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March 4, 2016

FTC Chairwoman Edith Ramirez
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: **FTC Public Workshop Examining the U.S. Auto Distribution System
Workshop Will Explore Competition, State Regulations, and Emerging Trends in the
Industry
Project No. P131202**

Submitted via FTC Comment Form: ftcpublic.commentworks.com/ftc/autodistribution

Dear Chairwoman Ramirez:

On behalf of the Texas Automobile Dealers Association (TADA), an organization comprised of the franchised new motor vehicle and heavy duty truck dealers in Texas, the Austin Automobile Dealers Association, the Dallas Ft. Worth Metropolitan New Car Dealers Association, the El Paso New Car Dealers Association, the Houston Automobile Dealers Association, the New Car Dealers of West Texas, the San Antonio Automobile Dealers Association, and the Valley Automobile Dealers Association, I appreciate the opportunity to comment regarding the Federal Trade Commission's (FTC) public workshop held on January 19, 2016.

As outlined in the published agenda, the workshop explored competition and related issues in the context of state regulation of motor vehicle distribution and how these regulations affect business and the consumer. Specific stated topics included:

1. The regulation of dealer location;
2. Laws relating to reimbursement of warranty services;
3. Restrictions on manufacturers' ability to engage in direct sales to consumers; and,
4. How the existing pattern of auto distribution and regulation may be affected by new developments such as autonomous vehicles, connected cars, and the rise of subscription-based automobile sharing services.

These comments focus on the first three workshop segments.

While any system can be faulted, the franchised automobile dealer model is the most advantageous to the consumer as well as to the vehicle manufacturer and retailer. A cursory as well as a thorough examination of the franchise system in this industry proves its advantages as well as forwarding the mission and vision of the FTC.¹

Numerical Overview

To understand better a franchised dealer's business and daily risk as well as the value the dealer delivers to the fabric of the economy, the following information is key.

According to NADA, there are approximately 16,396 new motor vehicle dealerships in the United States, representing 2,253,208 direct, indirect, and induced jobs (1,072,773 direct jobs and 1,180,645 indirect and induced jobs). The payroll at these dealerships throughout the United States represents \$58.1 billion with an average annual earning of \$54,170.00 per employee and 64 employees, on average, per dealership.

In Texas, the franchised motor vehicle industry is responsible for 213,217 direct, indirect, and induced jobs (97,750 direct jobs and 115,567 indirect and induced jobs). The Texas payroll at these dealerships is just under \$6 billion with the average employee per dealership grossing over \$61,300.00 per year.

A Texas franchised dealership is located in 284 cities and towns. According to TADA membership data, the following chart applies:

<u>Population</u> (2010 Census)	<u>No. of Dealerships</u> (As of 2/22/16)	<u>No. of Cities</u> (As of 2/22/16)
0 - 5,000	116	81
5,000 - 15,000	190	83
15,000 - 50,000	248	64

“Our Mission: To prevent business practices that are anti-competitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”

“Our Vision: A U.S. economy characterized by vigorous competition among producers and consumer access to accurate information, yielding high-quality products at low prices and encouraging efficiency, innovation, and consumer choice.”

www.ftc.gov/about-ftc

<u>Population</u> cont.	<u>No. of Dealerships</u> cont.	<u>No. of Cities</u> cont.
50,000 - 250,000	351	47 ²
250,000 +	<u>392</u>	<u>9</u> ³
TOTAL	1297	284

Fifty-eight percent (58%) of the towns in Texas that have a franchised dealer are under 15,000 in population and represent 24% of the total dealer count.⁴ In addition to Texas, the industry provides numerous well-paying jobs and taxes for their community, state, and country.

The NADA Dealer Financial Profile for year-end 2015 shows that nationally, the franchised dealer made a 2.2% net profit, on average, per dealership on sales of \$52,143,971.00. The net profit in 2014 stands also at 2.2%.

A break down of the average dealership's annual revenue of \$52,143,971.00 is as follows:

²These cities include: Laredo, Lubbock, Garland, Irving, Amarillo, Grand Prairie, Brownsville, Pasadena, Mesquite, McKinney, McAllen, Killeen, Waco, Carrollton, Beaumont, Abilene, Frisco, Denton, Midland, Wichita Falls, Odessa, Round Rock, Richardson, Tyler, Lewisville, College Station, The Woodlands, San Angelo, Pearland, League City, Kingwood, Longview, Sugar Land, Edinburg, Mission, Baytown, Pharr, Temple, Harlingen, Bryan, North Richland Hills, Victoria, New Braunfels, Conroe, Spring, Port Arthur, Euless.

³Houston, San Antonio, Dallas, Austin, Fort Worth, El Paso, Arlington, Corpus Christi, Plano.

⁴The fact that 24% of the Texas franchised dealers reside in towns of 15,000 or less in population shows that the Fortune 500 dealer is not the typical dealer.

FTC Transcript, January 19, 2016, Segment 2, Professor David Sappington, University of Florida: "And as we've heard a bit this morning, I think the basic story that tries to justify these regulations is that if we have a setting where there's a huge dominant manufacturer and a small dealer who is beholden to the manufacturer, it may turn out to be the case that manufacturer would abuse that power. And, in fact, withhold payments for warranty work, for example, from the dealers. And consumers would be harmed in the process, because dealers would not have the proper incentives to do the warranty work properly. Now, that's a story that one might tell, but that's not the way I perceive the industry and I think a more realistic depiction of today's industry is that, in fact, we have many manufacturers competing against one another to reach customers. They do so through their dealers, but those dealers notice now in this new picture are not tiny little entities, as Dan [Daniel Goldberg] has mentioned, they are in fact major players, major economic entities. . . In addition, if we just look at the list of dealers who are now currently on the Fortune 500 list of the nation's largest corporations, we do see the dealers showing up there. So that picture from back in the 1950s really does not capture the industry today, in my view."

