



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

[CHRO letterhead]
March 31, 1995

The Honorable **Leonard R. Price**
Minnesota State Senate
235 State Capitol
St. Paul, Minnesota 55155

Dear Senator Price:

The staff of the Federal Trade Commission⁽¹⁾ is pleased to offer this response to your request for comment on Senate File No. 1065. The bill would require that those who offer the service of "brokering" new vehicle sales or leases, and receive a fee for that service from the vehicle seller or lessor, obtain licenses from the state. S.F. No. 1065 does not appear to require licenses for those who provide brokering services that are paid for directly by consumers. One effect of the bill may be to encourage brokering by reducing uncertainty about the legal status of brokers and brokering services. It may be, however, that the bill, by providing for licensing and regulation of brokers paid by dealers, will be applied to discourage or prohibit brokering services paid for directly by consumers. Permitting brokering services of all kinds to compete could benefit Minnesota consumers by saving them money and inconvenience.

I. Interest and experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁽²⁾ Consistent with this statutory mandate, the Commission and its staff work to identify restrictions that hinder competition and increase costs without providing countervailing benefits to consumers.

The Commission has long been concerned about restrictions imposed on retailing methods that can be beneficial to consumers. In the retail automobile market in particular, the Commission has ruled that dealers in the Detroit area unreasonably restricted competition by agreeing to limit their hours of operation.⁽³⁾ The staff of the Commission has published economic research about automobile marketing.⁽⁴⁾ The staff has submitted comments to state governmental bodies nationwide about proposals to restrict competition among automobile marketers. The staff has frequently commented on proposals to prohibit brokering or regulate off-premises sales, most recently in California⁽⁵⁾ and Indiana,⁽⁶⁾ and also in Missouri, Wisconsin, Illinois, and Michigan.⁽⁷⁾

II. Description of S.F. No. 1065

"Brokering" under Minnesota law means arranging sales of motor vehicles for a fee.⁽⁸⁾ S.F. No. 1065 would add a separate definition of "motor vehicle broker."⁽⁹⁾ In the proposed definition of "motor vehicle broker," the fee is paid by the seller or lessor, but in the definition of "brokering," which would not be changed in this respect, the source of the fee is not stated.

The bill would also regulate the motor vehicle brokers it defines, adding a new section to the law describing what they could do.⁽¹⁰⁾ Although they would have to obtain licenses as "motor vehicle brokers," they would not have to comply with all the requirements otherwise applicable to new car dealerships. A motor vehicle broker would have to furnish buyers or lessees with a written disclosure of the broker's dealership affiliations, including a statement that the broker is compensated by the dealers. The scope of the licensed broker's functions would be defined by the broker's

contracts with dealers, and could include advertising and soliciting sales or leases and executing transactions on behalf of dealers, as well as negotiating or quoting prices and terms. A broker would be required to maintain a commercial office space.(11)

III. Effects of S.F. No. 1065.

The bill would address some aspects of the business of helping consumers arrange new vehicle purchases or leases. This service appears in many forms. One source, which has been growing over the last few years, is individual brokers and buying services that offer consumers the service of arranging new car transactions, usually for a set fee. These brokers may solicit competitive bids from dealers for vehicles that meet their customers' requirements. Such brokers may save consumers money on the purchase price, compared to the prices that consumers could negotiate for themselves, and they can also save consumers "search costs," such as the time and effort spent on haggling.

Another source of assistance is credit unions, which sponsor automobile sales conducted through dealers. In such sales, dealers make vehicles available to credit union members at favorable prices. Credit unions encourage these sales to promote opportunities to provide financing. Dealers may agree to participate to attract potential customers and to ensure higher sales volumes, which in turn may make it possible for the dealers to offer substantial savings.(12) Consumers may benefit from lower prices, easier shopping, and better financing arrangements.

