

Sunrise Report

Motor Vehicle Salesperson

**The Level of Risk of Harm to the Public From
the Unregulated Occupation of Motor Vehicle
Salesperson is Unclear**

**If the Legislature Chooses to Regulate Motor
Vehicle Salespersons, the Form of Regulation
Should Be Registration**



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Executive Summary

Finding 1: The Level of Risk of Harm to the Public From the Unregulated Occupation of Motor Vehicle Salesperson is Unclear.

Salespersons whose sole responsibility is to show vehicles present minimal risk to the public, while those who have the responsibility to handle the financial matters of a transaction present a higher risk

In accordance with West Virginia Code §30-1A-3, the Division of Motor Vehicles (DMV) has submitted a Sunrise application seeking the licensure of Motor Vehicle Salesperson. Based on a survey conducted by the DMV, there are approximately 5,000 individuals practicing the occupation of motor vehicle salesperson. West Virginia Code requires that all motor vehicle sales take place at a licensed dealership. However, West Virginia Code currently has no requirements for the licensure of motor vehicle salesperson.

The Legislative Auditor concludes that an argument can be made for or against regulation.

The intent of the Legislature was to prevent individuals who have demonstrated a lack of moral integrity or who have previously defrauded the public from being placed in a position to cause harm to the public as a motor vehicle dealer. However, the Department of Motor Vehicles' regulatory jurisdiction extends only to the dealer, not to staff below the dealer level. The objective of the DMV sunrise application is to prevent unscrupulous individuals from harming the public as a motor vehicle salesperson. **The Legislative Auditor finds that the risk to the public welfare from the unregulated practice of motor vehicle salespersons is unclear.** Salespersons whose sole responsibility is to show vehicles present minimal risk to the public, while those who have the responsibility to handle the financial matters of a transaction present a higher risk. However, there is no knowledge on the composition of motor vehicle salespersons between these two functions. **The Legislative Auditor concludes that an argument can be made for or against regulation.**

The Legislative Auditor recommends that if the Legislature chooses to regulate motor vehicle salespersons, the form of regulation be registration without the requirement of an examination.

Finding 2: If the Legislature Chooses to Regulate Motor Vehicle Salespersons, the Form of Regulation Should Be Registration.

The sunrise application submitted by the DMV recommends that the regulation of motor vehicle salesperson be licensure. The DMV proposes requiring individuals who desire to enter the occupation to apply, submit fingerprints for a background check, and successfully pass an exam administered by the DMV. The Legislative Auditor recommends that if the Legislature chooses to regulate motor vehicle salespersons, the form of regulation be registration without the requirement of an examination.

Furthermore, the Legislative Auditor concludes that enabling the DMV to conduct the registration rather than creating a separate board or commission would be more efficient. **The following recommendations are made in the event that the Legislature chooses to regulate motor vehicle salespersons.**

Recommendations

- 1. The Legislative Auditor recommends that the Legislature consider enabling the Department of Motor Vehicles to register motor vehicle salespersons as the form of regulation.*
- 2. The Legislative Auditor recommends that the Legislature require all individuals currently employed as a motor vehicle salesperson to comply with the mandatory background check.*
- 3. The Legislative Auditor recommends that the Legislature consider granting the commissioner of the Department of Motor Vehicles discretionary authority to grant registration to individuals with known criminal records without the need for a formal appeal by the applicant.*

Background

West Virginia Code §30-1A-3 requires the Performance Evaluation and Research Division of the Legislative Auditor's Office to analyze and evaluate the application of professional and occupational groups who seek to be regulated. Applicants must submit the application to the Joint Standing Committee on Government Organization no later than the first day of December of any year. After its evaluation of an application, the Performance Evaluation and Research Division must submit a report to the Joint Committee on Government Organization no later than the first day of July following the date the application was submitted.

The report submitted to the Committee shall include evaluation and analysis as to:

- Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, and whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument;
- Whether the public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional or occupational competence;
- Whether the public can be adequately protected by other means in a more cost effective manner.

