

**Don't Be Sold a 'Pig in a Poke'**by : Rich Sox

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Dealers are being sold a “pig in a poke” on what the term of a sales and service agreement really means. It seems as though some of the factories are playing the fear factor game to induce dealers to comply with sales performance requirements and factory imaging plans. We would like to be able to say that only a few of the factories are using this ploy, but that is not the case. Nor can we limit the offensive activity to only imaging plans. It seems that most of the factories are trying to tie the renewal of your sales and service agreement to compliance with factory initiatives that may or may not make economic sense.

Manufacturers play this game by waiting until the expiration of the term stated in your franchise agreement and then inform you that it will not be renewed for a full term *unless* you agree to comply with the manufacturer's sales and/or image program.

Toyota Motor Sales has been notorious in using the renewal of franchise agreements as leverage to obtain a written commitment by the dealer that he will fully comply with USA Image II and, in some cases, to obtain a written commitment that the dealer will agree to achieve a certain sales penetration level. Nissan North America is likewise fond of using its franchise agreement as leverage over the dealer. Nissan takes things a step further and issues a term sales and service agreement, even before the dealer's standard agreement expires under its own terms. Specifically, Nissan uses a change in executive manager as the excuse for proposing a term agreement. This agreement, which replaces the standard sales and service agreement, states that the dealer will be given a six-month term in which to demonstrate sales and service performance at specific levels and, if applicable, to make progress toward the Nissan Retail Environmental Design Initiative (NREDI).

In these term agreements or extensions of sales and service agreements, the manufacturer includes *specific* performance criteria that are more definitive than the language in your standard sales and service agreements. In a standard agreement you will find sales performance language like “meet reasonable sales penetration goals.” In the term agreements or extensions very specific sales performance is included such as “meeting or exceeded regional average sales penetration.” These more specific obligations cause the lawyers of Myers & Fuller great heartburn because it is very difficult to extract a dealer from these agreements once signed by the dealer.

In many situations, there is a legitimate reason why a dealer does not meet the obligation set out in the term agreement or extension. Circumstances such as an inappropriate assignment of market area the dealer is responsible for or the presence of a competing manufacturer's supplier or manufacturing plant can cause your sales penetration goals to be simply unattainable. Likewise, the inability to locate land for a facility or a local government's refusal to issue permits for certain facility work can make compliance with image program deadlines impossible. However, unless there is a very specific franchise law addressing the performance obligation at issue, most judges will look at these obligations as binding on a dealer. After all, the judge will say you are an experienced businessperson and should know not to sign anything that you don't intend to abide by. Even if there is a general requirement in your state's franchise laws that “reasonable” criteria must be used as relates to performance or facility standards, many judges will agree with the manufacturer that the more specific obligation agreed to in a term agreement or extension voids the statutory protection. This is not a position in which you want to find yourself.

So what are your choices? Your factory representative tells you that your dealer agreement has expired and won't be renewed unless you agree to certain specific obligations in the form of a term agreement or extension of your standard dealer agreement. Can they do that? Absolutely. The manufacturer can

propose whatever contract it wants. Do you have to agree to that term agreement or extension?  
Absolutely not.

Years ago your state legislature made your franchise agreement perpetual as long as you don't violate any reasonable sales, service or facility requirements. In each state, the manufacturer must renew your franchise agreement unless it has "good cause" to non-renew that franchise agreement. The term "good cause" is generally defined as the dealer not complying with reasonable terms of the franchise (miserable sales performance under otherwise appropriate standards or a woefully inadequate facility). In the vast majority of cases, the manufacturer is simply leveraging you for more than what would be considered reasonable under an objective standard.

You have two choices. The first is to decline to sign the term agreement or extension and, instead, insist on a renewal of your standard sales and service agreement. If the manufacturer refuses, by default you continue to operate under your "old" sales and service agreement. The only option the manufacturer has is to give you formal notice of a non-renewal. The manufacturers know the franchise laws in each state like we do. In 99 percent of the situations, the manufacturer knows it doesn't have "good cause" to non-renew.

Your second choice is to negotiate the term agreement or extension. If the term agreement or extension contains language requiring you to meet some requirement that you could not, or would not, accomplish under the old agreement you can't sign it. You have got to negotiate more neutral terms that don't give away your rights under the standard sales and service agreement or your state's franchise protections.

Whatever you do, don't accept your factory representative's explanation that signing the term agreement or extension "doesn't change anything." Before committing yourself to obligations you may not be able to meet and which nullify your franchise protections, have an experienced motor vehicle franchise attorney review what the manufacturer is proposing upon renewal of your sales and service agreement.

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