



Submission on
Administrative Monetary Penalties
Ministry of Consumer Services

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Used Car Dealers Association of Ontario

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UCDA Submission On Administrative Monetary Penalties *Ministry of Consumer Services*

The Used Car Dealers Association of Ontario (UCDA) has reviewed the proposal to create administrative monetary penalties (AMPs) dated October 4, 2013, to enforce consumer protection and public safety statutes and provides the following submissions.

As it relates to the motor vehicle sales industry, regulated by the Ontario Motor Vehicle Industry Council (OMVIC), the UCDA has serious concerns about the proposal as written.

We view it as an unnecessary addition to the existing arsenal of measures at OMVIC's disposal. It threatens the rights of our members and the close working relationship the UCDA and other stakeholders in our sector have established with OMVIC.

The proposal could undermine the hard won gains achieved over many years in leveling the playing field for all dealers, improving consumer protection, satisfaction and positive imaging.

To fully understand how such a proposal would affect our 4,800 motor vehicle dealer members, one must first appreciate how heavily regulated our industry already is. The proposal is vague with regard to due process and the infractions that would trigger AMPs and the case has not been made that AMPs are necessary or would contribute in any meaningful way towards improved consumer protection especially in the automotive industry.

Existing Regulation Of The Automotive Industry

As with the previous version of the *Motor Vehicle Dealers Act*, the “new” *Motor Vehicle Dealers Act, 2002* (“*MVDA, 2002*”) incorporates all the powers of prosecution and revocation OMVIC previously exercised with respect to motor vehicle dealers and salespeople, but with a vastly increased scope.

One area in which OMVIC has excelled in recent years is in the prosecution of “curbsiders”. These vehicle retailers pose a real and present danger to consumers because, while they portray themselves as legitimate private sellers, they are actually operating illegally, without registration, in the unregulated motor vehicle sales business. They foist vehicles that have suffered serious accident damage, are encumbered by liens, have rolled-back odometers and various hidden histories on innocent buyers without declarations of any kind. The *MVDA, 2002* bolsters OMVIC’s efforts in this regard with robust minimum fines that start at \$2,500 per offence.

The current proposal is silent about the obvious potential for the use of AMPs against illegally operating non-registrants. The proposal speaks only of targeting the body of legitimately registered dealers and salespeople. We believe this is a mistake.

In addition, since 2010, with the introduction of the *MVDA, 2002*, OMVIC’s internal dealer discipline process has been formally recognized by Ontario law. The fines can be very steep. It’s not uncommon to see penalties of more than \$10,000. The maximum is, of course, \$25,000.

This process was designed and serves as an intermediate measure beyond a simple warning, but before the more formal mechanisms available to OMVIC by way of the prosecutions or revocations previously mentioned.

OMVIC makes effective use of its existing discipline process. The jurisdiction for discipline runs the gamut of dealer operations and can touch upon any of the following activities:

- Disclosure and marketing
- Disclosure in contracts and leases
- Accountability
- Compliance
- Respect
- Professionalism

How The Discipline Process Works

Typically, a registrant subject to the process receives a 'Notice of Complaint' from OMVIC. The Notice generally outlines all of the notices, bulletins, newsletters and information made available to registrants about their compliance obligations. It may detail past inspection visits paid to the dealer by OMVIC and alleged errors the dealer has made in its ads or on its bills of sale.

The Notice asks the registrant to provide a written response to the allegations within 15 days. Once this has been done, OMVIC will usually offer a settlement which, if agreed to, can resolve the issue without need of a hearing. The settlement usually includes an agreed upon penalty and an agreement to take the OMVIC education course.

Typically, these settlements are in the thousands of dollars.

If not settled, the matter will proceed to a discipline panel hearing which, like a court or tribunal, will hear evidence from both the dealer and an OMVIC representative. The registrant may choose to hire a lawyer to make submissions ... obviously this can become costly for the dealer.

The panel then reaches a decision about whether the dealer has breached the *MVDA, 2002* Code of Ethics and if it believes the registrant has, can impose punishment i.e. fines, education course, etc.

The powers of the Panel include:

- Requiring dealers and salespeople to take education courses
- Requiring dealers and salespeople to pay for such courses
- Ordering fines as high as \$25,000
- Ordering costs to be paid to OMVIC by the dealer or salesperson

Decisions of the Panel, whether as the result of settlement or by order of the Panel, are published online and updated regularly at <http://www.omvic.on.ca/portal/DealersSalespersons/EnforcementCompliance/DisciplinaryProcess/DisciplineDecisions.aspx> which also identifies the registrants who have been disciplined. The benefit to consumers of being made aware of discipline panel decisions is quite apparent. However, it is hard to imagine what benefit would arise from, 'naming names' for minor infractions amounting to a few hundred dollars or for first-time AMP offenders.

There is even a meaningful appeal process written into the *MVDA, 2002*, allowing registrants the opportunity to question discipline decisions they feel are wrong or unfair. Justice is not only done, but seen to be done, in a system that affords registrants due process.