\$52,143,971.00	Average annual dealership revenue
– 45,367,254.00	Paid to manufacturer for cost of vehicles and parts
<hr/> \$ 6,776,717.00	
– 5,610,042.00	Operating expenses including payroll, rent, insurance premiums, interest payments, advertising, and state and local taxes
<hr/> \$ 1,166,675.00	Net profit <u>before</u> federal income tax

The generation of over \$52 million in revenue is quite removed from the dealer's net profit before federal, and if applicable, state income taxes.

The Texas franchised dealer provides consumer access and choice. By locating in 284 cities and towns, the consumer, manufacturer, and community are served by the franchised dealership model.

The amount of revenue necessary to make a profit in the industry is also instructive. The monetary "oil" to keep the dealership engine moving forward is daunting— especially in light of the marginal net profit obtained.

The approximate 2.2% net profit for the average franchised dealer before federal income tax is paid reveals the competitive nature of the franchised dealer system as well as the dealer's "tight" margins. This business model answers any economist's concern for whether the franchised dealer is subject to intense competition as well as "tight" margins.⁵ Whether a 2.2% net profit before federal income tax is a "comfortable" profit margin as allowed for by Professor Schneider, is certainly debatable.

The dealer's small net profit also belies the economist's perspective that the manufacturer or the consumer is filtering a subsidy through to a dealership.⁶ It also contradicts Professor Sappington's statement that "if we just take look at profit, Dan [Goldberg] has already mentioned,

⁵FTC Transcript, January 19, 2016, Segment 1, Professor Henry Schneider, Cornell University: "If there were intense competition at sort of the dealer level—either intra-brand or inter-brand—you would see tighter margins and so on. And I'm not arguing that a dealer should make no profits. Certainly comfortable profits in order for dealers to be able to make investments in their properties and so on would be in everybody's interest for sure."

⁶*Id.* Professor Henry Schneider: "But again, from as an outsider's economist perspective, my feeling would be that this is effectively if you want to subsidize or sort of protect local communities or economies, there are much more efficient ways to do that than to effectively have a subsidy paid by car makers, or especially car shoppers, and filtered through car dealerships. It's not a particularly efficient or fair approach to sort of protecting communities and economies."

there's a substantial profit of the dealers these days.”⁷

Again, the franchised dealer meets if not exceeds the FTC's stated mission and vision for consumer choice and competition as shown by the many available dealerships and the 2.2% before federal tax profit margin.

Franchises and State Regulation of Dealer Location

The Texas Legislature passed the statute overseeing consumer, state, dealer, and manufacturer concerns in 1971.⁸ This statute has been re-visited by the legislature each regular session since 1971—whether through filed bills, public hearings, or adopted amendments.

The individual state legislator is the one who is familiar with their community and the needs of their constituency. It is the state legislator who knows the day-to-day consumer and business concerns. It is the state legislator who is responsive to the needs of the state and its citizenry. Regulating the approximate 1300 Texas franchised dealerships and their manufacturers and distributors is appropriately done by the state and as set out in the U. S. Constitution.⁹

A grasp of the contractual relationship between the franchised dealer and manufacturer is necessary to an understanding of the growth of the statutory framework regulating the relationship and its on-going and dynamic changes.

A motor vehicle franchise agreement is not a negotiated document between the parties. It is not an individualized agreement. The standard provisions are the same whether the dealer is located in Texas, New York, or Ohio.

The Sherman Antitrust Act¹⁰ prohibits the dealers from coming together to negotiate their franchise agreements with the manufacturers or distributors.

The franchise agreement is written by the manufacturer or distributor and presented for signing to the dealer.

⁷*Id.* FTC Transcript, Segment 2.

⁸Act of April 7, 1971, 62nd Leg., R.S., ch. 51, 1971 Tex. Gen. Laws 89.

⁹U.S. CONST. amend. X: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

¹⁰15 U.S.C. §§ 1 - 7 (1890).

While the franchise agreement encompasses numerous issues, since the first segment of the FTC Workshop focuses on add points, relocations, and termination, the following agreements are primarily discussed within those confines.

BMW of North America, Inc. Dealer Agreement

Each franchised dealer's sales and service agreement a/k/a franchise agreement, contains many similar provisions, regardless of the franchise.

For illustration, the BMW dealer agreement includes the following:

1. Requires a dealer to agree **not** to make any major structural change in any of the dealer's premises without BMW's prior written consent;
2. Requires a dealer to agree **not** to change the location of any of the dealer's premises without BMW's prior written consent;
3. Requires a dealer to agree **not** to establish any additional location for dealer's BMW operations without BMW's prior written consent.¹¹
(Emphasis added.)

The BMW dealer does not have any exclusive specific geographic region to sell the BMW products.¹² This non-exclusive provision is typical in a motor vehicle franchise or sales and service

¹¹BMW of North America, Inc. Dealer Agreement, ¶ D, Form 78/12A: "Dealer agrees that, without the prior written consent of BMW, Dealer will not (i) make any major structural change in any of Dealer's Premises, (ii) change the location of any of Dealer's Premises or (iii) establish any additional location for Dealer's BMW Operations."

Similar language is included in the 2010 BMW Center Agreement (Vers. 2010.01CA), Article D: "In the event that Center [franchised dealership] desires to: (a) change its principal place of business from that first set forth in this Agreement; (b) change any location of the Center Facilities; (c) establish any additional locations for either operating its business or storage of BMW Products; (d) make any major structural or design change in the Center Facilities; or (e) change the usage or function of any locations or facility approved herein or otherwise utilize such locations other than the approved functions, Center must obtain the prior written approval of BMW NA for any such change or establishment."

¹²*Id.* ¶ A: "Dealer recognizes and agrees that its appointment as a Dealer in BMW Products does not confer upon it the exclusive right to deal in BMW Products in any specific geographic area. . . BMWNA reserves the right to grant or confer rights and privileges covering the sale and servicing of BMW Products upon such other Dealers selected and approved by BMWNA, whether located in Dealer's geographic area or elsewhere, as BMWNA, in its sole discretion, shall deem necessary or appropriate."

Similar language is in the Vers. 2010.01CA agreement, Article A: "Subject to the terms of this Agreement, BMW NA appoints Center as a dealer of BMW Products and grants Center the non-exclusive right to buy and/or sell and/or service BMW Products. Center accepts such

agreement.

