

BILL ANALYSIS

Senate Research Center
82R19588 E

H.B. 1960
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Transportation & Homeland Security
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Chapter 2352 (Boat Manufacturers, Distributors, and Dealers), Occupations Code, was enacted in 1991 to regulate the wholesale distribution of boats and boat motors by all manufacturers supplying Texas dealers. Chapter 2352 requires manufacturers to enter into dealer agreements with dealers that meet certain minimum standards addressing term, dealer territory, performance, and product standards, and manufacturer warranty work rates and reimbursement, and provides for other related regulatory requirements.

Chapter 2352 needs updating to address changing conditions in the retail boat business since 1991. The primary area of concern is the use of one-year dealer agreements by manufacturers. This is problematic for Texas dealers and no longer consistent with the amount of dealer investment in retail space and facilities, repair and warranty work capability, and product advertising and branding necessary to successfully market a manufacturer's products.

H.B. 1960 addresses this concern by mandating that the term of an agreement between a dealer and manufacturer may not be less than three years. The requirement is accompanied by performance standards and other conditions and protections which permit the termination of an agreement before three years for non-compliance by a party. The requirement is based on model agreement provisions derived from the 2005 recommendations of the Special Task Force on Dealer/Manufacturer Agreements. The task force recommendations were approved by the primary national trade groups for both dealers and manufacturers.

H.B. 1960 amends current law relating to the regulation of boat manufacturers, distributors, and dealers and provides a civil penalty.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 2352.001, Occupations Code, by amending Subdivisions (1), (3), (4), and (5) and adding Subdivisions (2-a), (5-a), (8-a), and (8-b), to redefine "agreement," "dealer," "distributor," and "manufacturer" and to define "boat motor," "marketing standards," "performance standards," and "territory."

SECTION 2. Amends Section 2352.051, Occupations Code, to prohibit a manufacturer or distributor contracting with a dealer from selling or offering for sale, and prohibit a dealer from purchasing or offering to purchase, a new boat or a new boat motor, rather than outboard motor, unless the manufacturer or distributor and the dealer enter into an agreement that complies with this chapter.

SECTION 3. Amends Section 2352.052, Occupations Code, as follows:

Sec. 2352.052. TERMS OF AGREEMENT. (a) Requires that an agreement under this chapter include:

- (1) the dealer's territory and dealership locations, rather than the dealer's location, territory, or market area;
- (2) the length of the agreement, which must be not less than three years;
- (3) performance standards or marketing standards, if any;
- (4) working capital, inventory, facility, equipment, or tool standards, including mutually agreed minimum product stocking requirements, if any;
- (5) provisions for termination or nonrenewal of the agreement and the designation of a successor dealer in the event of the dealer's death or disability;
- (6) the obligations of the manufacturer, distributor, and dealer in the preparation and delivery of and warranty service on new boats and new boat motors, rather than outboard motors;
- (7) the obligations of the manufacturer, distributor, and dealer on termination of the agreement, including inventory of new boats and new boat motors, rather than outboard motors, parts inventory, equipment, furnishings, special tools, and required signs;
- (8) mutually agreed standards for maintenance of a dedicated or self-funded line of credit, if any, and a trade-in line of credit or self-funded trade-in line of credit, if any; and
- (9) dispute resolution procedures. Makes nonsubstantive changes.

(b) Requires a dealer and manufacturer, at the end of the first year of an agreement, to evaluate the dealer's progress in meeting the agreement's performance standards, marketing standards, and line of credit standards, to determine whether to enter into a new three-year agreement.

(c) Provides that if the dealer and manufacturer enter into a new agreement, the initial agreement is void. Provides that if the dealer and manufacturer do not enter into a new agreement, the dealer and manufacturer are bound by the terms and conditions of the initial agreement.

(d) Creates this subsection from existing text. Requires that a dealer agreement and any transaction subject to this chapter, notwithstanding the terms of a dealer agreement, comply with the requirements of this chapter, rather than section.

SECTION 4. Amends Subchapter B, Chapter 2352, Occupations Code, by adding Sections 2352.0521, 2352.0522, 2352.0523, and 2352.0524, as follows:

Sec. 2352.0521. **PERFORMANCE STANDARDS.** (a) Requires a manufacturer to make reasonable efforts to provide a dealer with information regarding the dealer's compliance with performance standards.