Buying clubs and referral services may also arrange to make new cars available to consumers at discount prices. These services, which generally charge consumers an annual membership fee, arrange new car transactions for their members at guaranteed prices with participating dealers. As with the credit unions, dealers may agree with buying clubs to offer cars to the club's members at reduced prices; in return, the dealers gain access to customers and perhaps increased volume. A survey of six automobile buying services by Changing Times magazine concluded that customers buying cars through these services would have realized substantial savings on each purchase.(13)

S.F. No. 1065 would provide for licensing certain firms or individuals that provide brokering services, but is silent about others. The bill deals with brokers being under contract with, and paid by, dealers. The definition of "motor vehicle broker" includes receiving a fee from the seller or lessor, and the description of what only licensed brokers may do is put in the context of brokers' contracts with and payment by dealers.(14) This definition's terms may describe the operations of some credit unions, buying clubs and referral services. By contrast, the bill does not appear to address brokering services for which compensation is not paid by a dealer, such as an individual broker or buying service arranging a transaction for an individual consumer.(15) The statutory definition of "brokering" contains no reference to the source of payment,(16) and the bill would not amend it in that respect. The term thus could include the function of arranging sales or leases for a fee paid directly by the purchaser or lessee, rather than by the seller or lessor. Because the bill's list of actions that only licensed brokers could perform contains the qualification that the services are paid for by dealers, it appears that businesses performing brokering services that are not paid for by dealers would not require licenses.

In this respect, the bill would apparently maintain the statute's present treatment of brokering for new vehicles. The references to brokering in the bill and the statute, other than definitions and the proposed new section about motor vehicle brokers, are authorizations permitting new and used car dealers to broker vehicles.(17) Those authorizations come after, and are separate from, the phrases specifying the actions that only licensed dealers can perform. The actions that now require a new vehicle dealer's license are selling new vehicles and offering, soliciting, and advertising their sale;(18) this list does not include the distinctive feature of brokering, namely "arranging" sales.(19)

Creating distinctions based on source of income may impair the ability of some providers of brokering services to compete. Under S.F. No. 1065, licensed brokers who are under contract with dealers could enjoy some advantages. The law would clearly authorize them to advertise particular models and to handle all the practical details of sale and lease transactions (if their dealer contracts permitted). A firm not paid by or under contract with a dealer could advertise brokering services, but it apparently could not solicit or advertise particular new vehicles for "sale." In addition, such a firm might be thought to lack authority to handle transactional details for consumers, because the

statute describes such functions only for licensed brokers paid by dealers. Limitations on how other brokering services could advertise and operate could increase the costs of providing those services and thus might ultimately increase costs to consumers.

Some functions probably could not be performed by a broker or buying service lacking some kind of contract arrangement with a dealer. And it may be that some brokers have engaged in unfair or deceptive practices, in the claims they have made about their ability to make deals on popular models or in their course of dealing with consumers or dealers. The legislature may wish to consider whether unfair or deceptive practices by brokers might best be addressed directly, perhaps under general provisions dealing with such conduct.

The reasons for defining the scope of the oversight by the source of payment are not clear to us. The legislature might be concerned that consumers are deceived by brokering services that advertise themselves as serving consumers' interests but fail to disclose the fact that they are paid by dealers to promote the dealers' sales. The proposal to require disclosure of that interest, where it is present, would alleviate that concern. Otherwise, it is not clear why brokering services require particular regulation, except perhaps to ensure compliance with financial and fiduciary obligations appropriate for such businesses.

If the present statute were being applied to prevent brokering by anyone except licensed new and used car dealers, then establishing the new category of "motor vehicle broker," with fewer requirements for obtaining the necessary license, could represent an improvement over the status quo. It may be that, by authorizing and requiring licensing of brokers that are paid by dealers, the bill is intended to prohibit other kinds of brokering services. As it stands, the bill does not appear to do that, and such a prohibition would be unfortunate. Consumers looking for better deals at lower costs may prefer a broker or buying service that is working directly for them, rather than for the sellers. Competition among brokers working under different arrangements could help ensure that the consumer's interests are served most effectively.

IV. Conclusion.

S.F. No. 1065 deals principally with brokers paid by dealers; as such, it does not appear to prohibit brokering services paid for directly by consumers. Permitting all kinds of brokering services to compete effectively appears more likely to benefit Minnesota consumers by saving them money and inconvenience.

