

Clearinghouse Rule 08-029

PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
ADOPTING RULES

The Wisconsin Department of Transportation proposes an order to renumber TRANS 139.02(1); to amend TRANS 137.03(9)(b)3., 138.04(1)(a) and (3), and 139.03(5); and to create TRANS 137.03(8m), 138.02(11m), 139.02(1) and (19m), 139.035, 139.04(6)(a)4m. and 139.05(2)(fm), relating to motor vehicle dealer franchise operations, record keeping and trade practices.

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: Subchapter 1 of Chapter 218, Stats.

Statutory authority: ss. 85.16(1), 218.0152 and 227.11, Stats.

Explanation of agency authority: The Wisconsin Department of Transportation is authorized to license and regulate motor vehicle dealers and their trade practices. This rule making controls motor vehicle dealer trade practices, record keeping, and relevant definitions.

Related statute or rule: Chs. 218, 341, 342 and 429, Stats., chs. Trans 137, 138 and 139, Wis. Adm. Code.

Plain language analysis: This rule amendment makes several additions to chs. Trans 137, 138 and 139, regarding motor vehicle dealer requirements under Chapter 218, Wis. Stats. The rule additions clarify several authorized and prohibited actions by dealers, most of which the Department has previously clarified in policy.

1. Explicitly define in chs. Trans 137, 138 and 139 a “title” as a title in s. 342.10, Stats. While common understanding of the term has long prevailed, this will make the meaning clear.

2. Create a definition in ch. Trans 139 of “bird dogging,” i.e., referral selling, and explicitly prohibit this practice. While this practice is prohibited in statute, which governs dealer behavior, DOT believes it would be appropriate to repeat the statutory prohibition in rule and elaborate on statutory definition.

3. In ch. Trans 138, clearly allow multi-location dealership records to be kept at a single location, with proper availability for inspection. This is implicit in rule reference to a dealership, and is currently allowed by DMV policy, but it would appropriate to state

explicitly, and to clarify what constitutes a single dealership with multiple locations as opposed to separate dealerships.

4. Amend the ch. Trans 137 definition of “used motor vehicle” to include rental or leased vehicles with 4,000 or fewer miles that have been damaged. The current definition effectively treats these vehicles as “new” for the purpose of needing a franchise to sell the vehicles.

5. Amend ch. Trans 139 to allow, instead of currently prohibit, the use of motor vehicle pricing guides (such as Kelly Blue Book or Edmunds guide) as price comparison in advertising used vehicle prices.

6. Amend the ch. Trans 138 requirement that dealers have in their possession the title for any vehicles they offer for sale to exclude title of a manufacturer buy-back under the lemon law, instead allowing a dealer to have in its possession a copy of the title. Wis. Stat. 218.0171(2)(d) requires that no manufacturer buy-back may be sold or leased to a new customer unless the manufacturer buy-back condition is fully disclosed to that customer. To protect themselves from liability, manufacturers have developed a disclosure form that they require dealers to submit to them before they will release the title to the dealer. In the meantime, the dealer keeps a copy of the title in its possession. DMV allows this by policy, and DMV wishes to clarify this in rule.

7. Amend ch. Trans 139 to clarify that if the dealer proposes to make changes to the warranty and service contract language in the Buyers Guide or in the Purchase Contract, the dealer shall send the proposed changes to DOT, which will reply within a certain time frame approving or denying the changes.

Summary of, and preliminary comparison with, existing or proposed federal regulation: Wisconsin statutes and rules govern motor vehicle dealer sales practices and recordkeeping. No federal regulations apply to these policies.

Comparison with Rules in the Following States: Most of the proposed provisions are already DOT policy. With regard to the newly proposed provisions:

Michigan:

1. Michigan would consider a damaged rented or leased vehicle a “used” vehicle, similar to what DOT proposes in this rule making.

2. Michigan does not have regulations on this point, and thus would allow use of pricing guide, similar to what DOT proposes in this rule making.

3. Michigan regulations do not require verbatim language or approval of language in the purchase contract or disclosure statements, unlike Wisconsin current or proposed regulations.

Minnesota:

1. Minnesota would consider a damaged rented or leased vehicle a “used” vehicle, similar to what DOT proposes in this rule making.

2. Minnesota regulations regarding advertising are unclear to DOT, as the Minnesota Department of Public Safety does not regulate advertising.

3. Minnesota regulations do not require verbatim language or approval of language in the purchase contract or disclosure statements, unlike Wisconsin current or proposed regulations.