Finding 1

The Level of Risk of Harm to the Public From the Unregulated Occupation of Motor Vehicle Salesperson is Unclear.

The Legislative Auditor finds that the unregulated practice of motor vehicle salespersons poses an unclear risk to the public welfare.

In accordance with West Virginia Code §30-1A-3, the Division of Motor Vehicles (DMV) has submitted a Sunrise application seeking the licensure of Motor Vehicle Salesperson. There is currently no official group or association that represents motor vehicle salesperson. Based on a survey conducted by the DMV, there are approximately 5,000 individuals practicing the occupation of motor vehicle salesperson. West Virginia Code requires that all motor vehicle sales take place at a licensed dealership. However, West Virginia Code currently has no requirements for the licensure of motor vehicle salesperson.

Required Analysis

West Virginia Code §30-1A-3 requires the Legislative Auditor to evaluate Sunrise applications based on the following criteria:

- Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, and whether the potential for harm is easily recognizable and not remote or dependent upon tenuous argument;
- Whether the public needs, and can reasonably be expected to benefit from, an assurance of initial and continuing professional or occupational competence; and
- Whether the public can be adequately protected by other means in a more cost-effective manner.

The Legislative Auditor concludes that an argument can be made for or against regulation.

The Legislative Auditor finds that the level of risk from the unregulated practice of motor vehicle salespersons is unclear. Salespersons whose sole responsibility is to show vehicles present minimal risk to the public, while those who have the responsibility to handle the financial matters of a transaction present a higher risk. However, there is no knowledge on the composition of motor vehicle salespersons between these two functions. **The Legislative Auditor concludes that an argument can be made for or against regulation.**

Applicant's Argument for Expanded Regulation of Motor Vehicle Dealerships

The Division of Motor Vehicles currently regulates the motor vehicle industry in West Virginia. West Virginia Code §17A-6-3 states:

No person shall engage or represent or advertise that he or she is engaged or intends to engage in the business of new motor vehicle dealer, used motor vehicle dealer, house trailer dealer, trailer dealer, recreational vehicle dealer, motorcycle dealer, used parts dealer or wrecker or dismantler in this state unless and until he or she first obtains a license certificate therefor as provided in this article.

Motor vehicle dealers are required to meet additional requirements beyond that of a normal business license.

Motor vehicle dealerships are regulated in all 50 states. As such, motor vehicle dealers are required to meet additional requirements beyond that of a normal business license. These additional requirements typically include a bond requirement and some form of background check. When the DMV receives the application, it fingerprints the owner and officers and obtains signatures on a release of information waiver. The DMV then contacts other state agencies to determine the following:

However, the DMV suggests that these measures are insufficient to protect the public.

- Prospective dealers must be approved through the Bureau of Employment Programs for non-delinquency of unemployment benefits;
- Criminal investigation bureau reports must be returned stating “no record;”
- DMV must receive a letter of good standing from the Tax Department in the names of all owners/corporate officers.

However, the DMV suggests that these measures are insufficient to protect the public. According to the DMV's application, it seeks licensure:

to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles. Some persons engaged in this business lack the knowledge or aptitude to properly prepare documents related to vehicle purchases, make false and deceptive claims concerning motor vehicles to customers and have engaged in fraud and other illegal conduct which has resulted in customers, motor vehicle dealers, banks and

the state sustaining financial losses. This article establishes minimum competency and ethical standards for persons engaged in the business of selling motor vehicles to the general public.

The DMV contends that individuals who have demonstrated a lack of character can enter, or re-enter the motor vehicle industry as salespersons and pose a risk to the public welfare. **The DMV specifically seeks to extend its authority beyond the dealer level to the level of the motor vehicle salesperson.** This would also include individuals who are acting in the capacity of financing and insurance representatives.

The DMV contends that individuals who have demonstrated a lack of character can enter, or re-enter the motor vehicle industry as salespersons and pose a risk to the public welfare.

