

Chapter 5
CASH SALES, SELLER FINANCING, RETAIL INSTALLMENT
CONTRACTS AND REPOSSESSIONS
Chapter 348, Texas Finance Code

Preface: Companies that finance motor vehicle sales in Texas are licensed and regulated by the Office of Consumer Credit Commissioner. Dealers who provide customer financing or who arrange for customer financing are required to be licensed by the OCCC. Finance companies that acquire or purchase motor vehicle retail installment contracts from dealerships are also required to obtain licenses from the OCCC.

This section will provide an overview of key concepts related to motor vehicle sales financing, but does not address specific statutes and rules administered by the OCCC. To enhance your general understanding of the topics, the material is presented in as familiar language as possible; terms defined in this section may not use specific wording contained within Chapter 348 of the Texas Finance Code but will convey the meaning and intent of applicable statutes and rules. Dealers who have specific questions regarding motor vehicle sales financing are urged to contact the Office of Consumer Credit Commissioner at 512-936-7600 or www.occ.state.tx.us.

CASH TRANSACTIONS

5.1 Cash Sale. Chapter 348 does not provide a formal and specific definition of a 'cash sale'. In general terms, a cash sale is any sale in which the retail seller collects the total cash price of the vehicle before delivery of the vehicle to the retail buyer.

5.2 Cash Sales Required Documents. The Texas Transportation Code and rules promulgated by the Texas Department of Motor Vehicles establish the recordkeeping requirements for cash sales. Examples of required records include, but are not limited to, the sales contract or purchase order, Buyer's Guide signed by the consumer, front and back copies of the vehicle title, and the title application receipt. The OCCC does not regulate cash sales, and specific questions about document retention for cash sales should be directed to the Texas Department of Motor Vehicles. If the dealer or dealership engages in cash-only sales, and does not provide or arrange for financing, licenses are not required by the OCCC.

FINANCED TRANSACTIONS

5.3 Deferred Collection of Tax, Title and License Fees. The Texas Finance Code allows retail sellers to defer the collection of tax, title, and license (TT&L) fees, and the manner in which the TT&L is collected determines whether the retail seller must be licensed by the OCCC.

a. Cash Sale – No License Required: If the retail seller does not include the TT&L in the cash price of the transaction, and subsequently collects the TT&L, the transaction is considered a cash sale and is not subject to regulation by the OCCC.

b. Retail Installment Transaction – License Required: A retail seller may add tax, title and registration fees in the cash price of the vehicle. However, if a retail seller defers the collection of these fees over a period of time, the transaction is no longer considered a cash sale and the retail seller must be licensed by the OCCC.

5.4 Seller-Finance License Required. The 77th Texas Legislature amended Chapter 348 of the Texas Finance Code to require holders and retail sellers of motor vehicle retail installment contracts to become licensed effective as of September 1, 2002.

a. A 'holder' is defined as "a retail seller; or if a retail installment contract or the outstanding balance under the contract is sold or otherwise transferred, the person to whom it is sold or otherwise transferred" (§348.001 (3)). *(A holder may also be referred to as a creditor in later portions of this document)*

b. A 'retail seller' is defined as "a person in the business of selling motor vehicles to retail buyers in retail installment transactions" (§348.001 (8)).

Any motor vehicle dealer who provides customer financing, with or without assessing finance charges, is considered a 'holder' and must be licensed by the OCCC. Additionally, any company that provides customer financing for dealers within the state of Texas is considered a 'holder' and must be licensed by the OCCC. The licensing requirement applies to dealers who provide direct customer financing, dealers that originate retail installment contracts, dealers who arrange customer financing, holders who acquire a retail installment contract or the outstanding balance of such a contract, securitization entities, and any registered offices. A dealer considering financing options for the sales of motor vehicles should contact the OCCC for specific guidance before initiating or engaging in any regulated activities.