(b) Requires that performance standards be evaluated on an annual basis and, if a dealer and manufacturer agree, authorizes the standards to be adjusted to promote the sale of the manufacturer's products.

(c) Provides that if revised performance standards are not agreeable, the initial performance standards remain in place until the expiration of the agreement.

Sec. 2352.0522. DEALER TERRITORY. (a) Prohibits a manufacturer, during the term of an agreement, from appointing another authorized dealer for the sale of the manufacturer's boats in a dealer's territory.

(b) Prohibits a dealer, except for purposes of advertising without an advertised price or with a manufacturer's suggested retail price, from advertising or promoting the sale of the manufacturer's boats outside the dealer's territory, including through the Internet.

(c) Prohibits a dealer from using a broker in another dealer's territory to sell a manufacturer's boat.

(d) Provides that this chapter does not prohibit a dealer from selling a boat to a customer residing outside of the dealer's territory who independently visits the dealership and seeks to purchase a boat from the dealer.

Sec. 2352.0523. DEFAULT. (a) Provides that a default under an agreement under this chapter by a manufacturer, distributor, or dealer is:

(1) a material failure to meet minimum product stocking requirements as specified by the agreement;

(2) a material failure to make timely payment of any material obligation as specified by the agreement;

(3) a material failure to substantially comply with federal, state, or local laws, rules, regulations, ordinances, or orders applicable to the agreement; or

(4) an act of material fraud relating to the performance of a right or obligation under the agreement.

(b) Provides that a default by a dealer under an agreement under this chapter is:

(1) a material failure to meet applicable performance standards as specified by the agreement for a defined one model year marketing cycle;

(2) a material failure to meet applicable marketing standards as specified by the agreement;

(3) a material failure to meet applicable standards for a dedicated or self-funded line of credit or a trade-in or self-funded trade-in line of credit as specified by the agreement; or

(4) the marketing of the manufacturer's boats by the dealer outside of the dealer's territory in violation of this chapter.

Sec. 2352.0524. CURE OF DEFAULT. (a) Requires a manufacturer or distributor, except as provided by Section 2352.053(d)(3), (8), or (9), to give a dealer written notice of a default under Section 2352.0523 and allow the dealer to cure the default within a cure period as provided by Subsection (b).

(b) Requires a dealer to cure a default not later than the:

(1) 30th day after the date of receipt of notice of a default under Section 2352.0523(a)(2) or (b)(4);

(2) 60th day after the date of receipt of notice of a default under Section 2352.0523(b)(2) or (3);

(3) 90th day after the date of receipt of notice of a default under Section 2352.0523(a)(1); or

(4) 180th day after the date of receipt of notice of a default under Section 2352.0523(b)(1).

SECTION 5. Amends Section 2352.053, Occupations Code, as follows:

Sec. 2352.053. TERMINATION OR NONRENEWAL OF AGREEMENT; NOTICE.

(a) Prohibits a manufacturer or distributor, except as provided by Subsection (d), from terminating an agreement unless the dealer defaults under Section 2352.0523, rather than unless there is good cause for the termination, and:

(1) the manufacturer or distributor gives the dealer written notice of the default and possible termination in clear and concise terms;

(2) the notice states the default, rather than reasons for termination;

(3) the dealer has been given the applicable cure period, rather than 30 days, to make a good faith effort to cure the default, rather than reasons for termination, stated in the notice; and

(4) the dealer fails to cure the default. Makes nonsubstantive changes.

(b) Provides that good cause is not required for the nonrenewal of an agreement. Deletes existing text relating to an agreement having an original term of less than one year.

(c) Provides that the fact that a dealer holds an agreement involving another line, make, or brand of new boat or new boat motor, rather than outboard motor, does not constitute a default or grounds for termination of an agreement, rather than does not constitute good cause.

(d) Authorizes a manufacturer or distributor to terminate an agreement on written notice, without a cure period, if the dealer takes certain actions, including engages in an act of material fraud relating to the performance of a right or obligation under the agreement, rather than fraudulent conduct in conducting the dealer's business or performing the agreement; fails to substantially comply with a law, rule, regulation, ordinance, or order applicable to the agreement; or receives three notices of a default under Section 2352.0523 for the same default, whether cured or not, within a 12-month period.