Some Risk of Harm to the Public is Evident

The Legislative Auditor concludes that some level of risk of harm to the public is easily recognizable and is not remote or dependent on tenuous argument. As indicated earlier, all 50 states require additional requirements beyond that of ordinary business licensure for motor vehicle dealers because of the potential for harm to the public from dealership activities. Consider the following examples given by the DMV in its application:

1. *Dealer pocketed the taxes and fees due the state from five consumers. He additionally fraudulently filed 48 duplicate title applications to defraud a lending institution to obtain additional financing by double floor planning the 48 vehicles.*
2. *Dealer purchased between 40 to 60 vehicles from a dealership in Virginia. The individual never paid the selling dealership for the vehicles and subsequently sold most of the vehicles in a 60 day period. The subject and his wife pocketed all of the proceeds of the vehicles as well as the taxes collected from the purchaser on behalf of the state.*
3. *Dealer failed to pay off the liens on seven vehicles that were traded in by customers to the dealership for other vehicles. The salesperson pocketed the money that was supposed to go to the banks to pay off the liens on the trade-ins and left the customers responsible for two vehicle payments; the new car the customer bought, and the trade-in vehicle which the salesperson was supposed to pay off on behalf of the customer. Additionally, the customers were still responsible for paying personal property taxes on the trade-in vehicles because the vehicles were still titled in their names.*

The Legislative Auditor concludes that some level of risk of harm to the public is easily recognizable and is not remote or dependent on tenuous argument.

The Legislature's recognition that dealership activities pose a clear risk to the public safety can be seen as early as 1951 when the Legislature passed HB 189 requiring the licensure of motor vehicle dealers. According to WV Code §17A-6-2:

The DMV does not have regulatory jurisdiction at the salesperson level.

Individuals who commit fraudulent activities as salespersons are free to re-enter the industry.

The Legislature hereby determines and finds that in the past some persons engaged in the business of selling new or used motor vehicles, house trailers, trailers, recreational vehicles, motorcycles, or used motor vehicle parts, and in the business of wrecking or dismantling motor vehicles, have not had the necessary qualifications, staff, equipment or facilities to adequately serve the public; that some persons engaged in the businesses have made false and deceptive claims and advertisements to the public and have engaged in fraud and other illegal conduct; that certain citizens of this state have sustained financial losses as a result thereof; and that in some of the cases there has been no adequate means to prevent the conduct or protect the interests of the citizens of West Virginia. It is, therefore, declared to be the public policy of this state that the business of new motor vehicle dealer, used motor vehicle dealer, house trailer dealer, trailer dealer, recreational vehicle dealer, motorcycle dealer, used parts dealer, or wrecker or dismantler, affects the general welfare of this state and its citizens; that persons without the necessary qualifications, staff, equipment or facilities to adequately serve the public, and persons not of good character or who have or are likely to attempt to misrepresent their product or engage in fraudulent or other illegal conduct should not engage in these businesses. (emphasis added)

According to the DMV, all of the dealers who conducted the fraudulent activities discussed previously are currently working as salespersons for other dealerships. The DMV does not have regulatory jurisdiction at the salesperson level. Additionally, this means that individuals who commit fraudulent activities as salespersons are free to re-enter the industry and can assume a position that would allow them to harm the public. Oklahoma currently licenses automobile salespersons and they have indicated that this prevents individuals from re-entering the industry. According to the Oklahoma Motor Vehicle Commission:

The few times that a salesperson has been called before the Commission have usually involved fraud in the sales and/or F&I process,

*such as allegations of forgery of a customer's name on a document, or issuing fraudulent sales orders for the purpose of "saving" motor vehicle tax for a customer. In these instances, both the dealership and the salesperson were called before the Commission. The salespersons usually are terminated by the dealer, thereby losing their Salesperson license. However, if the dealer did not terminate the employee, the OMVC would have revoked their license upon a finding of guilt. **In either case, the salesperson would have to appear before the Commission prior to consideration of any future licensing.** (emphasis added).*