The deterrent effect of the discipline process far exceeds what is proposed by the Ministry in terms of the use of AMPs.

The Ministry does not need an intermediate penalty positioned between a simple warning and a prosecution or registration suspension ... it already exists in our sector.

The Proposal Is Vague And Lacks Due Process

The imposition of fines under the proposed AMP process can range from \$100 to as high as \$10,000. With such a large potential penalty, courts will expect a fairly high degree of natural justice to be extended to a registrant by an administrative authority. We anticipate that this process will have to become cumbersome and bureaucratic with procedures more closely aligned with a court or tribunal format. Otherwise, challenges to the law by way of judicial review will ensue.

At a minimum, the accused registrant will have to be given notice of the case against it, the chance to have their side heard and some kind of reasons for any decision reached. This proposal is silent as to these matters.

The actual frame work will be left to regulators to design. This means more uncertainty for registrants as they wait to learn what AMPs will apply in which situations. It is entirely unclear what input, if any, would be afforded to the regulated by the regulator.

The other problem is fairness. Individual administrative authorities may have very different approaches to their use of AMPs. Hence registrants may not be treated equally under the law. Different standards being applied for the same conduct could give rise to confusion and even Charter challenges. The same registrant could find themselves treated very differently, under the same legislation, by different regulators, or the Ministry or subject to multiple AMPs, for the same infraction.

The tricky question of appeal rights is also not fully discussed in the proposal. This poses one of the biggest problems with the proposal, and in our view, illustrates why it will be difficult to put into practice. The suggestion that AMPs could be reviewed “under certain circumstances” suggests there may be circumstances where **no** review, appeal or recourse will be afforded at all.

We cannot support such a proposal. In other, more complex cases with higher fines, rights of appeal would have to be so robust as to ultimately look and feel much like the court process that AMPs purport to seek to avoid.

The Payday Loans Act establishes an absolute liability standard for AMPs offences with no right to a hearing and extremely limited rights of appeal. This harsh approach is an understandable reaction to a troubled industry posing a real and present danger to consumers.

Such a draconian approach is not needed, justified or desirable in our industry.

The Proposal Is Unnecessary

Registrants will almost certainly view this proposal as a cash grab ... and it's hard to argue that it isn't. Dealers already know and see the full power of OMVIC as it affects their operations, and their costs. Great strides have been made in the motor vehicle dealer sector to improve the industry for the better and OMVIC would be the first to acknowledge that. This proposal promises little in the way of increased consumer protection, but risks much.

AMPs take the regulator further away from a positive working relationship with its registrants. The benefits of education and training, of building relationships and the notion that the administrative authority is there to work with the registrant community to improve professionalism and integrity will be compromised. Instead regulators, like OMVIC, will seem more like mere enforcers to the regulated.

Take the example offered in the proposal. A salesperson who can't produce their salesperson registration card can be fined on the spot by OMVIC – issued a “ticket” like a police officer would issue a jaywalker. This might ensure the registrant will carry his card next time, but at what cost to industry perception of the regulator?

Perhaps the larger question is: how is consumer protection improved by such a measure? OMVIC knows who its registrants are without being shown an ID card. The consumer would not even know such a card exists, and yet there will be an AMP for no other reason than the regulator can issue one ... and collect money.

OMVIC's present approach and the rules guiding it have achieved more positive progress in this industry in a short period of time than AMPs could ever hope to do.

Summary

As with any measure the UCDA considers, we take our cues from our membership. If this proposal were to be shared in its present form, we would expect widespread opposition to it.

The UCDA is amenable to certain monetary checks to deter behaviour by registrants that results in extra costs being incurred by OMVIC. For example, late filers for renewal might be charged a sum of money to recoup OMVIC's added administrative processing costs. This idea has already been discussed directly with OMVIC and we feel it is fair.

As mentioned earlier, another possible use of AMPs, or such other regulatory mechanisms that enable OMVIC to impose a fine or issue a "ticket" on the spot, may be in relation to non-registrants. Trading in vehicles without registration as a dealer or salesperson presents a serious threat of consumer harm and the UCDA would support a careful consideration of such options. Prosecution of such offences is currently OMVIC's only option, and it is a significant drain on OMVIC's resources in terms of cost and manpower.

The present proposal makes OMVIC judge, jury and executioner over its registrants, with little or no right to due process, without a hearing or meaningful appeal for the registrant.

It also remains to be shown that AMPs actually increase compliance, as is often suggested by regulators. We have seen scant evidence that this is the case. It seems unlikely that AMPs will bring greater benefits for consumers, at least as it relates to registrant behaviour, than what OMVIC is already achieving.

The potential benefits offered by an AMP approach are far outweighed by the costs in terms of relationships, complexity and bureaucracy.

If the motor vehicle regulatory regime is to include AMPs, their use must be restricted to clearly defined issues, where significant consumer harm might be expected to result and where there is no reasonable argument to defend against the allegation, other than the use of due diligence.

If the Ministry is determined to implement AMPs in our sector, we would like to be involved in their design to ensure the concerns we have outlined are addressed.