5.5 Commercial Transactions. The 82nd Texas Legislature enacted House Bill 2559, effective September 01, 2011, which created Chapter 353 of the Texas Finance Code. This new chapter covers general provisions and licensing requirements for commercial vehicle dealers. Commercial vehicles are broadly defined as vehicles which are not used primarily for personal, family, or household use. Chapter 353 removes provisions relating to commercial motor vehicle installment sales from Chapter 348 of the Texas Finance Code. Essentially, the legislative change splits Chapter 348 into a commercially related component and a consumer-related one, moving the commercially related law into a new chapter, and leaving all law applying to consumer transactions in Chapter 348. If a dealer originates consumer and commercial transactions, their current Chapter 348 motor vehicle sales finance license will suffice. If a dealer executes only commercial transactions, they must obtain a Chapter 353 license for commercial motor vehicles sales.

5.6 Retail Installment Transaction. A “retail installment transaction' is “a transaction in which a retail buyer purchases a motor vehicle from a retail seller other than principally for the purpose of resale and agrees with the retail seller to pay part or all of the cash price in one or more deferred installments” (§348.001 (7)).

5.7 Parties to a Retail Installment Transaction. A Retail installment transaction involves two parties: a "retail seller" and a "retail buyer".

- a. A 'retail seller', as defined in paragraph 5.4, and is either a “franchised dealer” or a “non-franchised dealer.”
- b. A 'retail buyer' is defined as “a person who purchases or agrees to purchase a motor vehicle from a retail seller in a retail installment transaction” (§348.001 (5)). *(A retail buyer may also be referred to as a debtor in later portions of this document).*

5.8 Requirement to Utilize a Retail Installment Contract. Each motor vehicle sale meeting the definition of a 'retail installment transaction' must be documented on a retail installment contract as discussed in Section 5.8.

A retail installment contract is defined as "one or more instruments entered into in this state that evidences a retail installment transaction" (§348.001 (6)). A buyer’s order is specifically excluded from the definition and is not considered a part of the retail installment contract. Failing to properly utilize a retail installment contract for each retail installment transaction is a violation of the Texas Finance Code and the Texas Business and Commerce Code and the dealer is subject to administrative action.

5.9 Elements of a Retail Installment Contract. As previously stated, a retail installment transaction must be documented on a retail installment contract. The material in this section does not provide a complete discussion of retail installment contracts and should not be considered the final determinant on required elements of a contract. This section does provide a general overview and guidance on the required elements of a contract. A dealer should contact the OCCC with specific questions related to retail installment contracts.

- a. ***Required Provisions.*** A retail installment contract must be in writing, be dated, be signed by both the retail buyer and retail seller, and include all required provisions (with limited exceptions).

Retail Sellers or dealers may wish to utilize contracts obtained either through computer software vendors or commercial printers.

In an attempt to meet federal and state statutory or regulatory requirements, these products will include a broad range of state and federal disclosures and provisions, which may or may not be applicable to the retail seller’s specific transaction. The disclosures and provisions may be provided in text form for inclusion in a contract, or may simply provide space in which the retail seller is to

document the required disclosures and provisions. Whether provided the 'text' or the 'space' to document these requirements, the retail seller is responsible for ensuring all required and mandated disclosures and provisions are appropriately incorporated into the contract.

Specific contract provisions are numerous and are not fully addressed here. A dealer should contact the OCCC for specific guidance on the preparation of retail installment contracts and provisions.

- b. *Specific Terms.*** Terms related to retail installment contracts have specific meanings as they apply to retail installment transactions. The terms discussed below represent major elements of the retail installment contract, and dealers should become familiar with them.
 - 1. *Cash Price:*** The cash price of a vehicle is the price offered, whether the vehicle is financed or a cash sale, in the "ordinary course of business" to all customers. The cash price does not include finance charges, but may include the price of accessories, services related to the sale, service contracts, taxes, and TT&L fees. It is important to note that an advertised price, in and of itself, does not necessarily establish or equate to the cash price the transaction. (§348.004)
 - 2. *Itemized Charges:*** A charge not included in the cash price of a retail installment transaction is an itemized charge. The only authorized itemized charges are those for TT&L, service contracts, insurance, warranties, a full service deputy fee, and charges related to debt cancellation agreements.
 - 3. *Notice to Buyer:*** A Notice to Buyer is formal notification required by the federal government and provided to the customer containing specific language related to consumer credit transactions.
 - 4. *Documentary Fee:*** A documentary fee is one charged to a retail buyer for costs directly related to the retail seller's handling and processing of documents for the sale of the motor vehicle. The fee may only include costs that are imposed uniformly to cash and credit transactions, and may not exceed a reasonable amount as agreed upon by the seller and buyer. If the documentary fee is over \$50, the dealer must provide the OCCC an electronic notice of the maximum documentary fee that may be assessed to any customer. This notice can be found on the OCCC website (www.occc.state.tx.us). After completing the notice as instructed, the dealer must email the "Documentary Fee Request Form" to www.docfee@occc.state.tx.us. Documentary fee filings that do not adhere to the prescribed instructions will not be considered as having been filed or retained by the OCCC. Any fee between \$50 and \$125 will not require additional information or documentation unless specifically requested by the OCCC. Dealers filing notices of documentary fees above \$125 will be