Illinois:

1. Illinois would consider a damaged rented or leased vehicle a “new” vehicle, similar to Wisconsin’s current rule.

2. Illinois would allow use of pricing guide, similar to what DOT proposes in this rule making.

3. Illinois regulations require documents to comply with specific state law, similar to Wisconsin’s current rule.

Iowa:

1. Iowa would consider a damaged rented or leased vehicle a “used” vehicle, similar to what DOT proposes in this rule making.

2. Iowa Attorney General’s office does not review advertising related to car price.

3. Iowa regulations do not require verbatim language or approval of language in the purchase contract or disclosure statements, unlike Wisconsin current or proposed regulations.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: Most of the proposed provisions are already DOT policy. The following provisions are newly proposed:

1. Amend the ch. Trans 137 definition of “used motor vehicle” to include rental or leased vehicles with 4,000 or fewer miles that have been damaged. The Department has received several inquiries during the past few years from rental and leasing companies that need to dispose of damaged vehicles. The Department has concluded that allowing this exception to the new vehicle definition, for purposes of needing a franchise to sell, will not adversely affect franchised motor vehicle dealers.

2. Amend ch. Trans 139 to allow, instead of currently prohibit, the use of motor vehicle pricing guides (such as Kelly Blue Book or Edmunds guide) as price comparison in advertising used vehicle prices. This has been considered an unfair trade practice

because price guides may not sufficiently account for vehicle condition. However, the Department recognizes that these pricing guides are readily accessible on the internet and in print, and consumers often make use of them. The Department proposes to couple allowing use of price guides with requirements for dealer disclosure of vehicle condition sufficient to protect a customer from making false inference about the vehicle's actual sales price and thus being taken in by false advertising.

3. Amend ch. Trans 139 to clarify that if the dealer proposes to make changes to the warranty and service contract language in the Buyers Guide or in the Purchase Contract, the dealer shall send the proposed changes to DOT, which will reply within a certain time frame approving or denying the changes. The Department recognizes that the vehicle manufacturing industry now offers "manufacturer certified used vehicle programs," which carry certain warranties; and current ch. Trans 139 does not sufficiently accommodate new industry practices. However, the Department proposal retains DOT authority to determine, on a case-by-case basis, an adequate disclosure to the consumer of warranty provisions if they differ from mandatory language in ch. Trans 139.

Analysis and supporting documentation used to determine effect on small businesses: The Department bases the determination of effect on small businesses on comments, questions, and petitions and requests for regulation changes that the Department has received from motor vehicle dealers and their trade association, rental and leasing companies.

Effect on small business: Most provisions are already in Department policy. For those that are not currently in policy, the proposals will ease regulatory requirements and costs on motor vehicle dealers and vehicle rental and leasing companies. The Department enforces statute and rules through periodic auditing of motor vehicle records, inspection of motor vehicle dealership facilities, and investigation of consumer complaints. The Department's Regulatory Review Coordinator may be contacted by e-mail at ralph.sanders@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands.

Anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on state or private sector revenues or liabilities.

Agency contact person and place where comments are to be submitted and deadline for submission: The public record on this proposed rule making will be held open until close of business the day of the hearing to permit the submission of comments in lieu of public hearing testimony or comments supplementing testimony offered at the hearing. Any such comments should be submitted to Carson Frazier, Department of Transportation, Bureau of Vehicle Services, Room 255, P. O. Box 7911, Madison, WI 53707-7911. You may also contact Ms. Frazier by phone at (608) 266-7857 or via e-mail: carson.frazier@dot.state.wi.us.

To view the proposed amendments to the rule, view the current rule, and submit written comments via e-mail/internet, you may visit the following website: <http://www.dot.wisconsin.gov/library/research/law/rulenotices.htm>.

TEXT OF PROPOSED RULE

SECTION 1. Trans 137.03(8m) is created to read:

Trans 137.03(8m) "Title" means certificate of title properly issued by the Wisconsin department of transportation pursuant to ch. 342, Stats., or by another state in conformity with its applicable law, as evidence of ownership of a specific vehicle.