BMW allows for termination of the agreement upon the death or permanent disability of any owner holding a majority or controlling ownership interest in the dealership. A termination provision is also included if there is any other change in the ownership or beneficial interest in the dealership. BMW also grants itself the right to terminate a dealer upon the death or permanent disability of or any change in the dealership's general manager, without BMW's prior written consent.¹³

BMW may also terminate, under their agreement, if the dealer sells, assigns or transfers or attempts to sell, assign, or transfer the dealership without BMW's prior written consent.¹⁴

appointment and agrees to be bound by this Agreement. While Center recognizes that its performance will be primarily measured based upon its activities in its Primary Market Area, Center agrees that this appointment does not confer upon it the exclusive right to deal in BMW Products in any specific geographic area within the United States, nor does it limit the persons within the United States to whom Center may sell BMW Products for use therein. Center agrees that it will not sell BMW Products for resale in the United States or for resale outside the United States. In addition, Center agrees to abide by BMW NA's Export Policy and all amendments and modifications thereto. Center acknowledges that BMW NA reserves the right to appoint additional BMW Centers, whether located near Center's location or elsewhere, as BMW NA in its sole discretion deems necessary or appropriate. BMW NA agrees that it will not appoint additional representation without first conferring individually with the BMW Center(s) surrounding the proposed location to determine whether other alternatives to additional representation are satisfactory to BMW NA. If a decision is made to proceed with establishment of additional representation, BMW NA will provide such BMW Center(s) no less than thirty (30) days written notice of such decision."

¹³BMW of North America, Inc., Dealer Standard Provisions Applicable to Dealer Agreement, Form 78/12B, ¶ 12(b)(1). Under ¶ 12(e), if the dealer's interest passes directly to the surviving spouse and children or to any of them and the general manager remains unchanged or within 90 days of the death of the owner and arrangements are made for the management satisfactory to BMWNA, then BMWNA will not terminate before the end of 12 months and may also extend the agreement.

The Vers. 2010.01CASP also includes similar language in ¶¶ 12(b)(10),(12), and ¶ 12(g) as it allows for termination upon the death or permanent disability of the owner holding a majority or controlling interest or the permanent disability of the operator which may, at BMW NA's option, result in termination, upon written notice to the dealership. BMW NA shall provide notice within a reasonable time after the death or permanent disability and termination is effective 60 days from the notice date.

¹⁴*Id.* ¶ 12(b)(4).

See Vers. 2010.01CASP ¶¶ 12(b)(10), (11).

These contractual provisions limit an owner's right to manage, sell or transfer his or her investment to the owner's preferred buyer, save for state law. Again, the state grasps the need to balance the factory's concerns with the dealer's investment and continuity and the state's laws of descent and distribution in order to maintain a competitive environment for the consumer by providing statutory oversight.¹⁵

In addition to the manufacturer's demands outlined in their franchise agreement, most manufacturers require the dealer to expend a significant amount of capital on their facility which increases the cost for a new point or a relocation as well as an existing facility. These requirements go beyond what is necessary for a satisfying customer sales experience. The level of manufacturer detail gets down to a specific paint color and floor tile and display style.¹⁶

For example, BMW requires a minimum display space in the showroom for a dealer with a sales planning guide of 1 - 800 units. This dealer is required to display a minimum of 8 vehicles in a "driving gallery" formation; a dealership with a sales planning guide of 801 to 1400 is required to display 9 vehicles in a "driving gallery" formation; and, a dealership with a sales planning guide of 1401 and above is required to display 10 vehicles in a "driving gallery" formation.

The required space in the showroom per vehicle is 325 square feet. The dealer who must display 8 vehicles is now required to have a showroom that is, at minimum, 325 x 8 or 2,600 square feet; 325 x 9 = 2,925 square feet for the dealer required to display 9 vehicles; and, 325 x 10 = 3,250 square feet to display 10 vehicles.¹⁷ (*See Attachment 1.*)

Under BMW's facility requirements, if a BMW dealer sells 20 new units per month, that dealer is required to build a showroom for 8 vehicles, i.e., 2,600 square feet. A dealer who sells 66 units per month must have the same size showroom.

A dealer who sells 117 units or more monthly is required to have 3,250 square feet for displaying vehicles, which is 650 square feet more in the showroom than the dealer selling only 20 units per month. The expense placed upon the dealer selling 20 units per month for a required 2,600 square feet versus the dealer selling 117 units per month with a requirement of an additional 650 square feet is an example of a questionable position by a manufacturer or distributor regarding facility requirements.

The 20 unit a month dealer must now have a showroom size that does not lend itself to "best practices" for the dealership. This dealer will have to spend money that may be better spent

¹⁵TEX. OCC. CODE ANN. § 2301.462 (Vernon 2012).

¹⁶BMW CORA (Center Operating Requirements Addendum) 2015 ¶¶ 3.4, 3.5, 3.6, 7.14 (p. 8, 17) 02.26.2015 Version 2.

¹⁷*Id.* ¶ 3.1, 3.2 (Page 7-02.26.2015 Version 2).

elsewhere in the business or risk losing factory incentives.

In an NADA research project by Glenn Mercer, the dealership facility was not primary as to a consumer's choice for either the vehicle or the dealership.¹⁸ (*See Attachment 2.*) Yet, a dealership may be deprived of a manufacturer's incentive monies if the facility does not have the right paint color, tile, furniture, and "driving gallery" showroom formation.¹⁹

Mr. Mercer's research indicates that the manufacturer may not always be in tune with the needs or desires of the consumer or the dealership and that local decisions may be best left to the dealership owner or in cooperation with one another. Again, the state attempts to bring balance by requiring reasonableness, fairness and equity.²⁰

Nissan Sales and Service Agreement

The Standard Provisions in Nissan's Agreement provide that the dealer is assigned a "Primary Market Area" (PMA); however, this geographic area is a tool for Nissan to evaluate a dealer's performance. A dealer has no right or property interest in any such geographic area that Nissan assigns and subject to the agreement, Nissan may add, relocate, or replace dealers in a dealer's PMA as well as change the dealer's PMA.²¹

Nissan also gives itself the right to terminate the agreement if there is any actual or attempted sale, transfer, assignment or delegation, whether by operation of law or otherwise, by the dealer of an interest in or a right, privilege or obligation under the agreement. In addition, if there is an actual or attempted sale, transfer, assignment, or delegation, whether by operation of law or otherwise, of the dealer's principal assets that Nissan considers necessary for the dealer's responsibilities without

¹⁸Glenn A. Mercer, "Factory Image Programs" (February 4, 2012).

