

IN A NEW YORK STATE OF MIND: THE NEW YORK BUY-SELL

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Each state has its own special rules regarding buy-sells. These include the state's franchise law, licensing requirements and local custom/protocol. The State of New York certainly has its own such nuances. These must be understood to accomplish an effective and successful deal.

- Franchise Approval. The Franchise Motor Vehicle Act ("Act") contains an express provision regarding buy-sells. The Act prohibits a manufacturer from arbitrarily rejecting a buyer. The statute provides that it cannot "unreasonably withhold consent to the sale or transfer" [§463(2)(k)]. If consent is withheld, the franchisor must provide "specific reasons for its withholding consent." This decision must be made within sixty (60) days of a request to approve a deal "provided such a request is accompanied by proper documentation as may be reasonably be required by the franchisor".

In short, the manufacturer cannot be unreasonable and must name a decision within sixty (60) days. Unfortunately, the latter aspect is not as clear as it sounds. The problem revolves around the determination of when the period starts. Customarily, this means the date that a completed application is submitted. Of course, most franchisors are very evasive about completeness. It is incumbent on the buy-sell parties (particularly, the seller) to confirm this and the start of the 60-day period in writing.

The question of whether a manufacturer was unreasonable in rejecting a buyer can be challenging in New York. The Act does not provide any specific criteria,

and the case law has not been extensive enough to provide any major guidance. What is clear is that the franchisor must base a rejection on material, objective factors. Clearly, a qualified buyer cannot be turned down for arbitrary or nefarious reasons. The following are the requisite qualifications that should pass muster in New York and most states:

- Sufficient experience in owning and operating a new motor vehicle dealership.
- Sufficient unencumbered capital to meet the manufacturer's reasonable requirements.
- Sufficient net worth,
- The absence of any major performance problems, such as consumer issues, tax issues, financial issues (e.g., S.O.T.) and the like.

In addition, the Act makes it clear that a rejection cannot be based upon the fact that the buyer owns other automotive franchises or intends to dual the franchises.

- Unreasonable Restrictions. In New York, the franchisor is also prohibited from imposing unreasonable conditions on its franchise approval. In this regard, the Act prohibits the following:
 - Restrictions on the subsequent transfer of the franchise.
 - Non-competition covenants.
 - Site control.
 - Rights of first refusal or option to purchase.
 - Compliance with subscribed standards.
 - Assertion of legal or equitable rights to a franchise.

- Preventing a seller from obtaining fair value for his/her franchise.
- Licensing. For years, the New York DMV has been notoriously slow in issuing a new dealer license to a buyer. There have been many deals delayed because of licensing requirements. To overcome this, sellers have allowed a buyer to “use” its license, which is not a good idea for either party. Fortunately, was rectified by a change in the law a few years ago. In June 19, 2013, the law was changed to allow for a temporary license. N. Y. Comp, Codes R. & Regs. Tit. 15, § 78.4. This usually takes a few weeks. A buyer is well-advised to start this process as soon as possible.
- Bulk Sale Tax. Unlike many states, New York imposes a sales tax upon the buyer in a buy-sell. The tax is based upon the value ascribed to the fixed (or tangible) assets included in the deal, excluding inventories. N. Y. Tax Law § 1105. For example, if a dealership is sold for \$5,000,000.00 plus dollar-for-dollar for inventories and parts, and the price is allocated \$4,500,000.00 to blue sky and \$500,000.00 to fixed assets, the buyer must pay a sales tax on the \$500,000.00 for the fixed asset at closing at the applicable sales tax rate. If this is 8.5%, the tax is \$42,500.00.

Because of this tax, an interesting dilemma is presented for the buyer in relation to the income tax law. Usually, the buyer preferred a larger allocation to the fixed assets to obtain higher depreciation and related write-offs. However, as this allocation increases, so does the sales tax. As such, careful attention must be given to a balanced allocation. A well-experienced automotive accountant familiar with the New York tax law should be consulted on this aspect.

- ROFR. Lastly, the franchisor's right of first refusal ("ROFR") must be kept in mind. There is no prohibition against a ROFR in New York, whether by statute or case law. Thereupon, this aspect must be carefully planned by the parties (both buyer and seller) before the buy-sell is finalized and executed.

There is nothing more disappointing to a buyer than to lose a deal to another buyer substituted by the manufacturer after ROFR exercise. This may be a disappointment to the seller as well. Even though the seller receives the same money, there may be reasons that he/she prefers the first buyer. This may particularly be the case if the dealership facility is to be leased to the buyer. With a ROFR exercise, the seller/landlord could be left with a less than desirable tenant, although, arguably, the manufacturer would remain liable under the lease.

Handling a New York buy-sell (indeed, a buy-sell anywhere) can be a challenge. However, a keen understanding of the New York nuances is invaluable in this process.