Other factors that contribute to the risk of the public from motor vehicle salespersons include:

1. **Lack of Barriers to Occupational Entry** - According to the DMV, the minimum competencies required to enter the occupation are basic high school level reading and comprehension skills. Motor vehicle dealerships regularly advertise employment and indicate that no experience is necessary. Additionally, according to a survey of new and used motor vehicle dealerships conducted by the DMV, approximately 50 percent of all individuals hired in the capacity of salesperson had no previous industry experience. Individuals could easily omit instances of employment termination or legal complications and could still enter the occupation.
2. **Workforce Turnover** - In order to estimate the population of individuals practicing as a motor vehicle salesperson, the DMV conducted a survey of new and used motor vehicle salesperson. The dealerships reported a combined average sales force of 279 salesperson. Of these, the dealerships reported hiring 237 of these individuals (85% of the average sales force) during the current year. Based on its survey results, the DMV estimates that each year, approximately 2,400 individuals with no previous experience will enter the occupation and an additional 1,800 individuals will change dealerships. Table 1 shows the survey results for the 12 dealerships surveyed by the DMV.

Individuals could easily omit instances of employment termination or legal complications and could still enter the occupation.

Dealership	Average Sales Force	Number of Hires	Hired with No Experience	Hired with Experience
A	2	1	0	1
B	5	2	0	2
C	6	4	2	2
D	6	4	0	4
E	10	5	1	4
F	14	4	2	2
G	20	14	10	4
H	20	36	30	6
I	21	7	5	2
J	50	55	35	20
K	55	25	10	15
L	70	80	40	40

One factor that complicates the decision for regulating the industry is that the level of risk to the public is not the same for all levels of the occupation.

Depending on the actual composition of the occupation, an argument can be made both for or against regulation.

Level of Risk Not Uniform for Entire Occupation

One factor that complicates the decision for regulating the industry is that the level of risk to the public is not the same for all levels of the occupation. For example, an individual showing a motor vehicle can misrepresent the product, or a salesperson who has a prior felony conviction for sex offenses could be a risk to the public in conducting test drives with a customer. Nevertheless, this level of risk is likely relatively small. However, an individual who is responsible for the financial and contract negotiations of a motor vehicle has more opportunity to directly defraud a customer. The Legislative Auditor recognizes that the responsibility to simply show an automobile has a lower level of risk of harm than individuals who have the responsibility for the financial aspects of a vehicle purchase. However, neither the Legislative Auditor nor the DMV can identify what percentage of the occupation consists of individuals engaged solely in low risk activities. If the population is highly concentrated by those who only show a vehicle, then the risk overall is relatively low and would not justify regulations. Depending on the actual composition of the occupation, an argument can be made both for or against regulation.

Conclusion

The level of risk from those who only have the responsibility to show vehicles is relatively low, while those who are responsible for the financial aspects of a vehicle transaction pose a higher risk. Depending on the composition of the occupation between these two functions, an argument can be made both for or against regulation.

The intent of the Legislature was to prevent individuals who have demonstrated a lack of moral integrity or who have previously defrauded the public from being placed in a position to cause harm to the public as a motor vehicle dealer. However, the Department of Motor Vehicles' regulatory jurisdiction extends only to the dealer, not to staff below the dealer level. The objective of the DMV sunrise application is to prevent unscrupulous individuals from harming the public as a motor vehicle salesperson. Since the occupation of a motor vehicle salesperson requires no previous experience or formal education and because of a high salesperson turnover rate, individuals can easily enter the occupation of motor vehicle salesperson. Salespersons have direct contact with the public and can misrepresent the automobiles they sell. Furthermore, the DMV is aware of cases in which individuals who defrauded the public when they were dealers are now operating as salespersons. The level of risk from those who only have the responsibility to show vehicles is relatively low, while those who are responsible for the financial aspects of a vehicle transaction pose a higher risk. **Depending on the composition of the occupation between these two functions, an argument can be made both for or against regulation.**

Finding 2

If the Legislature Chooses to Regulate Motor Vehicle Salespersons, the Form of Regulation Should Be Registration.