required to provide additional supporting information and documentation and should contact the OCCC for specification of those requirements. Any dealer or retail seller with questions on documentary fees should contact the OCCC or seek appropriate legal advice.

5. ***Annual Percentage Rate (APR), Regulation Z Disclosure:*** Credit agreements can vary in terms of interest-rate structure. A standardized computation such as the APR provides debtors with a bottom-line number they can easily compare to rates charged by other potential creditors. The APR is the total cost of credit for this transaction on a yearly basis and is applied to the *amount financed* in the transaction, which may include fees or additional costs associated with the transaction. Disclosure of the APR is a federal requirement as stipulated in the Truth-in-Lending Act. Most dealer management software applications will calculate and incorporate the APR disclosure into the retail installment transaction and contract.

The APR ***does not represent the contract rate applied to retail installment contracts.*** These terms are not interchangeable and do not represent the same finance charges or rates.

Contract Rates are assessed against the principal balance subject to finance charge for the term of the contract. These rates cannot exceed the daily rate converted to an annualized rate.

5.10 Contract Completion. *A retail installment contract* must contain all essential elements defined by statute as well as any state or federally mandated disclosure statements and notices. A retail buyer should not sign a retail installment contract until the contract has been fully and properly prepared. Examples of acceptable and reviewed contracts can be found on the *OCCC website* (www.occc.state.tx.us). Additionally, dealer management software applications generate retail installment contracts that include essential elements and required disclosure notices, based upon data provided and input by the dealer. However, retail sellers are responsible for the accuracy of the dealer management software. Reliance upon the software for accuracy does not mitigate administrative action from OCCC if information or calculations are incorrect.

5.11 Conditional Delivery Agreement *(also known as “Spot Delivery”):* Dealers may attempt to deliver a vehicle to a consumer before the successful placement of financing with an outside source. The Texas Finance Code defines a 'conditional delivery agreement' as “a contract between a retail seller and prospective retail buyer under the terms of which the retail seller allows the prospective retail buyer the use and benefit of a motor vehicle for a specified term.” This agreement defines the terms, conditions and obligations of the retail seller and the prospective buyer until resolution of the transaction is attained. It is important to note that the conditional delivery agreement cannot require the prospective buyer to purchase the vehicle; it only defines the terms of use agreement. Once the retail installment contract is consummated, a conditional delivery agreement

becomes void. Either a conditional delivery agreement or a retail installment contract is in force at any given time; the agreement and the contract cannot exist simultaneously.

5.12 Debt Cancellation Provisions. Debt cancellation agreements are covered either under §348.124 or Chapter 348, Subchapter G of the Texas Finance Code. A debt cancellation agreement for total loss or theft of a motor vehicle is a retail installment sales contract term or a contractual arrangement modifying a retail installment sales contract term under which a retail seller or holder agrees to cancel all or part of an obligation of the retail buyer to repay an extension of credit from the retail seller or holder on the occurrence of the total loss or theft of the motor vehicle that is the subject of the retail installment sales contract but does not include an offer to pay a specified amount on the total loss or theft of the motor vehicle. The 82nd Texas Legislature passed a bill, HB 2931, which creates a new statutory framework for certain debt cancellation agreements covered under Chapter 348, Subchapter G of the Texas Finance Code.

