

Don't Settle for Less than a Full-term Standard Dealer Agreement

by : Richard N. Sox, Jr.

We had one of those disturbing dealer phone calls last week. The dealer called to say that he and his brother had succeeded their father as principal owners and dealer operator of the dealership. Their father was now enjoying his retirement but the boys had gotten saddled with a term dealer agreement from the factory (Toyota, in this case).

As part of Toyota's approval of the transfer of majority ownership and dealer principal position to the dealer's sons, Toyota issued a two-year term agreement which included specific sales targets and, you guessed it, a promise to build an Image II facility within the term of the agreement. Although these guys were not calling to discuss the term agreement, and how to avoid the onerous commitments they have made in it, but instead were calling to discuss further ownership transfer amongst the brothers. Hearing their story reminded me to again emphasize to all dealers that these term agreements should be avoided like the plague!

The reason these term agreements are so onerous is not only because of the commitment you make in them as it relates to sales performance, customer satisfaction performance and facility programs, but because in most cases the term agreement contains a provision which says you agree you are in breach of your dealer agreement and the manufacturer has good cause to terminate you. Trust me, from experience we know that such a provision is very difficult to overcome in court.

In the vast majority of states, your motor vehicle franchise laws protect you in an ownership or dealer principal transfer situation. These laws provide specific criteria at which the manufacturer may look in determining whether an individual is qualified to assume majority ownership and/or the dealer principal position. The manufacturer may not look beyond those criteria. Dealerships which are undergoing a transfer of ownership or dealer principal position to family members as the result of retirement or death of the existing dealer principal, in particular, generally have very strong state law franchise protections which limit the manufacturer's right to prohibit the transfer.

If the proposed majority owner and/or dealer principal meet the state law requirements then, by all means, insist upon receiving a full-term, standard dealer agreement from the manufacturer. The manufacturers know that when push comes to shove they have no right to demand compliance with specific provisions which are different than what is included in their standard dealer agreements. As we all know, the manufacturer is not looking out for your best interest, so they attempt to convince you that it is routine policy to issue term dealer agreements, ranging from six to 24 months, and require specific performance as part of any ownership or dealer principal transfer. Don't let your desire to complete the transfer blind you to the incredibly onerous long-term effects a term agreement will have. Instead, be patient and continue to insist on a standard dealer agreement and have an experienced motor vehicle franchise lawyer review what is being represented by the factory as their 'standard' terms. If the dealer agreement contains any 'additional provisions' or 'addendum' then it is not the standard dealer agreement. The extra time and work involved will be well worth the effort.

I expect that our newest clients (the brothers mentioned above) will be calling before too long to discuss how to avoid proceeding with the costly Image II program, or worse, to discuss how to avoid termination as a result of not hitting the arbitrary sales targets set for them by Toyota. Don't put yourself in this box.

Hyundai's resurrection of tiered sales incentive program

Now, it makes sense. It dovetails nicely with the new metro market approach. When I was writing the February *Dealer magazine* column back in January, I was frankly puzzled as to why Hyundai would be

going back to the discriminatory tiered sales incentive program that it had just gotten rid of a year ago. Just as importantly, I was asking myself why the Hyundai dealer council would appear to be supporting this move backwards. A couple weeks after writing my article criticizing this 'new' program as blatant price discrimination no different than what Kia and Hyundai had in place before, it was reported that Hyundai had a 'new approach' to dealer market areas. This approach, dubbed the 'hub and spoke' approach, was to give key dealers a much larger sales territory using satellite service centers and small off-site storefronts in outlying areas to meet customer needs.

Now it makes sense. The tiered sales incentive program will serve the purpose of running the smaller, rural dealers into the dirt. Those small dealers will ultimately be in a position of choosing to go out of business or to sell their franchise to the nearby metro dealer (possibility with some financial assistance from Hyundai). Ruthless! Hyundai sets up its dealer network by adding dealers where Hyundai, not the dealer, deems appropriate, demands that these dealers invest substantial dollars in land, facility and personnel, provides dealers with the industry's lowest profit margins on the sale of new vehicles and then turns around and says we don't want you 'small' dealers anymore. Worse yet, Hyundai says we aren't going to do the honorable thing and discuss an exit strategy for you that will reimburse you for your investment but, instead, reinstitutes an insidious incentive program which will drive you to your knees!

All you Hyundai dealers out there that find yourselves competing against a larger dealer who, by the sheer size of his or her market, can always hit a higher sales tier than you need to stand up and be heard. Hyundai's tiered sales incentive program, like before, is a clear violation of federal and state price discrimination laws (see my article in February *Dealer magazine*). In addition, these Hyundai dealers potentially now have a claim for constructive termination of their franchises. Don't sit back and let Hyundai methodically destroy your investment. Act now while your dealership is still a growing concern and you have the wherewithal to fight!

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