The Legislative Auditor concludes that if the Legislature chooses to regulate this occupation, the public can be adequately protected by registration, not licensure. Furthermore, because of the infrastructure currently in place at the DMV, the Legislative Auditor recommends that the DMV provide oversight to the occupation rather than creation of a new board or commission.

The sunrise application submitted by the DMV recommends that the regulation of motor vehicle salesperson be licensure. The DMV proposes requiring individuals who desire to enter the occupation to apply, submit fingerprints for a background check, and successfully pass an exam administered by the DMV. However, the Legislative Auditor concludes that if the Legislature chooses to regulate this occupation, the public can be adequately protected by registration, not licensure. Furthermore, because of the infrastructure currently in place at the DMV, the Legislative Auditor recommends that the DMV provide oversight to the occupation rather than creation of a new board or commission.

Required Analysis

When considering whether the public can be reasonably expected to benefit from an assurance of competency, the Legislative Auditor must determine what method of regulation is best suited for the occupation. West Virginia allows for different levels of professional regulation. What separates each level of regulation is whether or not the potential harm to the public is the result of a lack of competency, and whether or not this competency should be possessed by all members who participate in an occupation. The different levels of regulation include:

1. **Registration** - Under registration, individuals are required to comply with specified standards in order to be placed on a registry. The standards may involve passing an examination, submitting proof of possessing certain credentials, or meeting other specified requirements, such as passing a background check. The registry indicates those individuals who are “registered” or qualified to perform in a given occupation. Unregistered individuals may perform a registered occupation. The registry gives the public the choice of whether to employ someone registered or unregistered. However, in some cases employment may be restricted by law or by policy to those on a registry.
2. **Certification** - Under certification, individuals are required to comply with specified standards, such as passing an examination or possessing certain credentials. The primary difference between registration and certification is that certification grants individuals the right to use a specified title. Although any individual can practice the occupation,

those who are not certified are prohibited from presenting themselves to the public under the title that is reserved for those who are certified in the occupation. A certification process is generally considered “title protection.”

3. **Licensure** - Under licensure, only individuals who are licensed can practice the occupation and the occupational title is restricted to individuals who are licensed. Individuals who possess certain educational or experiential requirements are licensed, and continuing education is generally required.

What is unclear to the Legislative Auditor is whether or not some competency exists for the occupation that, absent the competency, the individual poses a clear risk to the public.

The Applicant Proposes Licensure

According to question seven of the sunrise application, the DMV is seeking “*the licensure of all persons engaged in the occupation of selling, buying and leasing motor vehicles.*” By proposing the licensure of motor vehicle salesperson, the DMV is suggesting that all motor vehicle salespersons pose a potential risk to the public, and that part of the risk to the public is based on a lack of competency possessed by some portion of the profession. However, what is unclear to the Legislative Auditor is whether or not some competency exists for the occupation that, absent the competency, the individual poses a clear risk to the public.

Questions 16 through 19 of the sunrise application deal with establishing the competencies that are necessary for practice of the occupation. To each of these questions, the DMV’s responses indicate that entry into the occupation requires no special competencies, no formal education beyond a secondary level education, and no experience. As such, the DMV cannot identify any professional association that currently measures the occupational competency of motor vehicle salespersons. Table 2 shows questions 16 through 19 of the sunrise application as well as the DMV’s responses to these questions.

Table 2		
Sunrise Application Competency Questions and DMV Responses		
Number	Question	DMV Response
16	Describe the minimum competencies necessary to enter this occupation.	Basic high school level reading and comprehension skills.
17	List institutions and program titles offering accredited and non-accredited programs in West Virginia to prepare practitioners for entry into this program. What is the cost of completing these programs? If programs are not available in West Virginia, what is the cost of out-of-state programs? If no formal training or education is required, how does the practitioner learn the occupation?	The Division of Motor Vehicles is not aware of any programs to prepare motor vehicle salespersons. Training, if any, is conducted in-house at larger dealerships.
18	Is there an examination currently used to measure qualifications for entry? If so, who constructs and administers the examination? Please submit documentation on the validity and reliability of such exams.	No, individual dealerships may have some sort of pre-employment screening to determine sales abilities.
19	Is this occupational group affiliated with an association which sets and enforces standards? If so, please explain the process and standards.	No.

