Being Pressured to Upgrade your Facility? Hedge your Bet
by : Richard N. Sox, Jr.

These days, every manufacturer wants a new, shiny facility. They want a facility that houses only their linemakes and they want that facility not just to be large but to include the finest in furniture, countertops and building materials. Even the second and third tier manufacturers have a very involved, expensive facility image program.

We have all read that Toyota has gone so far as to determine that its dealerships will need a whopping one service stall for every 400 units in operation. Don't ask me how they estimate units in operation looking several years into the future. It's their own special brand of math.

Between the up and coming franchises and the established juggernauts like Toyota and Honda all putting intense pressure on their dealer bodies to provide exclusive facilities which conform to the latest image and space requirements, dealers have some difficult financial decisions to make. I have written on many occasions, and reiterated in every speech I give to dealer groups, that dealers have got to remember that you only have to comply with reasonable, minimum facility guidelines to be in compliance with your franchise agreement. Anything beyond that (providing exclusive facilities and/or an "imaged" facility) is strictly your business decision. It's always so easy for the factories to tell you how to spend your money. We work with dealers every day to write letters to their manufacturer saying that although the dealer agrees with the manufacturer's overall facility/image plans, for reasons out of the dealers control (no additional land available, too expensive to remodel or regulatory barriers) and despite an earnest effort, the dealer is unable to participate at this time. The name of the game is delay, delay, delay. The ideal situation is for the dealer to maintain the appearance of "trying" to comply but at the same time avoiding the expenditure until you as the dealer decide it is the right time to make the investment. In many cases the dealer can wait for the next image program and avoid an entire facility expenditure cycle. Remember Toyota's USA Image I? That was only around for 18 months or so before USA Image II came along.

I know that sounds great but what do you do when your factory representative is putting intense pressure on you, you are receiving letters monthly which degrade you for not having a facility that is up to standard and, for the most part, you want to keep your OEM happy? Well, if you aren't able or willing to delay the process as long as needed, there is another way to hedge your bet on building that large, exclusive facility. That is franchise legislation. Specifically, adding a provision to your state motor vehicle franchise law that provides a manufacturer is prohibited from preventing you the right to bring another franchise into your dealership unless the manufacturer can demonstrate that the addition of that new franchise will cause you to no longer be able to "adequately" sell and service their vehicles. This is not pie in the sky franchise protection. Several states have this type provision and Myers & Fuller assisted the Florida Automobile Dealer Association in writing and obtaining passage of such a franchise protection earlier this year during the 2007 legislative session. Sure, the manufacturers absolutely hate this type of provision and fought it tooth and nail, but when the dealers support their state and/or metro association, anything can be accomplished.

Remember, your dealer agreement is clear that you cannot add another franchise to your dealership without the express permission of the factory, and that permission can be withheld in the factory's sole discretion. Except in extraordinary circumstances, judges will almost always enforce the terms of the dealer agreement. After all, judges believe that you are big boys and girls and should know what you are getting into when signing your dealer agreement.

This dualling provision, which is now found in only a handful of states, will go a long way in protecting you against a decline in business after spending millions on a new facility. A recent example of this very situation can be found in VW's Marketplace facility program. It wasn't more than five years ago that VW was pulling itself out of the doldrums with new product that was selling like crazy. Like many manufacturers, as soon as things were looking up, VW developed the Marketplace program and demanded that its dealers provide these huge exclusive facilities. Unfortunately, before construction was complete on many of these facilities, VW started a backslide from which they have yet to fully recover. We represented a VW dealer in Georgia who had constructed such a facility and now had excess sales and service capacity. He was having difficulty covering his nut. Fortunately for him, Georgia is one of those handful of states that has this wonderful little dualling provision. After declining our dealer's request to add another franchise to his Marketplace facility, VW did a 180-degree reversal when we enlightened them to the Georgia franchise law.

Another example of where this type of provision could yet come into play is the Nissan NREDI facility program. Many dealers have completed or are in the process of providing these large, exclusive facilities. However, through May, Nissan national sales are down approximately 30 percent.

If that decline continues, dealers who are NREDI compliant will need some relief. Hedge your bet and ask your dealer association to consider pushing for a dualling provision in your state's next legislative session. It will be your best protection in taking that leap of faith to spend the millions of dollars to comply with your manufacturer's facility/image program.

Now is the time to plan your state's franchise law updates

The discussion above is a prime example of an update that is needed in most state franchise laws. Your state and metro dealer associations have worked hard over the years to obtain franchise protections for you. However, with the manufacturers always coming up with new ways to spend your money and take more control of your dealership, franchise protections naturally need to be updated.

In most states, the legislature meets anywhere from January through June. Therefore, summertime is the best time to plan and begin to implement your legislative strategy. It takes dealer involvement to make this happen. Your association director will not know what new challenges you are facing from the factories unless you tell the director about it. And it is not enough to just pick up the phone and run through your wish list of franchise protections. You have to get involved. Attend your association's meetings (usually there is a legislative committee established) and lend your assistance in planning the franchise law upgrades. Assist your association in hiring experienced motor vehicle franchise lawyers to determine what updates are needed. Then lend your time in meeting with your local legislators in obtaining advance support for the franchise legislation. And last but not least, contribute money to your dealer association's political action committee that makes contributions to key legislators.

We have seen time and again, when dealers truly get behind franchise legislation, they are unstoppable. Let's face it, in the vast majority of states there is little to no manufacturer presence. However, in every state there is a car dealership in every legislator's district.

Rich Sox is a lawyer with the firm of Myers & Fuller PA, with offices in Tallahassee, Florida and Raleigh, North Carolina. The firm's sole practice is the representation of automobile dealers in their quest to establish a level playing field when they deal with automobile manufacturers.