¹⁹A BMW dealership must meet the CORA facility requirements as a part of the "Added Value Program" in order to receive incentive monies.

²⁰*Id.* §§ 2301.4671, 2301.468.

²¹Nissan Dealer Sales and Service Agreement, Standard Provisions, Section 3.A., Form # NDA-4S/9-99.

See also Nissan Dealer Sales & Service Agreement, Article First: (a): Subject to the conditions and provisions of this Agreement, Seller (a) appoints Dealer as an Authorized Nissan Dealer and grants Dealer the non-exclusive right to buy from Seller those Nissan Products specified in Dealer's current Product Addendum hereto, for resale, rental or lease at or from the Dealership Locations established and described in accordance with Section 2 of the Standard Provisions;"

the prior written consent of Nissan, Nissan gives itself termination rights.²²

Again, a dealer's life work should be able to be sold or transferred to a qualified buyer subject to reasonable manufacturer concerns without the threat of termination.²³

Dodge Sales and Service Agreement

The Dodge agreement provides that the dealer can order and "sell at retail to customers located within the United States" specified vehicles as shown on the dealer's addendum.²⁴ The agreement also states that the dealer has the non-exclusive right, subject to the agreement, to purchase new specified vehicles for sale within the United States for sale to customers located within the United States for sale at the dealer's facilities and location.²⁵

Again, the non-exclusive right to sell vehicles is limited in this agreement to the United States—no exclusive territory is given. The breadth of territory, i.e., the United States, is indicative of the competitive environment in the franchised motor vehicle arena and fostered by the parties to the agreement.

Legislative Response

The state laws regulating the motor vehicle industry are enacted through the state's police power as allowed under the Tenth Amendment to the U. S. Constitution. There is an inherent understanding by each state that the motor vehicle industry affects its general economy and the public interest and welfare of its citizens.

The motor vehicle allows the citizenry to go to work; to take children to school; to travel to the hospital; to choose where to live; to participate in extra curricular activities; to travel; to shop; to deliver goods—to name only a few of the daily activities in which the automobile plays a central role.

²²*Id.* Section 12.A.1.

²³TEX. OCC. CODE ANN. § 2301.359 allows a manufacturer or distributor 60 days after a notice and application to purchase is received to accept or reject a transferee. Consideration is given to the transferee's financial and operational performance if a franchised dealer; the moral character of the prospective transferee; as well as the manufacturer's or distributor's available written, reasonable, and uniformly applied criteria regarding business experience and financial qualifications.

²⁴Chrysler Group LLC, Dodge Sales and Service Agreement ¶ 1, Form SSA D11.

²⁵*Id.* ¶ 4.

The limited number of complaints filed between the manufacturer or distributor and dealer indicates that there is little desire for litigation between the two parties to the franchise agreement.

The state agency with jurisdiction over manufacturers, distributors, representatives and dealers in Texas also licenses these entities. If a complaint is filed regarding a new dealership point, a relocation of a dealership point, or a termination of a dealership, as well as any contested case, the parties must first participate in mediation as provided by board rule before the parties may have a case hearing.²⁶

If the mediation is not successful, a hearing is held by an administrative law judge with the State Office of Administrative Hearings. After the hearing, the administrative law judge issues a proposal for decision and recommends a final order to the agency's board.²⁷

The agency's board issues a written final decision or order, which requires a majority vote of a quorum of the board.²⁸ The board consists of nine members appointed by the governor with the advice and consent of the senate.²⁹ Currently, the agency's board chair is the manufacturer-distributor representative.

New Point

In order to establish a new franchised dealership point in Texas, the board weighs the interests of the public as well as the affected parties.³⁰ The need for the investment and building of a new dealership facility must be shown for approval. No community wants a new facility to be built only for it to be shuttered later because there was not adequate business to sustain it.

Additionally, although a business model may be able to justify a new dealership facility, the manufacturer's experts as well as the dealer's experts may not be totally infallible. Neither party

²⁶TEX. OCC. CODE ANN. § 2301.703(c) (Vernon Supp. 2015).

²⁷*Id.* § 2301.704.

²⁸*Id.* § 2301.709.

²⁹TEX. TRANSP. CODE ANN. § 1001.021 (Vernon 2011). Three members must be persons who hold a dealer's license issued under Chapter 2301, Occupations Code, of whom two must be franchised dealers of different classes and one must be an independent dealer; one member must be a representative of a manufacturer or distributor that holds a license issued under Chapter 2301, Occupations Code; one member must be a tax assessor-collector; one member must be a representative of a law enforcement agency of a county or municipality; and one member must be a representative of the motor carrier industry. The remaining members must be public members.

³⁰*Id.* § 2301.652.

wants a new dealership investment to fail—it reflects poorly on the community and the manufacturer as well as the potential loss of a person’s life savings.

The board is tasked with considering the public’s interest; a competitive marketplace; whether the manufacturer or distributor is adequately represented; harm to a protesting dealer; harm to an applicant; economic conditions; financial expectations; and, market conditions.

Protest standing is given to the same line-make dealership located in the same county or within a 15-mile radius. Any protest must withstand the scrutiny of the needs of the consumer with the factory’s, applicant’s, and protestant’s interests. A successful protest in Texas is rare.