It is not certain how many salespersons will have responsibilities in an auto dealership in which they will have to know how to prepare documents that are sent to the DMV.

Although the DMV indicates that there are no competencies necessary to practice the occupation, the DMV proposes testing applicants. According to the DMV's application,

Some persons engaged in the business simply lack the knowledge or aptitude to properly prepare documents related to vehicle purchases. This proposal establishes minimum competency, background and ethical standards for persons engaged in the business of selling motor vehicles to the general public.

This statement indicates that the competency the DMV considers necessary for motor vehicle salespersons relates to properly preparing documents related to vehicle purchases. One problem with this is that it is not certain how many salespersons will have responsibilities in an auto dealership in which they will have to know how to prepare documents that are sent to the DMV. Some salespersons are only responsible for presenting vehicles to customers, while other salespersons may have only the responsibility of the financing and paperwork associated with a vehicle purchase. The DMV was unable to provide a statewide breakdown of the number of individuals in these two distinct positions.

Many individuals who will only present vehicles will have to learn and be tested on information that will not relate to their job and will not enhance public safety.

The Legislative Auditor received a proposed test from the DMV that each salesperson would be required to take. Some of the test questions that relate to proper documentation involve the time frames for documents to be submitted to the DMV. Knowledge of this information would benefit the DMV more than the public. Also, many individuals who will only present vehicles will have to learn and be tested on information that will not relate to their job and will not enhance public safety. Furthermore, some of the questions relate to the requirements for the salesperson’s license, which also would not increase public safety.

The DMV’s concept of salesperson competency is consistent with the small number of other states identified by the Legislative Auditor as requiring an examination as part of licensure. The Legislative Auditor identified 19 states that currently require the licensure of motor vehicle salespersons. However, the Legislative Auditor identified only four states that test applicants. In each of these states, the subject matter of the examination included the requirements for licensure and laws regarding the legal transfer of ownership for motor vehicles. Table 3 shows states that require motor vehicle salesperson licensure.

Table 3				
States Requiring the Licensure of Motor Vehicle Salesperson				
No Exam Required				Exam Required
Maryland	Pennsylvania	Tennessee	North Carolina	Virginia
Arkansas	Nebraska	Utah	Hawaii	Kansas
Oklahoma	Idaho	California	Ohio	Colorado
Nevada	Louisiana	Kentucky		Wisconsin

What is unclear to the Legislative Auditor is the extent to which the public benefits from salespersons having this knowledge as well as what percentage of the occupation is actually involved in the legal transfer of motor vehicles.

Although an argument can be made for the merits of this knowledge, what is unclear to the Legislative Auditor is the extent to which the public benefits from salespersons having this knowledge as well as what percentage of the occupation is actually involved in the legal transfer of motor vehicles. West Virginia Code §30-1A-3 clearly indicates that the benefit of the competence is to be the public. In most instances, when a member of the public purchases a motor vehicle from a dealer, the dealer provides the citizen with a temporary registration plate that allows the citizen the ability to take physical possession of the motor vehicle and operate it for up to 60 days. During this 60-day period, the dealer is required to file the necessary paperwork with the DMV. Given

The Legislative Auditor concludes that this competency is more important for the Division of Motor Vehicles and is of little benefit to the general public.

that physical possession proceeds legal possession, and that the licensed dealership has 60 days to transmit a proper form for transfer of ownership, the Legislative Auditor concludes that this competency is more important for the Division of Motor Vehicles and is of little benefit to the general public.