The three basic models for debt cancellation agreements are:

- a. Debt cancellation agreement for total loss or theft of ordinary vehicle that includes insurance coverage as part of retail buyer's responsibility to holder. The amount charged for the DCA must be created in good faith, be commercially reasonable, and comply with the requirements of Chapter 348, Subchapter G of the Texas Finance Code. A DCA provided to the OCCC must be approved or denied within 45 days from submission. The submission forms can be found on the OCCC's website.
- b. Debt cancellation agreement for total loss or theft of ordinary vehicle in which holder bears complete responsibility for cancelling the debt after total loss or theft. The amount charged for the DCA must be reasonable, and not exceed the rates set by the Finance Commission of Texas. Additionally, the DCA must comply with the requirements of §84.308 of the Texas Administrative Code.
- c. Debt cancellation agreement for total loss or theft of used ordinary vehicle with a cash price of \$15,000 or less in which the retail seller does not assign the retail installment sales contract to any party other than a related finance company as defined by Texas Tax Code, §152.0475(a), and in which the retail seller bears complete responsibility for cancelling the debt after total loss or theft whether the retail buyer elects to obtain property insurance. The amount charged for the DCA must be reasonable, and not exceed the rates set by the Finance Commission of Texas. Additionally, the DCA must comply with the requirements of §84.308 of the Texas Administrative Code.

5.13 Maximum Finance Charges. Finance charges are the cost associated with deferring payment of the vehicle price over a period of time. Maximum finance charges are derived by utilizing the add-on rates stipulated in the Texas Finance Code (§348.104).

Section 348.104 specifies add-on rates for four classes of vehicles and the maximum add-on rate to be used for each class. The class of vehicle is dependent upon the model year designated by the manufacturer of the vehicle.

The add-on method represents a specified amount of finance charge per one hundred dollars per year on the initial principal balance and is used in calculating finance charges for retail installment contracts of *substantially equal monthly payments*. These rates may be converted to equivalent annualized contract rates for the financing of vehicles in installments that are *not monthly or substantially equal*.

5.14 Methods of Calculating a Finance Charge. Three allowable methods for calculating a finance charge exist: the add-on method, the scheduled installment earnings method, and the true daily earnings method.

- a. ***Add-on Method:*** The add-on method is a pre-computed method to calculate the finance charge for a regular retail installment contract in which the retail buyer agrees to pay the total of payments, which include both the principal balance of the contract and the finance charges of the contract. The add-on charge is calculated at the inception of the contract and is based upon the principal balance of the contract in which the principal balance of the contract is assumed not to decline over the term of the contract.

A regular contract is one that in which the payments are consecutive, monthly, substantially equal in amount, and the first payment is not more than a month and 15 days from the date the contract is completed. This method of calculating the finance charge can only be used with regular contracts.

- b. ***Scheduled Installment Earnings Method:*** "The scheduled installment earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance subject to a finance charge as if each payment will be made on its scheduled installment date. A payment received before or after the due date does not affect the amount of the scheduled reduction in the unpaid principal balance subject to a finance charge or the amount of the earned finance charge." (Chapter 342, §342.002, Texas Finance Code)
- c. ***True Daily Earnings Method:*** The true daily earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance (Chapter 342, §342.002, Texas Finance Code). The daily rate is 1/365th of the equivalent contract rate. The earned finance charge is computed by multiplying the daily rate by the number of days the actual unpaid principal balance is outstanding (Chapter 342, §342.002, Texas Finance Code).

Payments are credited as of the date received. Therefore, payments received prior to the scheduled installment date result in a greater reduction of the unpaid principal balance than the scheduled reduction, and payments received after the

scheduled installment date result in a lower reduction of the unpaid principal balance.

Most dealer management software calculates the finance charge using either the scheduled installment earnings method or the true daily earnings method. The add-on method is utilized by dealers less frequently and does not normally require the use of computer software.

5.15 Collection of State Sales Tax. When transferring a motor vehicle title, a retail seller may either disburse the entire amount of the state sales tax in one lump sum or defer the state sales tax under the provisions of Chapter 152 of the Texas Tax Code.