Relocation

Standing to protest a relocation is the same county and a 15-mile radius with several stated exceptions. If the proposed relocation site is not more than two miles from the dealership’s current location or if the relocation is farther from a dealer with standing, then no protest is allowed.³¹

Additional exceptions disallowing a protest are based on the population size of the county as well as if a relocation is necessary because of a natural disaster or if eminent domain is threatened or exercised.³²

No dealership is granted a “veto” right in a new point or in a relocation. There is no exclusive territory for a dealership either by statute or through the dealer’s sales and service agreement with the manufacturer or distributor.

Given the outlay of money by a dealer in the showroom, offices, service department, and the required land to display inventory, the expansion and relocation of a dealership is a state’s concern for buyers, taxpayers, the community, as well as the dealership owner and manufacturer.

Termination or Discontinuance

In determining whether there is good cause to terminate or discontinue a franchise, the injury or benefit to the public is required to be considered along with the dealership’s sales, facilities, investment and obligations to the public as well as the interests of the manufacturer or distributor.³³

The public’s needs and benefits are taken into account whenever a new dealership point, a relocation of a dealership point, or a termination of a dealership is at issue. The Texas Legislature

³¹*Id.*

³² *Id.* § 2301.6521 and § 2301.6522.

³³*Id.* § 2301.455.

statutorily mandates that its citizen's needs be accounted for by the board in its decision-making and the board always weighs the public interest and welfare of Texans when arriving at a decision.

The example and concern for the Pittsburgh area for the GM and Toyota number of dealerships and the Cadillac example with 1,000 points of sale compared to the "other" luxury makes which have 200 to 300 points of sale is of interest. Professor Schneider points out that Cadillac sells, on average, approximately 200 new cars per franchise; whereas, others "may sell 600, 700, 800 or even over 1,000 new cars per franchise. And presumably those costs are passed on to some degree to consumers."³⁴

Professor Schneider also discusses "costs of sort of having more points of sale for at least some car manufacturers and dealers is it makes it hard, for example to reach economies of scale. . . there's all kinds of savings you can get from being larger in terms of back office costs, financing terms, and so on. It's a complicated issue how large you want your dealer to be in terms of market power versus scale. But generally having more flexibility, I think, would be beneficial."³⁵

The alleged savings and costs that Professor Schneider enumerates are not quantified. It may be that they are not measured because no economies of scale are measurable in this instance or they may be slight or illusory; however, to suggest that unmeasured and unsubstantiated costs are borne by the manufacturer or customer is giving a peek into the professor's ideology.

The fiction that a dealership is a cost to a manufacturer is discussed in a July 19, 2010, SIGTARP report.³⁶ In that report, "the anticipated benefits to GM and Chrysler from a smaller dealership network were far more amorphous—a better 'brand equity' and the potential ability to decrease dealership incentives over time." The report continues that "GM acknowledged that its cost savings (assuming the decreases in incentives could be realized) could only be calculated across its entire network and could not be calculated for a single particular closed dealership. Indeed, one GM official emphasized this point by telling SIGTARP that GM would usually save 'not one damn cent' by closing any particular dealership."³⁷

One of the lessons learned from the questionable and painful dealership termination process is that the anticipated benefits to the companies of accelerated terminations were "based almost entirely on the not-universally-accepted theory that an immediate decrease in dealerships would make

³⁴*Id.* FTC Workshop, Segment 1.

³⁵*Id.*

³⁶Office of the Special Inspector General for the Troubled Asset Relief Program, "Dealership Termination Decisions Were Not Based on GM's and Chrysler's Cost Savings Estimates", SIGTARP-10-008 (July 29, 2010).

³⁷*Id.* at 30.

them similar to their foreign competitors and therefore improve the companies' profitability, and the theory arguably did not take into account some of the unique circumstances of the domestic companies' dealership networks."³⁸

SIGTARP also found that no market studies to test their theory was undertaken until after making the termination decision. In addition, there was no effort to quantify the number of job losses that the closing decision would contribute to until, again, after making the decision. The effect on the broader economy was also not "sufficiently considered" in the decision to accelerate dealership terminations.³⁹

Decisions made at the federal level are far removed from local needs. This one significant example and its impact on the industry and local communities exemplifies the reason for the state to continue to make decisions regarding the motor vehicle industry, especially distribution.

Again, the statutes passed by Texas do not prohibit the establishment of a new franchised dealership point nor do they prohibit the relocation of an established dealership. Finally, no law prohibits the manufacturer or distributor from terminating a dealer for good cause.

These statutes bring together the interests of the consumer, community, and state as well as the party's interests and define the elements for the board to consider.

Warranty Reimbursement and Recalls

The second workshop discusses warranty reimbursement with respect to the FTC's vision and mission.

A Texas dealer is required to perform warranty repairs⁴⁰ as well as recalls. The tools, training, facilities, and certified technicians are costs borne by the franchisee.

A significant amount of repairs are performed under warranty and of late, under recall. It was reported in Automotive News⁴¹ that the Takata airbag inflator recalls alone are impacting 12 manufacturers and as many as 25 million U.S. vehicles, spanning model years from 2000 to 2015.

³⁸*Id.* at 31.

³⁹*Id.*

⁴⁰*Id.* § 2301.353.

⁴¹Ryan Beene, www.autonews.com/article/20160229/OEM11/302299984/recall-of-the-century (February 29, 2016)

A manufacturer disallowing the sale of a vehicle because of a recall is quite costly for the dealership as the dealer owns that vehicle, typically when it is delivered to a common carrier.⁴² A vehicle under recall with a “stop sale” requires a dealer to continue to safeguard and pay carrying costs on that vehicle without knowing when it will be repaired and subsequently available for sale.

The cost of a part used in a recall is also under the manufacturer’s control in that before the recall, the part may be one amount and after the published recall, the part may be listed for another amount.

As an example, effective March 27, 2015, a platform trailer hitch is listed to the dealer for \$189.60; to the trade for \$268.60; and list for \$316.00, with a core value of \$0. These prices continue in effect through 2015. On January 1, 2016, this same platform trailer hitch part is now payable to the dealer for \$42.19; to the trade for \$0; list for \$0; and has a core value of \$100.00.