Additionally, it is unclear what percentage of the occupation is actually involved in the legal transfer of ownership of the motor vehicle and would therefore require this competency. The Legislative Auditor recognizes that in large dealerships a segregation of duties likely exists, in which transferring the motor vehicle license and registration are likely not duties expected of the entire population of salespersons.

Registration by DMV Not a Separate Board Would Be More Efficient

The DMV already has infrastructure in place for investigating complaints against salespersons.

The Legislative Auditor concludes that registration of motor vehicle salespersons through the DMV rather than a separate board or commission would be more efficient. First, the DMV already has infrastructure in place for investigating complaints against salespersons. According to the DMV, it currently receives complaints against motor vehicle salespersons and it investigates these complaints as complaints against the licensed dealers and conducts an investigation. Extending this authority to include salespersons would be more efficient than creating a separate inspection and investigation group.

Given that the public would receive a minimum benefit from an examination requirement for motor vehicle salespersons, the Legislative Auditor recommends the registration of motor vehicle salespersons. This regulatory method would require motor vehicle salespersons to submit to a background check, receive ethical standards and the consequences for violating the standards. If the applicant does not have a criminal record, then the individual's name would be placed on a registry of individuals who can be legally hired as a motor vehicle salesperson. Dealerships can be provided the register in order that they will know who they can hire. The DMV, through its inspection process, can determine if those hired by dealerships are on the registry.

DMV's Grandfather Clause Would Not Be Necessary Under Registration

The DMV's sunrise application contains a grandfather provision, whereby anyone who has been in the employment of a single licensed dealer for five years or more is exempt from the required background check. The

The Legislative Auditor concludes that grandfathering individuals is not in the best interest of the public when there is a genuine concern for public safety.

Legislative Auditor recognizes that the number of individuals who would be eligible for this exemption is relatively small. As discussed in Finding 1, the DMV estimates the population participating in the occupation to be 5,000 individuals. Also, the DMV's survey of licensed dealerships suggests that only 15 percent of the population have more than one year's experience with the licensed dealership where they are employed. Therefore, the number of individuals who would be eligible for this exemption would likely be less than 15 percent or 750 salespersons. **The Legislative Auditor concludes that grandfathering individuals is not in the best interest of the public when there is a genuine concern for public safety.** Furthermore, a grandfather clause is generally considered when the requirements would place an undue burden on current individuals to meet new requirements, such as a higher educational requirement. However, under the Legislative Auditor's recommendation of registration, no educational burden would be placed on individuals.

The Legislative Auditor recommends that the Legislature consider giving the commissioner of the DMV the discretionary authority to register a salesperson with a criminal record under appropriate circumstances.

In addition, the Legislative Auditor recommends that the Legislature consider giving the commissioner of the DMV the discretionary authority to register a salesperson with a criminal record under appropriate circumstances, such as if the felony is unrelated to a vehicle salesperson position or if the individual has been employed by a dealership for an extended period without incident. According to the DMV's draft legislation, the DMV will refuse to issue a license to an individual if the individual:

Has been convicted of a felony: Provided, That upon the applicant's appeal the Commissioner may grant an exemption to this restriction if the felony did not involve financial matters or the motor vehicle industry;

Although the Legislative Auditor agrees with having an appeals process for applicants, the language could place an administrative burden on the DMV. The Legislative Auditor is concerned that if the DMV can only grant registration to individuals with criminal records after individuals appeal the denial, the number of appeals heard by the DMV could be significant.

In FY 2005, the DMV solicited information from the surrounding states regarding the regulation of motor vehicle salespersons. In April 2005, the DMV received information from the Dealer Licensing Section of the Ohio Bureau of Motor Vehicles. In its letter, the division chief stated:

Prior to April 1987, applicants for a salesperson's license had to submit a police report prepared by a local law enforcement office. Less than 1% of all applicants reported a criminal record. Within one week of requiring

The Legislative Auditor is concerned that the absolute requirement contained in the DMV's proposed legislation could result in 250 or more appeals initially and an ongoing increase of 100 appeals annually.

fingerprinting reports from our Bureau of Criminal Identification and Investigations Section of the Ohio Attorney General's Office, over 14% of the applicants showed criminal records ranging from minor misdemeanors to insurance and mail fraud, bank robbery, kidnaping, manslaughter, etc. The most common record found at that time was theft by deception. Ohio law permits a felon to obtain a salesperson's license.

