or sublease with a real estate broker licensed under Chapter 1101 (Real Estate Brokers and Salespersons) not later than the 30th day after the effective date of the termination or discontinuance described by Subsection (a) and to reasonably cooperate with the broker in the performance of the broker's duties.

(f) Authorizes a manufacturer, distributor, or representative to reduce the amount of a payment made to a franchised dealer under Subsection (b)(1)(B) by the amount of any income earned by the dealer from the dealership during the month preceding the payment.

(g) Requires the manufacturer, distributor, or representative, as appropriate, to pay any amount described by Subsection (b)(1)(A), (b)(2), or (b)(3) not later than the 90th day after the date of the termination or discontinuance described by Subsection (a).

(h) Provides that an amount payable under Subsection (b)(1)(A) or (b)(2) does not include any tax depreciation benefit received by the franchised dealer or any amount previously paid to the franchised dealer by the manufacturer, distributor, or representative to subsidize the costs incurred by the dealer in performing the activities described by Subsection (b)(1)(A) or (b)(2).

SECTION 5. Amends Section 2301.467, Occupations Code, by amending Subsections (b) and (c) and adding Subsections (b-1) and (b-2), as follows:

(b) Prohibits a manufacturer, distributor, or representative, notwithstanding the terms of any franchise, from unreasonably requiring a franchised dealer to relocate, or to replace or substantially change, alter, or remodel the dealer's facilities. Provides that, except as provided by Subsections (b-1) and (b-2), rather than provides that for the purposes of this subsection, an act is reasonable if it is justifiable in light of current and reasonably foreseeable projections of economic conditions, financial expectations, and the market for new motor vehicles in the relevant market area.

(b-1) Provides that it is unreasonable for a manufacturer, distributor, or representative to require a franchised dealer to construct a new dealership or to substantially change, alter or remodel an existing dealership, except for changes necessary to comply with health or safety laws or technology requirements necessary to sell or service a line-make, before the 10th anniversary of the date the construction of the dealership at that location was completed if the construction was in substantial compliance with standards or plans provided by a manufacturer, distributor, or representative or through a subsidiary or agent of the manufacturer, distributor, or representative.

(b-2) Provides that it is unreasonable for a manufacturer, distributor, or representative to require a franchised dealer to substantially change, alter, or remodel an existing

dealership, except for changes necessary to comply with health or safety laws or technology requirements necessary to sell or service a line-make, before the 10th anniversary of the date that a prior change, alteration, or remodel of the dealership at that location was completed if the change, alteration, or remodel was in substantial compliance with standards or plans provided by a manufacturer, distributor, or representative or through a subsidiary or agent of the manufacturer, distributor, or representative.

(c) Provides that this section applies, rather than the prohibitions under this section apply, to the relationship between a manufacturer, distributor, or representative and a current franchisee of the manufacturer, distributor, or representative, a successor of a current franchisee of the manufacturer, distributor, or representative, or a franchised dealer who is seeking to become a franchisee of the manufacturer, distributor, or representative. Makes a nonsubstantive change.

SECTION 6. Amends Subchapter J, Chapter 2301, Occupations Code, by adding Section 2301.4671, as follows:

Sec. 2301.4671. FRANCHISE PROVISION ESTABLISHING RESTRICTION ON DEALER'S USE OF DEALERSHIP PROPERTY. Prohibits a manufacturer, distributor, or representative, notwithstanding the terms of any franchise, from:

- (1) unreasonably limiting or impairing the ability of a franchised dealer to use the dealership property as the dealer considers appropriate;
- (2) controlling the use of the dealership property after the franchise is terminated or discontinued; or
- (3) at any time, exercising exclusive control over the use of the dealership property.

SECTION 7. Amends Section 2301.468, Occupations Code, as follows:

Sec. 2301.468. New heading: INEQUITABLE TREATMENT OF DEALERS OR FRANCHISEES. Prohibits a manufacturer, distributor, or representative, notwithstanding the terms of a franchise, from treating franchised dealers of the same line-make differently as a result of the application of a formula or other computation or process intended to gauge the performance of a dealership or otherwise enforce standards or guidelines applicable to its franchised dealers in the sale of motor vehicles if, in the application of the standards or guidelines, the franchised dealers are treated unfairly or inequitably in the sale of a motor vehicle owned by the manufacturer or distributor, rather than, prohibiting a manufacturer, distributor or representative, notwithstanding the terms of any franchise from directly or indirectly discriminating against a franchised dealer or otherwise treating franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership or discriminating unreasonably between or among franchises in the sale of a motor vehicle owned by the manufacturer or distributor. Makes nonsubstantive changes.