On March 1, 2016, a factory bulletin is sent to the dealers stating that the trailer hitch could develop cracks at the weld points and the dealer must remove and replace it. Dealers are notified that the involved vehicles must be held and not delivered to customers, dealer-traded, released to auction, used for demonstration, or any other purpose. The service is performed at no charge to the customer until February 28, 2018.

This particular trailer hitch part is an example of the ability of the manufacturer to substantially alter the price of a part and the amount paid to a dealer.

With respect to warranty and recall repairs, the manufacturer not only prices the part but determines the amount of time that it will pay for any repair through published time standards, regardless of the actual time expended by the technician. Since the manufacturer sets the time standard for a warranty or recall repair, the dealership is bound by it and is paid in accordance with the manufacturer’s stated time.

⁴²BMW of North America, Inc. Dealer Agreement, ¶ 8(f) Form 78/12B: “All BMW Vehicles sold to Dealer shall be at Dealer’s risk and peril from the time of delivery to Dealer, Dealer’s agent, or a common carrier at BMWNA’s established place of delivery and during all subsequent transportation. It shall be the obligation of Dealer to insure against such risks for its benefit and at its expense.”

BMW NA’s Vers. 2010.01 CASP ¶ 8(f) carries forward this same passing of risk.

The Ford Sales & Service Agreement FD 925A ¶ 11.(b) has a similar provision: “Title to each COMPANY PRODUCT purchased by the Dealer shall (unless otherwise provided in the applicable VEHICLE or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN) pass to the Dealer, or to such financing institution or other party as may have been designated to the Company by the Dealer, upon delivery thereof to the carrier or to the Dealer, whichever occurs first, but the Company shall retain a security interest in and right to repossess any product until paid therefor.”

Whether the published factory time standards are accurate or not, the dealership and technician are paid subject to the manufacturer's determination.

Being able to rely upon a required dealer network to satisfy a buyer's warranty claims and recall needs is necessary for the customer as well as beneficial to the manufacturer and the dealer. The buyer knows where to go when their vehicle fails. The manufacturer can set reasonable repair standards for the franchisee who in turn can satisfy the customer's needs.

Adequate and fair compensation and reimbursement for work that is charged for similar non-warranty work is the standard in this state for warranty work reimbursement.⁴³

The quality of the vehicle manufactured and the length of the factory's warranty primarily determines whether a vehicle will need a repair covered by warranty and consequently whether a dealer will ever be performing and thus compensated for warranty repairs. The dealership has no guarantee of any warranty work; yet, the dealership must meet the standards set by the manufacturer for tools, training, facilities, and certified technicians.

Professor Sappington theorizes that "in my view, the competition is quite pronounced in the auto industry today. And, therefore, other than serving to transfer wealth from manufacturers to dealer, it's not clear what role these rules [Re: warranty work] are playing."⁴⁴ The professor also argues that requiring a manufacturer to pay the same for warranty as a customer pays for the same repair provides an incentive for a dealership to increase the prices charged to a customer for non-warranty work.⁴⁵

The professor does not state the methodology used to conclude that when a manufacturer pays for a good or service in which the amount of time expended is predetermined by that manufacturer and when a part used in both warranty and customer pay is that manufacturer's original equipment manufacturer part, that a "transfer of wealth" occurs. Also unstated is data for the assertion that there is an incentive for a dealership to increase their customer pay repairs. The "pronounced" competition in the industry as acknowledged by the professor should allay this concern.

The many dealerships available for service allows an automobile owner to be selective as to who performs and where to go for their warranty repair. This choice breeds competition. Again, the current system is satisfying the goals of the FTC's mission and vision of choice and competition.

As posited by Maryann Keller when discussing warranty repairs: "Who would you trust to

⁴³*Id.* §2301.402.

⁴⁴*Id.* FTC Workshop, Segment 2.

⁴⁵*Id.*

do the right thing for the owner? The dealer who desperately wants to retain the customer or the auto maker who wants to minimize the cost of the repair?”⁴⁶

Factory Distribution

This FTC Workshop, Segment 3, determined to re-visit the issue of manufacturer direct distribution of motor vehicles. Mr. Roach, with the FTC’s Office of Policy Planning, stated that “this is a topic on which the FTC staff has expressed our views in advocacy letters responding to state legislators in three states over the past couple years. We have opposed these sorts of regulatory restrictions [prohibiting manufacturer district distribution].”⁴⁷

In addition to the staff’s advocacy letters, FTC Commissioner Maureen K. Ohlhausen is determined to bring this viewpoint for direct sales forward. The commissioner, in a speech given June 27, 2015, discusses that many U.S. states have automobile distribution statutes that prohibit the direct sale by manufacturers to consumers. She continues by stating that “the FTC staff has pointed out repeatedly in letters and commentary to state legislatures and government officials that these laws are anomalous within the larger economy and potentially counterproductive.”⁴⁸

Continuing, the Commissioner states that “thankfully, it seems the FTC’s advocacy efforts are paying some dividends, albeit small ones. The state of New Jersey recently passed legislation—what I would call a test bill—that specifically allows Tesla to operate a handful of direct sales outlets in the state.” A justification for this point of view by the Commissioner is that “these new distribution models also offer **potential** efficiencies that **could be passed on to consumers** in the form of better pricing or quality of service.”⁴⁹ (Emphasis added.)

There is no evidence that the direct motor vehicle distribution model offers any consumer efficiency. More importantly, there is no evidence that if the model derived any efficiency that the manufacturer would pass it on to a consumer in the form of better pricing or quality of service.

As franchised automobile dealerships compete on price, financing, and service, the research on intra-brand competition demonstrates that competition lowers the price of the automobile.

⁴⁶*Id.* FTC Workshop, Segment 3.

⁴⁷*Id.*

⁴⁸Commissioner Maureen K. Ohlhausen, When Regulation Protects Privilege Instead of People: Government Restraints of Trade—A Competition Enforcer’s Perspective, The Antitrust Enforcement Symposium 2015—The Journal of Antitrust Enforcement, Oxford, England (June 27, 2015).