SECTION 6. Amends Section 2352.101(a), Occupations Code, to make conforming changes.

SECTION 7. Amends Section 2352.103, Occupations Code, to make conforming changes.

SECTION 8. Amends Section 2352.104, Occupations Code, as follows:

Sec. 2352.104. New heading: SALE OF PARTS AND ACCESSORIES AND SERVICE AFTER TERMINATION OR NONRENEWAL OF AGREEMENT. (a) Authorizes the former dealer, after a manufacturer or distributor terminates or does not renew an agreement, to continue to purchase parts and accessories to service the products covered by the agreement until the first anniversary of the date of termination or nonrenewal.

(b) Requires a dealer, until the first anniversary of the date of termination or nonrenewal of an agreement, to continue to perform warranty work for the manufacturer's products, unless otherwise specified by the manufacturer in the termination notice, rather than providing that Subsection (a) does not apply if the manufacturer or distributor terminates the agreement based on quality of service, or for a reason justifying immediate termination under Section 2352.053(d).

SECTION 9. Amends Section 2352.105, Occupations Code, by amending Subsection (d) and adding Subsections (e) and (f), as follows:

(d) Requires a manufacturer or distributor to approve or disapprove a dealer's written claim for warranty work not later than the second business day after the date of receipt of the claim, rather than within a reasonable time. Requires the manufacturer or distributor, if the claim is approved, to pay the claim not later than the 30th day after the date of receipt of the dealer's written invoice or written proof of completion of the warranty work, rather than within a reasonable time.

(e) Prohibits a manufacturer or distributor from auditing a claim filed for warranty work after the first anniversary of the date the claim is submitted.

(f) Requires a manufacturer to act as the single source of contact for the dealer for the manufacturer's component product warranty, other than an engine-related product warranty.

SECTION 10. Amends Subchapter C, Chapter 2352, Occupations Code, by adding Section 2352.1051, as follows:

Sec. 2352.1051. DELIVERY OF PARTS. Requires a manufacturer, after signing an agreement, to provide the dealer with a written statement of the approximate amount of time the manufacturer takes to deliver a part to the dealer.

SECTION 11. Amends Sections 2352.107(a) and (b), Occupations Code, as follows:

(a) Requires a manufacturer or distributor who terminates an agreement to repurchase on demand from the dealer any of the following items, purchased by the dealer from the manufacturer or distributor, that are free and clear of a lien or encumbrance:

(1) a new, unsold, and complete boat, with accessories and packaged trailers sold with the boat, and any boat motor that is in the dealer's inventory, and was purchased during the two years, rather than within one year, preceding the date of the termination; and

(2) any new, current, unsold, undamaged, and unused parts or accessories for boats or boat motors in the original resalable merchandising package. Deletes existing text relating to retailable and undamaged boats. Makes nonsubstantive and conforming changes.

(b) Requires that a demand for repurchase be made in writing not later than the 90th day, rather than the 30th day, after the date the manufacturer or distributor terminates the agreement. Requires the dealer to provide the manufacturer or distributor with a complete list of the items to be repurchased. Requires the manufacturer or distributor to complete the repurchase not later than the 30th day after the date the dealer demands the repurchase, rather than within a reasonable time.

SECTION 12. Amends Subchapter D, Chapter 2352, Occupations Code, by adding Section 2352.204, as follows:

Sec. 2352.204. CIVIL PENALTY. (a) Provides that a manufacturer or distributor who violates this chapter is liable to this state for a civil penalty. Prohibits the amount of the penalty from exceeding \$500 for each violation.

(b) Provides that each sale of a new boat or boat motor by a manufacturer or distributor in violation of Section 2352.051 is a separate violation.

(c) Authorizes the attorney general to sue to collect a civil penalty under this section. Authorizes the attorney general to recover, on behalf of the state, the

reasonable expenses incurred in obtaining the penalty, including investigation and court costs, reasonable attorney's fees, witness fees, and other expenses.

SECTION 13. Makes application of this Act prospective.

SECTION 14. Effective date: September 1, 2011.