SECTION 8. Amends Subchapter J, Chapter 2301, Occupations Code, by adding Section 2301.4749, as follows:

Sec. 2301.4749. MANUFACTURER OR DISTRIBUTOR INCENTIVE PROGRAMS: PAYMENT TO DEALER. (a) Requires a manufacturer or distributor to pay a dealer's claim filed under a manufacturer or distributor incentive program not later than the 30th day after the date the claim is approved.

(b) Provides that a claim is considered approved unless a manufacturer or distributor rejects the claim not later than the 31st day after the date of receipt of the claim by the manufacturer or distributor.

(c) Requires the manufacturer or distributor to provide the dealer with written notice of a rejection of a claim and the reasons for the rejection.

SECTION 9. Amends the heading to Section 2301.475, Occupations Code, to read as follows:

Sec. 2301.475. MANUFACTURER OR DISTRIBUTOR INCENTIVE PROGRAMS: AUDIT OR CHARGEBACK.

SECTION 10. Amends Section 2301.475(a), Occupations Code, as follows:

(a) Prohibits a manufacturer or distributor, except as provided by Subsection (b), from taking certain actions after the first anniversary of the date a manufacturer or distributor pays a claim under Section 2301.4749, rather than after the first anniversary of the ending date of a manufacturer or distributor incentive program.

SECTION 11. Amends Subchapter J, Chapter 2301, Occupations Code, by adding Sections 2301.480, 2301.481, and 2301.482, as follows:

Sec. 2301.480. DISCLOSURE OF CERTAIN INFORMATION. Prohibits a manufacturer, distributor, or representative from requiring that a franchised dealer provide to the manufacturer, distributor, or representative information regarding a customer, except to the extent that a specific item of information is necessary:

- (1) for the sale or delivery of a new motor vehicle to a customer;
- (2) for reasonable marketing purposes;
- (3) to validate a claim and make payment under an incentive program;
- (4) to support a dealer's claim for reimbursement for repairs performed under a manufacturer's warranty; or
- (5) to satisfy a product recall or safety obligation.

Sec. 2301.481. PROPERTY USE AGREEMENT. (a) Prohibits a manufacturer, distributor, or representative from requiring that a dealer enter into a property use agreement as a condition of the manufacturer, distributor, or representative:

- (1) entering into a franchise;
- (2) approving a franchised dealer's application to add a line-make;
- (3) approving a franchised dealer's application to relocate a franchise; or
- (4) approving a sale or transfer of a dealer, dealership, or franchise.

(b) Provides that the following provisions in a property use agreement are void and unenforceable:

- (1) a limitation on the franchised dealer's ability to add a line-make; or
- (2) a provision that binds a franchised dealer's successor.

(c) Provides that a property use agreement expires on the earlier of the date provided by the property use agreement, or the termination of the franchise between the parties to the property use agreement.

(d) Provides that this section applies to a subsidiary of, or a person controlled by, a manufacturer, distributor, or representative.

Sec. 2301.482. CERTAIN PROPERTY USE AGREEMENTS. (a) Authorizes a franchised dealer to enter into a property use agreement, notwithstanding Section 2301.481(b)(1), for cash consideration that grants the manufacturer or distributor the exclusive rights to direct the use of the dealership.

(b) Requires that if a franchised dealer enters into an agreement described by Subsection (a) and breaches the agreement by altering the use of the property during the term of the agreement, the property use agreement is terminated and the dealer must reimburse the manufacturer or distributor in an amount determined by dividing the amount of the manufacturer's or distributor's cash consideration provided under Subsection (a) by the market value of the property identified in the original property use agreement at the time any necessary real estate has been purchased and any necessary construction has been completed, and multiplying the resulting quotient by the market value of the property at the time of the breach.