The applicant must have been convicted of some offense related to selling or otherwise dealing in motor vehicles to be denied a salesperson's license. Still, many applicants do not apply and do not work in this field because they would need to disclose their conviction to the dealership. The percentage of these applicants has dropped over the years to about 10%, and not many applications are received with convictions related to dealing in motor vehicles.

As can be seen by the response from the state of Ohio, not all applicants with an offense had a felony conviction, however, the Legislative Auditor is concerned that the absolute requirement contained in the DMV's proposed legislation could result in 250 or more appeals initially and an ongoing increase of 100 appeals annually.

The Legislative Auditor concludes that there is minimal competency that would benefit the public. Therefore, the Legislative Auditor recommends that if the Legislature chooses to regulate motor vehicle salespersons, the form of regulation be registration without the requirement of an examination.

The DMV has indicated that this language is currently identical to the regulation imposed upon motor vehicle dealers. However, the DMV regulates only 1,800 dealers compared to 5,000 salespersons. Furthermore, the DMV did not license all 1,800 dealers in a single year, nor does it receive new applications each year for dealers that it should expect to receive each year for registered salespersons. **Therefore, the Legislative Auditor recommends that the Legislature consider giving the commissioner of the DMV the discretionary authority to grant applicants registration who have criminal records without requiring a mandatory appeal.**

Conclusion

In determining the proper form of regulation that should occur in an occupation where there is the potential for harm to the public, the Legislative Auditor must determine whether or not a competency exists for which providing an assurance of that competency is a benefit to the public. In this regard, the Legislative Auditor concludes that there is minimal competency that would benefit the public. Therefore, the Legislative Auditor recommends that if the Legislature

chooses to regulate motor vehicle salespersons, the form of regulation be registration without the requirement of an examination. Furthermore, because of the infrastructure currently in place to support registration by the DMV, the Legislative Auditor concludes that enabling the DMV to conduct the registration rather than creating a separate board or commission would be more efficient.

However, the Legislative Auditor concludes that tenure at a licensed dealership is not necessarily equivalent to moral character. Therefore, the Legislative Auditor does not recommend a grandfather provision to the registration requirements proposed by the DMV. Additionally, the Legislative Auditor recommends that the Legislature consider legislation that includes an appeal process if an applicant is denied registration because of a criminal record; however, consideration should be given to allow the DMV commissioner discretionary authority to grant registration to applicants with a criminal record without the need for a mandatory appeal by the applicant. This would substantially reduce the administrative burden of a high number of appeals. **The following recommendations are made in the event that the Legislature chooses to regulate motor vehicle salespersons.**

Recommendations

1. *The Legislative Auditor recommends that the Legislature consider enabling the Department of Motor Vehicles to register motor vehicle salespersons as the form of regulation.*
2. *The Legislative Auditor recommends that the Legislature require all individuals currently employed as a motor vehicle salesperson to comply with the mandatory background check.*
3. *The Legislative Auditor recommends that the Legislature consider granting the commissioner of the Department of Motor Vehicles discretionary authority to grant registration to individuals with known criminal records without the need for a formal appeal by the applicant.*

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

February 17, 2006

Mr. Steven Dale, Assistant to the Commissioner
West Virginia Division of Motor Vehicles
Building 3, Room 113
1800 Kanawha Blvd., East
Charleston, West Virginia 25317

Dear Mr. Dale:

This is to transmit a draft copy of the required analysis of the Sunrise Application submitted by the Division of Motor Vehicles proposing the licensure of Motor Vehicle Salespersons. If you have any concerns with the content of the report, feel free to contact me at 347- 4891. We request that you not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

Enclosure

Joint Committee on Government and Finance