⁴⁹*Id.*

Thanks is rightfully given to those states and their legislators that allow for intra-brand competition. This is the system that allows a consumer to choose their seller, determine the product best-suited to their needs, and encourages a competitive market and price—not the one price, one seller, one location, one choice system that allows one manufacturer to build, price, sell, and locate their product and availability.

The Phoenix Center for Advanced Legal & Economic Public Policy Studies released a report in March 2015 that examined approximately 250,000 data samples of vehicle transactions between the years of 2011 and 2013 in Texas. The report shows that intra-brand competition in new motor vehicle sales lowers the price of the vehicle for the consumer. The Honda Accord is shown to sell for \$500 more when the distance between Honda dealerships is increased by 30 miles.⁵⁰

With not only common sense but also data confirming that this state’s current system of competition allows for lower prices versus the one price-one location-one seller-one provider-one choice distribution system, the Texas statute allows for a competitive and responsive system for the consumer.⁵¹

As pointed out by Peter Roff, the Phoenix Center’s work concludes that “when dealers selling the same make of automobiles compete against each other in a given market, auto prices drop significantly. It’s Economics 101: ‘the law of supply and demand.’ So it should come as no surprise the study also found less competition leads to higher prices.”⁵²

The FTC’s position is also questioned by The Hill in an article entitled “FTC Staff Bias on Intra-Brand Car Competition is a Bad Deal for Consumers.”⁵³ The article allows that “the error in the FTC’s thinking is echoed by many other opponents to automobile franchise laws. . .Automobile analysts believe that repeal of state franchise laws would result in a substantial contraction in the number of sellers—and we know from data that this would mean higher prices for consumers.”

As pointed out in a joint letter to FTC Chairwoman Ramirez and Commissioners Brill, Ohlhausen and McSweeney and signed by Grover Norquist with Americans for Tax Reform, Phil Kerpen with American Commitment, Andrew Langer with Institute for Liberty, George Landrith, Frontiers of Freedom, and Jeffrey L. Mazzella with the Center for Individual Freedom:

⁵⁰Phoenix Center Policy Paper Series, “The Price Effects of intra-Brand Competition in the Automobile Industry: An Econometric Analysis” No. 48 (March 2015).

⁵¹*Id.* § 2301.476.

⁵²U.S. News & World Report, “Obama’s War on Auto Dealers, The Federal Trade Commission is using faulty data to attack auto dealers and justify new regulations,” (Jan. 19, 2016--3:06 p.m.).

⁵³George S. Ford, contributor, (January 19, 2016-6:00 a.m.).

Finally, we find it a bit ironic that the FTC is investigating the effect of state dealer franchise laws when it was the federal antitrust laws that motivated the enactment of such laws in the first instance. As you know, auto retailers are prohibited by federal antitrust laws from collectively negotiating their contracts with manufacturers, and this artificial intrusion created an imbalance that disadvantaged dealers. Because exercising their collective economic power is prohibited by federal law, dealers had no choice but to turn to state legislatures to level the playing field while bargaining with manufacturers. A truly free marketplace would not have these antitrust prohibitions against auto retailers, nor state franchise laws. But eliminating one and not both would create an imbalance in the manufacturer-retailer relationship, and is tantamount to the government picking winners and losers.

Bottom line: there is no fact-based evidence in the public sphere that the current franchised dealer distribution system does not benefit consumers. All available evidence says that consumers will pay more for their vehicles if intra-brand price competition through dealers is eliminated. Given these facts, and the lack of any real world evidence to the contrary, it is troubling that the FTC would spend valuable time and resources looking into an issue where no evidence of a problem exists.⁵⁴

(See Attachment 3.)

The motor vehicle franchise system, in addition to offering the consumer the most competitive market, is also beneficial for the committed manufacturer. This system shares the costs inherent in the motor vehicle manufacturing and distribution system so that each can perform at their optimum.

The manufacturer can concentrate on designing, engineering, and nationally marketing vehicles in lieu of retailing. The dealership can concentrate on investing in their community, their land, their buildings, their customers, and employees so that the consumer can obtain their desired product with the optimum service for the best price.

Some estimates put the combined investment made by the dealers at more than \$200,000,000,000.00 (two hundred billion) in land, buildings, software and infrastructure to sell vehicles.⁵⁵ This combined dealership investment inures to the benefit of the consumer, the dealer,

⁵⁴January 19, 2016.

⁵⁵Peter Ferrara, Town Hall "FTC Regulation of Phantom Problems That Don't Exist is Over-regulation," (January 19, 2016).

the manufacturer, the community, and to the general economy. It can not be duplicated.

When the manufacturer attempts to retail, experience shows that the result is a fixed price, lower market share, and falling store profits, as evidenced by the Ford Motor Company retail network in 1997 and outlined by Maryann Keller. By 2002, “after lower market share in five test cities, falling store-level profits, and the added administrative cost burden, Ford terminated the retail network and sold the stores back to its dealers.”⁵⁶

Ms. Keller continues by explaining that Ford’s approach actually increased its distribution costs. “Making and selling cars are two different areas of expertise.”⁵⁷

The General Motors (GM) Brazil’s Celta experience is unfortunately incorrectly cited by some as evidence of savings in a factory direct build-to-order system. GM ended the direct sale of Celta in 2006 and emailed Ms. Keller’s business partner that the program ended “because of the high cost of selling online and operating distribution centers.” It is troublesome that this example is misused by those advocating for a factory direct build-to-order model.⁵⁸

Although Tesla’s representative at the workshop advocates for direct factory distribution because of product uniqueness,⁵⁹ the first electric car dates to the early 1800’s when Hungarian inventor Anyos Jedlik, who invented an early electric motor, built a small model car.⁶⁰ In 1896, the first motor vehicle dealer in the U.S. was established and only sold electric vehicles.⁶¹

Mr. Shahan chronicles that in 1900, 38% of all vehicles in the U.S. were electric; 40% steam; and, 22% gasoline-powered. This percentage would soon change when in 1913, Ford’s Model T rolled off the assembly line.⁶²

After the introduction of the Model T, the electric vehicle was two to three times more expensive than the gasoline vehicle. The electric vehicle could not compete with “cheap Texas oil;

⁵⁶*Id.* FTC Workshop, Segment 3, Maryann Keller, Managing Partner, Maryann Keller & Associates.