SECTION 2. Trans 137.03(9)(b)3. is amended to read:

Trans 137.03(9)(b)3. Has sustained damage while in-transit and has been acquired by the motor carrier from the motor vehicle manufacturer because of the liability agreement between the manufacturer and carrier, or has sustained damage while being operated under a rental agreement under s. 344.57(5), Stats., or a lease agreement under ch. 429, Stats., or

SECTION 3. Trans 138.02(11m) is created to read:

Trans 138.02(11m) "Title" means certificate of title properly issued by the Wisconsin department of transportation pursuant to ch. 342, Stats., or by another state in conformity with its applicable law, as evidence of ownership of a specific vehicle.

SECTION 4. Trans 138.04(1)(a) and (3) are amended to read:

Trans 138.04(1)(a) *Ownership records.* As evidence of ownership, title for each used vehicle owned and offered for sale and manufacturer's statement of origin, or MSO, for each new vehicle owned and offered for sale. If a manufacturer or lending institution is holding the title or MSO to ensure payment at the time of sale, the dealer shall have for each such vehicle either a factory invoice, a completed dealer

reassignment form, or a purchase contract evidencing trade-in or purchase. If the used vehicle is manufacturer's buy-back under s. 218.0171, Stats., commonly known as the lemon law, and the manufacturer holds title to the vehicle, the dealer may have in its possession of a copy of the title.

(3) RETENTION REQUIREMENTS. The used vehicle information described in sub. (1) (f) shall be maintained for a period of 5 years, as required by s. 342.16, Stats., and all other required records shall be maintained for a period of 5 years from the date of sale, including copies of factory invoices, dealer reassignment forms, consignment agreements, purchase contracts, MV1 or MV11 Wisconsin title, registration or license plate applications, Wisconsin buyers guides, regular and conforming power of attorney forms, prior owner odometer disclosure statements, dealer's subsequent odometer disclosure statements, lessor's notices to lessees relating to odometer disclosure required at end of lease, and lessee's odometer disclosure statement completed at end of lease. The records shall be kept in the place of business during business hours and shall be open to inspection and copying by a representative of the department during reasonable business hours. Multi-location dealerships may keep records at a single location. If the location is out of state, the dealerships shall reimburse the department for actual and necessary expenses, plus wages pursuant to the appropriate state compensation plan or applicable labor agreement for examining the documents at that location. The actual and necessary expenses charged include the following:

(a) Travel expenses.

(b) Meal expenses.

(c) Lodging expenses.

(d) Telephone expenses.

(e) Copying and data processing expenses.

SECTION 5. Trans 139.02(1) is renumbered Trans 139.02(1m).

SECTION 6. Trans 139.02(1) and (19m) are created to read:

Trans 139.02(1) “Bird dogging” means an arrangement by a dealer or salesperson that provides consideration of any kind to a third party for sales leads, contingent upon a sale of a vehicle, otherwise known as referral selling.

(19m) “Title” means certificate of title properly issued by the Wisconsin department of transportation pursuant to ch. 342, Stats., or by another state in conformity with its applicable law, as evidence of ownership of a specific vehicle.

SECTION 7. Trans 139.03(5) is amended to read:

Trans 139.03(5) USED VEHICLE COMPARATIVE SAVINGS. The use of manufacturer suggested retail prices, wholesale or retail dealer pricing guides, or similar price guides to advertise comparative savings for used vehicles other than demonstrators or executives is an unfair practice and prohibited, except that a motor vehicle pricing guide may be used if the source of the pricing is stated in any required disclosure and the full objective documentation used to set the price is available to the customer.

SECTION 8. Trans 139.035 is created to read:

Trans 139.035 Unfair trade practices. Engaging in bird-dogging is an unfair trade practice and prohibited.

SECTION 9. Trans 139.04(6)(a)4m. is created to read:

Trans 139.04(6)(a)4m. If a motor vehicle dealer proposes to use any language in the buyers guide that differs from that shown in s. Trans 139.04(6)(a)4., the dealer shall submit the proposed language to the department. The department shall respond to the

dealer within 30 days of receiving the proposed language whether the dealer may use the proposed language. The dealer may not modify the language in s. Trans 139.04(6)(a)4. prior to receiving approval from the department to use proposed language.

SECTION 10. Trans 139.05(2)(fm) is created to read:

Trans 139.05(2)(fm) If a motor vehicle dealer proposes to use any language in the purchase contract that differs from that shown in s. Trans 139.05(2)(f), the dealer shall submit the proposed language to the department. The department shall respond to the dealer within 30 days of receiving the proposed language whether the dealer may use the proposed language. The dealer may not modify the language in s. Trans 139.05(2)(f) prior to receiving approval from the department to use proposed language.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of April, 2008.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation