

General Motors' Re-emergence Means a New Incentive Program

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Most General Motors dealers are hearing the rumors about a new incentive program General Motors may roll out as early as October 1, 2009. Several of our General Motors dealers have learned that this "conformance-based" program has been given the name Essential Brand Elements or "EBE." It appears that EBE will pay dealers a per vehicle bonus for each vehicle ordered (not sold), within the calendar quarter if dealers do the following:

1. Meet GM's dealership training requirements;
2. Comply with GM's Digital Component Package;
3. Agree to a Data Sharing Agreement;
4. And have a fully compliant dealership facility.

The word on the street is that dealers who meet the first three requirements immediately and the facility requirement within a certain period of time, say one year, will be paid the full EBE incentive monies. If the facility is not completed within the agreed time, GM will be kind enough to "escrow" your EBE money until you do comply. For those BMW dealers reading this column, this will sound a whole lot like the vaunted "Added Value Bonus Program," complete with holding incentive monies hostage to coerce a dealer to spend millions on a new facility.

The flaw in GM's new program is the same as in all similar programs, including Added Value, and that is the blanket requirements to have a facility with certain image detail, specific square footage in each department, a certain number of parking spaces, and a baseline minimum acreage for the dealership site will never be a "one-size fits all" prospect. There will always be dealers, and in this economic climate likely many more dealers, who cannot justify the expenditure required to meet the program guidelines. In other cases, there will be dealers who, due solely to their location in a metro market, cannot expand their facility to a contiguous parcel or move to an entirely new location in order to meet the square footage, parking, and overall acreage requirements. On the other hand, there will also be dealers who haven't remodeled their dealerships in a number of years and, all else being equal, will determine that the required facility upgrade will be a good business decision. The dealers who do not comply with the EBE requirements, regardless of whether compliance was even possible, will be placed at a competitive disadvantage by not receiving incentive monies.

We believe that GM will press dealers to comply with the EBE requirements by pointing to the recently signed Participation Agreement and specifically to the provision stating that dealers must meet whatever facility requirements GM determines to be appropriate for their dealership. If GM follows that course of action, dealers should remember that the bankruptcy judge ruled that the Participation Agreements will be governed by their respective state franchise laws. Further, and equally as important, the bankruptcy court will not retain jurisdiction over any dispute arising out of the Participation Agreement.

The bankruptcy judge's ruling potentially gives GM dealers the ability to successfully challenge GM's requirements if their state franchise laws restrict a manufacturer's ability to force you to

comply with any terms of the Participation Agreement. If requirements within the EBE are unenforceable in a particular state, then GM cannot indirectly require compliance by withholding incentives, which are necessary to keep the dealer competitive in the market.

Many state franchise laws specifically restrict manufacturers from requiring facility upgrades or renovations unless the manufacturer can demonstrate that the costs associated with those changes are justified. Likewise, many state franchise laws limit the amount and type of training that can be required of a dealer. If your state law does not contain these types of fundamental protections, I would urge you support your dealer association in pursuing such additions to your state law.

There is an added layer of protection from the EBE program for GM dealers located within a state that contains an express prohibition against the manufacturer selling a vehicle to a dealer at a different net cost, after all incentives and rebates, than that which it sells to any other dealer. In that situation, the GM dealer won't have to argue that withholding EBE incentive monies from a dealer whose state law protects him or her from meeting one or more of the program requirements amounts to an "indirect" violation of the law. Instead, dealers can point to the express prohibition on discrimination in the payment of sales incentives, and argue that the failure of GM to pay dealers who haven't complied with the EBE program requirements is a "direct" violation of state law.

As the EBE program is rolled out, we would urge GM dealers to consult experienced motor vehicle legal counsel to determine which, if any, requirements of the EBE program are permitted within your state. For those dealers who determine that one or more of the program requirements violate state franchise laws, dealers should insist on payment of the full incentive in order to ensure their ability to be competitive in the market.

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