Sincerely,

Steven C. Baker
Director

(1) These comments represent the views of the staff of the Chicago Regional Office and the Bureau of Competition of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioners.

(2) 15 U.S.C. § 41 et seq.

(3) Detroit Auto Dealers Ass'n, Inc., Dkt. 9189, 111 F.T.C. 417 (1989), *aff'd in part and remanded in part*, 955 F.2d 457 (6th Cir.), cert. denied, 113 S. Ct. 461 (1992); consent orders issued against certain respondents, April 20, 1994 and July 10, 1994.

(4) See Robert P. Rogers, *The Effect of State Entry Regulation on Retail Automobile Markets*, Federal Trade Commission, Bureau of Economics Staff Report (January 1986). The Report concluded that state laws restricting the number of automobile dealers in an area were costly to consumers.

(5) Comment to Rep. Ted Weggeland (April 29, 1994); see also comment to Sen. Quentin L. Kopp (January 5, 1990).

(6) Comment to Rep. Rick McConnell (February 22, 1994).

(7) Comment to Missouri Sen. J. B. Banks (April 6, 1990); comment to Wisconsin Department of Transportation (November 3, 1989); comments to Illinois Sen. Aldo A. DeAngelis (March 21, 1989), Gov. James R. Thompson (September 8, 1989), and Rep. Woods Bowman (April 24, 1987); and comment to Michigan Sen. Dick Posthumus (September 29, 1988). For other comments on state proposals concerning vehicle sales, see comments to Florida Sen. Gwen Margolis (March 29, 1988); South Carolina Rep. David C. Waldrop, Jr. (March 21, 1988); California Assemblyman Richard Katz (January 29, 1988); and Texas Gov. William P. Clements, Jr. (June 1, 1987).

(8) Minn. Stat. § 168.27 Subd. 1(2). The bill would amend the existing definition of “brokering” to include arranging leases as well as arranging sales.

(9) S.F. No. 1065 Section 1, to add Minn. Stat. § 168.27 Subd. 1(14).

(10) S.F. No. 1065 Section 2, to add Minn. Stat. § 168.27 Subd. 7a. The section of the law under which motor vehicle brokers had been separately licensed, Minn. Stat. § 168.27 Subd. 5, was repealed in 1984. S.F. No. 1065 would reinstate the broker’s license.

(11) S.F. No. 1065 Section 3, to amend Minn. Stat. § 168.27 Subd. 10(6), and to amend and renumber §§ 168.27 Subd. 10(7) and 10(8).

(12) Credit union-sponsored sales may stimulate other business for dealerships, too. Special financing terms and rates may be offered for the sale, and credit union members may shop with pre-approved financing terms. Moreover, these terms may be kept open after the sale ends, so consumers may have the option to obtain a car that was not available at the sale, still under the sale’s financing terms.

(13) “Taking the Hassle out of Car-Buying, Changing Times, Aug. 1988, at 37. See also Kiplinger’s Personal Finance Magazine, Dec. 1992; “Car Buying for Those Who Hate to Haggle,” Business Week, Aug. 30, 1993, at 86.

(14) S.F. No. 1065 § 2, to add Minn. Stat. § 168.27 Subd. 7a: “No person ... shall engage in the business of arranging the sale [or lease of a motor vehicle], for which service the seller or lessor pays a fee, without first acquiring a motor vehicle broker’s license.”

(15) The proposed new definition of “motor vehicle broker,” which describes the business for which a license is required, and the new subsection regulating such brokers specify that a fee is paid by the seller or lessor, but do not state that licensed brokers could not accept compensation from the consumer as well.

(16) Minn. Stat. §168.27 Subd. 1(2).

(17) Minn. Stat. §168.27 Subd. 2(a) and 3; dealer licensees are entitled “to sell, broker, wholesale, or auction and to solicit and advertise the sale, broker, wholesale, or auction” of new or used vehicles.

(18) Minn. Stat. § 168.27 Subd. 2(a).

(19) The term “arranging” was deleted in 1988 from the subsection about new car dealers. The parallel section addressing used car dealers still includes “arranging” used car sales as a function that only a licensed used car dealer can perform. Minn. Stat. § 168.27 Subd. 3.