Mercedes-Benz Knows What's Best for its Dealers
by : Richard N. Sox, Jr.

Here we go again! Mercedes-Benz is the latest in a long line of manufacturers that have instituted a margin holdback program. You know these programs. At any given time almost every major manufacturer has played the game. A margin holdback program takes a few percentage points out of the limited base margin points paid to dealers on every new vehicle sold. These are base margin points you were previously paid but are subsequently withheld from you in exchange for certain "achievement of performance and sales goals."

In layman's terms these margin holdback programs are the classic "carrot and stick" approach to obtaining a dealer's compliance with the big three performance issues: facility, sales and CSI. Ernst Lieb, Mercedes-Benz's CEO, is on record as saying the goal of the program is to get every dealer on the same "level." Therein lies the problem; not every dealer is the same nor is every market the same. The inevitable result of these programs is that many dealers will be at a competitive disadvantage because they cannot comply with one of the performance goals.

The margin holdback programs have consistently been found to be illegal in certain states that have strict prohibitions against any factory program that results in dealers paying different net prices for vehicles purchased from the manufacturer. It would appear that if challenged in one of these states, Mercedes' new program would meet the same fate.

For dealers in most states, Mercedes' new program would not automatically be illegal but, instead, would be judged on a case-by-case basis. As I have written in this column on many occasions in the past, in these states the federal price discrimination law would apply. That federal law, known as the Robinson-Patman Act ("RPA"), looks at each dealer's individual situation in determining whether the incentive program is illegal. Specifically, the RPA considers whether the incentive program is "functionally available" to the dealer in question.

Putting the RPA standard in terms a normal human can understand (lawyers ain't normal), the incentive program violates the RPA if the dealer cannot within reason comply with the program's terms. Examples of violations of the RPA in the past are the BMW value-added program and the Kia stair-step incentive program. In the case of the BMW program, the dealer we represented could not reasonably afford to construct the new facility called for in the value-added program. Two years prior to the new BMW facility design being made a part of the value-added program, this dealer had spent several million dollars on his facility with BMW's approval. Therefore, he could not within reason afford to rebuild his dealership only two to three years later. In the case of our Kia client, the incentive program called for dealers to sell a certain number of vehicles in a month in order to receive different levels of bonus per vehicle sold (i.e. 15 cars sold – $500 per car; 30 cars sold – $750 per car; 45 cars sold – $1,000 per car). Our dealer was in a small market where Kia's own planning volume didn't call for him to sell more than 15 cars a month. Therefore, no matter what our client did to try to sell more cars the higher level Kia incentives were not available to him within reason.

If as a Mercedes-Benz dealer you find yourself unable to comply with any of the requirements of the margin holdback program, the first thing that should be done is to determine whether your state motor vehicle franchise laws contain a strict prohibition on such programs. If you are not in a state that has such a law, then it will be important for you to contact an experienced motor vehicle franchise lawyer to assist you in determining whether your situation would fall under the protection of the RPA. One more nice thing about the RPA is that it triples any losses you suffered under the illegal incentive program. Needless to say, this creates strong leverage in your fight with the manufacturer. Something tells me that ol' Ernst is not quite tuned up to these franchise protections.

Vehicle export penalties

You may recall that following the annual Mercedes-Benz dealer meeting on the French Rivera earlier this year, I reported through one of our loyal dealers that not only did Heir Lieb state he was going to push dealers toward minimum sales responsibility and insist upon everyone complying with the Autohaus design program (both coming to fruition through the margin holdback program) but Ernst insisted that MB would be taking a hard line on exporting vehicles. That initiative has also now also come to fruition.

We have had Mercedes-Benz dealer clients report that they have been tagged up to $15,000 per vehicle found to be exported. It looks like this new initiative started in the August-September timeframe. Our understanding is that the previous export policy was to give the dealer some number of "grace" vehicles which if found to have been exported would not result in a chargeback. Under the new program, MB is hitting dealers with a full chargeback from the first vehicle found to be exported. For many dealers, these dollars can add up fast.

What can dealers do? You guessed it; look at your state franchise laws for protection. Many of the motor vehicle franchise laws around the country provide protection to the dealers from inappropriate penalties related to exported vehicles. These protections range from a simple requirement that any such export penalty program be "reasonable" to a provision which requires the manufacturer to prove that the dealer "knew or should have known" that the vehicle was going to be exported.

Whatever you do, don't assume that Mercedes-Benz can levy these export penalties without limit. If you or your sales department had no reason to believe the vehicle was going to be exported, then being hammered with chargebacks on those vehicles is simply not fair. Especially when Ernst is asking you to spend more money on advertising, sales commissions and your facility!

Tier 3 advertising policy

The next area in which Mercedes-Benz wants to control the retail process in your dealership is lease advertising. MB recently sent out the 2007 Lease Support Compliance Form. This form provides that the dealer agrees to comply with minimum pricing requirements for Tier 3 lease advertising. The first violation is a freebie; the second violation is a chargeback of 50 percent of MB's market support money paid on the vehicles covered by the lease program during the month of the violation and the third violation results in a chargeback of 100 percent of those monies paid during the month. As I read this policy, those chargebacks involve *every* vehicle sold under the lease program during the *entire* month, not just those that were exported. That could be big money!

Again, dealers should seek out an experienced motor vehicle franchise lawyer to determine whether this new advertising policy violates one or more provisions of your state's franchise protections. Protections which could apply are a strict prohibition on the manufacturer setting the retail price of a vehicle and limits on the ability of the manufacturer to charge back sales incentives.

Whatever you do, don't sit idly by while Mercedes-Benz initiates these potentially harmful programs and policies. It is critical for Mercedes-Benz to understand that although Mercedes-Benz dealers are great business partners, you will not hesitate to take the steps necessary to protect your investment.

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