- a. ***Sales Tax Advanced:*** When completing the title work associated with a retail installment transaction, a dealer may remit the entire state sales tax due from the transaction to appropriate county tax assessor-collector on behalf of the retail buyer. This remittance is referred to as a 'sales tax advanced' transaction. Since the retail seller advances the sales tax due, this tax amount may be included in the contract amount that is subject to a finance charge, thereby incurring additional finance charges.
- b. ***Sales Tax Deferred:*** When a retail seller defers the sales tax the amount of the state sales tax is distributed over the term of the contract rather than being advanced to the state in a lump sum payment. When the retail buyer remits a scheduled payment, the retail seller will deduct the distributed tax amount from the installment payment and forward it to the state tax office. Under this collection method, the retail seller merely acts as an intermediary to transfer taxes from the retail buyer to the state. As the tax is owed to the state and not the retail seller, the sales tax may not be included in the contract amount that is subject to a finance charge.

5.16 Timely Transfer of Title. The Texas Tax Code requires retail sellers utilizing the sales tax advanced collection method to transfer a motor vehicle title into the name of the retail buyer within twenty (20) working days from the date of sale. Retail sellers holding a seller-financed sales tax permit (sales tax deferred) are allowed forty-five (45) calendar days from the date the motor vehicle is delivered to the retail buyer to transfer a motor vehicle title into the name of the retail buyer.

5.17 Recordkeeping Requirements. Dealers must demonstrate compliance with the Texas Finance Code and regulatory requirements. In order to demonstrate compliance dealers are required to maintain records for all retail installment transactions. These records must be maintained for a period of four years from the date of the contract, or two years from the date of the final entry made, whichever is later. The list of items that must be kept by a dealer is comprehensive and may be viewed within the motor vehicle rules administered by the OCCC.

REPOSSESSIONS

5.18 Right of Repossession. For the purposes of this section, repossession is considered as the physical retaking or regaining of a vehicle. The holder's ability to repossess a vehicle is based upon a contractual and legal right of the holder if the debtor does not meet certain conditions disclosed in a retail installment contract. To repossess a vehicle, the holder must have a valid security interest in that vehicle.

- a. ***Creating a Security Interest.*** A security interest is a legal share in the vehicle which secures payment of the debt, and is created when the buyer signs a security agreement with the creditor. In order for the security interest to be valid all of the following contractual elements must be present: value has been given to the vehicle, the debtor has rights in the collateral, and the buyer has signed a security agreement that provides a description of the vehicle used as collateral that states the buyer has given the creditor a security interest in the vehicle. Repossessing a vehicle without a having a valid security interest might be interpreted as an act of conversion (any unauthorized act that deprives an owner of personal property without his or her consent).
- b. ***Perfection.*** After a valid security interest is created through the use of a retail installment contract, the holder should then “perfect” the security interest. For motor vehicle dealers, perfecting the security agreement is accomplished by transferring the title, showing the buyer as owner of the vehicle and the holder a lien-holder on the vehicle. This transfer of title creates a public record of the holder's security interest and affords legal rights to the holder related to repossession. When the lien is perfected, the holder maintains a superior position if other parties attempt to repossess the vehicle for other outstanding debts. Without public notice or record of the holder’s security interest, a third party may be able to claim a superior position to the holder in actions related to any repossession, debt collection, or legal action.

The holder may repossess the vehicle before the lien is perfected if the debtor does not fulfill certain terms of the retail installment contract. A retailer seller or holder who has questions regarding repossession prior to perfection should contact the OCCC, or seek appropriate legal advice.

- c. ***Grounds for Repossession.*** The holder’s right to repossess is determined by its security interest in the vehicle and the terms that constitute default as delineated in the retail installment contract. Generally, contract terms require the buyer to make payments in a timely manner and to keep the fully vehicle insured.

Contracts typically include a general insecurity clause that allows the holder to repossess a vehicle if that holder believes in good faith that the prospect for payment is impaired. Repossession under the general insecurity clause is based upon the facts of the given situation and the reasonable belief by the holder that payment on the transaction is unlikely. Since this measure is based upon

articulated facts and circumstances, should the holder believe this remedy to be warranted, the holder should seek legal advice before taking action.