(c) Provides that for purposes of this section, the market value of property is to be determined by three appraisers chosen as follows:

- (1) one selected by the affected manufacturer or distributor;
- (2) one selected by the affected dealer; and
- (3) one selected by mutual agreement of the manufacturer or distributor and the dealer.

SECTION 12. Amends Section 2301.522(a), Occupations Code, to require the board of the Texas Department of Motor Vehicles, in an action brought against a manufacturer or distributor under Subchapter J (Manufacturers, Distributors, and Representatives), rather than under Sections 2301.451-2301.474, by a franchised dealer whose franchise provides for arbitration in compliance with this chapter, to order the parties to submit the dispute to mediation in the manner provided by this subchapter.

SECTION 13. Amends Section 2301.652(b), Occupations Code, to provide that, except as provided by Subsection (c) and Sections 2301.6521 and 2301.6522, a person has standing under this section to protest an application to establish or relocate a dealership if the person filing the protest is a franchised dealer of the same line-make whose dealership is located in the county in which the proposed dealership is to be located, or within a 15-mile radius of the proposed dealership.

SECTION 14. Amends Subchapter N, Chapter 2301, Occupations Code, by adding Sections 2301.6521 and 2301.6522, as follows:

Sec. 2301.6521. RIGHT TO PROTEST: CERTAIN RELOCATIONS.

(a) Defines, in this section, "affected county."

(b) Authorizes a franchised dealer, notwithstanding any other provision of this chapter and except as provided by Subsection (d), to protest an application to relocate a dealership from a location in an affected county to a location within the same affected county or an adjacent affected county only if the dealer is:

- (1) a dealer of the same line-make as the relocating dealership and is in the affected county where the proposed dealership is being relocated and is nearest to the proposed relocation site, if no dealership of the same line-

make as the relocating dealership is located within 15 miles of the proposed relocation site; or

(2) a dealer of the same line-make as the relocating dealership whose dealership location is within 15 miles of the proposed relocation site.

(c) Authorizes each dealer, if more than one dealership location is an equal distance from the proposed relocation site and each dealer and dealership location satisfies the requirements of Subsection (b)(1), to protest the relocation under Subsection (b)(1).

(d) Prohibits a dealer from protesting an application to relocate a dealership under this section if the proposed relocation site is two miles or less from the dealership's current location.

Sec. 2301.6522. RIGHT TO PROTEST: ECONOMICALLY IMPAIRED DEALER. (a) Defines, in this section, "economically impaired dealer."

(b) Prohibits a dealer, notwithstanding any other provision of this chapter and except as provided by Subsections (c) and (d), from protesting the relocation of an economically impaired dealer if:

(1) the relocation is reasonably expected to be completed before the first anniversary of the date of the event described by Subsection (a); and

(2) the proposed relocation site is two miles or less from the economically impaired dealer's current location.

(c) Authorizes a dealer of the same line-make as an economically impaired dealer whose dealership is nearest to the proposed relocation site of the economically impaired dealer to protest the relocation if the proposed relocation site is more than two miles closer to the protesting dealer's dealership than the site of the economically impaired dealer's current location.

(d) Authorizes each dealer, if more than one dealership location is an equal distance from the proposed relocation site and each dealer and dealership location satisfies the requirements of Subsection (c), to protest the relocation under Subsection (c).

SECTION 15. Amends Section 2301.805(a), Occupations Code, to authorize a person, notwithstanding any other law, including Subchapter E, Chapter 17, Business & Commerce Code, in addition to the other remedies provided by this subchapter, to institute an action under Subchapter E, Chapter 17, Business & Commerce Code, or any successor statute to that subchapter, and entitles the person to any procedure or remedy under that subchapter, if the person meets certain criteria, including the person is a franchised dealer who has sustained damages as a result of a violation of Subchapter J of this chapter, rather than Sections 2301.451-2301.474, or Subchapter E, Chapter 17, Business & Commerce Code.

SECTION 16. Makes application only to an agreement entered into or renewed under Chapter 2301, Occupations Code, on or after the effective date of this Act, prospective.

SECTION 17. Effective date: September 1, 2011.

EFFECTIVE DATE

September 1, 2011.