- d. **Retrieving the Vehicle.** Repossession simply means the act of regaining possession of the vehicle, whether through physical retaking or the buyer's voluntary surrender of the vehicle. A voluntary surrender occurs when a debtor voluntarily returns the vehicle and willingly turns it over to the holder. An involuntary surrender occurs when the holder takes specific action to physically retrieve the vehicle from the debtor. The law states that a holder with a legal right to repossess the vehicle may only do so without breaching the peace. All rights and restrictions on a holder's ability to physically repossess a vehicle also apply to the holder's employees and any independent contractor engaged by the holder.

- e. **Voluntary Surrender.** A debtor may agree to voluntarily surrender the vehicle. The holder may document this repossession on forms that indicates the debtor has:
 - 1. Waived the right to notices, or
 - 2. Accepted the creditor's decision to waive any deficiency balance.

- f. **Disposition of Collateral (Vehicle).** After default, a secured party or holder may dispose of secured collateral through several methods. The common methods of disposition are public or private sales of the vehicle or strict foreclosure (proposal for acceptance of collateral in full satisfaction of the obligation).
 - 1. **Public Sales.** A public sale is defined as a sale that is advertised for a specific date and location, is subject to competitive bids, and is open to the general public. The creditor must send a notice of disposition to the debtor and all secured parties. The notice of disposition must specify the date, time, and place of the sale and allow the debtor and any secured parties a reasonable opportunity to attend the sale. A public sale must meet the 'commercially reasonable;' standard. For a *public sale*, the standard focuses on how the sale is conducted. For example, if adequate advertisement of the sale existed and if the collateral was sold at a reasonable time and at an accessible location, the 'commercial reasonableness' standard has been met.

Private Sales. A private sale is defined as a sale that is advertised for a specific date and location, is subject to competitive bids, and is not open to the general public. A private sale requires that a notice of disposition be sent to the debtor and all secured parties informing them of the date after which the vehicle will be sold. A sale conducted at a wholesale auction is considered by the courts to be a private sale since the general public cannot participate. A private sale must meet the 'commercially reasonable' standard. In a *private sale*, the standard focuses primarily on the amount of proceeds received for the vehicle.

For example, if the vehicle is sold for at or near its current market value, the "commercially reasonableness" standard has been met.

2. ***Notification of Disposition.*** A notification of disposition of collateral for a public or a private sale sent at least ten (10) days before the earliest time of disposition is considered reasonable. If a creditor has failed to send a debtor a notification of disposition and the debtor has not provided a written relinquishment of his or her rights to notification after default, the court system has historically barred creditors from seeking a deficiency balance after the disposition of the collateral.
3. ***Strict Foreclosure.*** As an alternative to a public/private sale, the current holder or creditor may use a proposal to accept the collateral in full satisfaction of the obligation. This method of disposition may only be used if less than 60 percent of the cash price has been paid *unless* the debtor has signed a specific waiver regarding the equity on the vehicle. The holder must provide both the debtor and secured parties written notice of the intent to retain the collateral in full satisfaction of the debt. There is no specified time period in which this notice is to be sent, however statute provides a period of time in which the debtor or secured parties may submit objections to the holder's intent.

From the date the notice is sent by the creditor, the debtor will have twenty (20) days in which to submit a written objection to the holder's intent to retain the collateral. If the holder receives a written objection within the twenty-day (20 day) period, a public or private sale must be completed.

If the holder does not receive a written objection by the end of the twentieth (20th) day, the holder may retain the collateral in satisfaction of the debtor's obligation on the twenty-first (21st) day. By retaining the vehicle through this method, the holder forfeits its rights to seek a deficiency balance from the debtor. Additionally, while the holder may report the repossession to credit reporting agencies, it must report the outstanding balance as a zero balance.

- g. ***Calculation of Surplus or Deficiency.*** Following a public or private sale of the collateral, a creditor may be required to provide the debtor with a calculation of a surplus or deficiency balance. The calculation is needed when a debtor requests an accounting or reconciliation of the balance, a creditor seeks a deficiency balance payment, or the creditor forwards surplus sales proceeds from the sale of collateral to the debtor.