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* FTC Workshop, Segment 3, Mr. Todd Maron, General Counsel, Tesla Motors.

⁶⁰Zachary Shahan, “Electric Car Evolution” (April 26, 2015), originally published in Sustainnovate; <http://cleantechnica.com/2015/04/26/electric-car-history/>

⁶¹*Id.*

⁶²*Id.*

a more developed road network; the ability or desire to travel long distances as an electric car typically had a driving range of 30 to 40 miles; a limited charging infrastructure; the electric starter; slower speeds, about 20 mph for an electric vehicle; tough economic times during World War I; and, the stigma that electric cars were for women.⁶³

Since the last Detroit Electric vehicle was sold in 1926, the current administration determined to invest in electric vehicles and spent \$2 billion from the American Recovery and Reinvestment Act of 2009 toward the development of electric vehicle batteries and related technologies. Another \$400 million was awarded toward the development of a plug-in vehicle charging infrastructure.⁶⁴

The U.S. Department of Energy in 2009 awarded \$8 billion for fuel-efficient vehicle loans to Ford, Tesla Motors, and Nissan, part of the \$25 billion dedicated for such a purpose under the Energy Independence and Security Act of 2007.⁶⁵

As the government invests in the electric vehicle industry, Tesla Motors garners much attention, including their single-mindedness to distribute directly.

Tesla's representative, Mr. Maron, lists Tesla's reasons for a direct vehicle sales model in Segment 3:

1. Tesla stores are small and often in high foot traffic areas such as shopping malls;
2. Tesla stores don't carry inventory—"our cars are custom-built for each individual customer";
3. The Tesla customer has many questions and needs hours of patient education, a process that only they can afford;
4. The only profit at Tesla is from new car sales;
5. Tesla doesn't advertise and cannot subsidize a dealer's advertising;
6. Tesla will still be selling online, i.e., competing with a franchisee, and no customer would ever buy from a franchised dealer if there is a mark up; and,
7. Electric vehicles should entirely replace gasoline-powered vehicles and only Tesla can communicate this message.⁶⁶

With respect to Tesla's first stated reason for a manufacturer-direct sales model, the location of a dealership is for the most part, under the direction of any manufacturer. Locating a dealership in a shopping mall or other high foot traffic area is no impediment to a dealer distribution system.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.* FTC Workshop, Segment 3, Mr. Todd Maron .

Contrary to Tesla's second reason, a custom-built vehicle is not unique in the industry for a McLaren, Lamborghini, Rolls Royce, Aston Martin, Ferrari, Bugatti or even a Chevrolet, Ford, or Porsche dealer. Limited inventory is also common for the high-line, expensive, or "hot" model vehicles. A no-inventory custom-built sales model means less carrying costs but also means the customer is unable to view available options and is no justification for a direct sale model as custom-built vehicles occur in every line.

The third justification, that every Tesla customer has many questions and needs is risible. Every customer has many questions and needs. An electric vehicle is not unique in this regard and Tesla is also not unique. There are over 23 plug-in electric and 36 hybrid models available with more being built every year.⁶⁷ The BMW i3 electric is a stand-out and Porsche and GM are not far behind with an electric vehicle. In addition, the Nissan Leaf in 2014 became the first electric vehicle with over 100,000 sales.⁶⁸

To argue that a customer's questions and needs require a direct distribution system is a non sequitur. Sales personnel are able to respond to questions and needs for the electric vehicle customer and the hybrid vehicle customer every day in a BMW, Chevrolet, Nissan, Honda, Toyota, etc., dealership.

Tesla's next rationale is that they "only profit in one way—from new car sales and new car sales alone" because Tesla does not offer service and parts, trade and used car programs, financing products, insurance products and other add-ons. Whether Tesla profits solely from new vehicle sales may be questionable.⁶⁹ Its inability or self-imposed decision not to offer additional products may

⁶⁷"The History of the Electric Car" <http://energy.gov/articles/history-electric-car> (September 15, 2014–10:48 a.m.).

⁶⁸*Id.* Shahan.

⁶⁹Mike Ramsey and Colum Murphy, *Wall Street Journal*, "Tesla Won't Turn Profitable Until 2020" (January 13, 2015 6:02 p.m. ET). The article reports that Chief Executive Elon Musk told an auto industry gathering in Detroit that his luxury electric-car company will not be profitable on a basis that includes executive compensation and charges until 2020. In addition, Mr. Musk stated that the Model 3 needs to be in full production mode by the end of the decade [2020] to turn a profit under generally-accepted-accounting principles.

In 2013, Tesla Motor reported a "profitable first quarter because it took advantage of a "short squeeze" in its stock to raise more than \$1 billion in fresh equity and used some of that money to pay off its entire low-interest loan from the U. S. Department of Energy. Tesla was profitable because it earned \$68 million from selling Zero-Emission Vehicle credits to other automakers and a further \$17 million from selling Greenhouse Gas emission credits. It also logged \$11 million in warrant liability reversals along with \$7 million in foreign currency adjustments." John Voelcker, "Tesla Didn't Make a Profit On Its Cars in Q1: Let's Be Clear" May 29, 2013 www.greencarreports.com/news/1084403

be unsatisfactory for future Tesla buyers and certainly does not give consumer choice. Again, this is no reason to demand a state to change their competitive distribution model.

The fifth justification offered by Tesla, also self-imposed, is that it does not advertise and thus cannot subsidize advertising. Dealerships regularly advertise without manufacturer assistance. In addition, not all motor vehicle lines commonly advertise—Bugatti and Lamborghini, to name but a few, do not appear to spend their monies on the television, radio or newspaper.

Tesla's sixth justification is that it claims to sell its vehicle without marking up the price and thus it must sell direct. It is the unusual vehicle sale in a dealership that sells for the stated manufacturer's price, i.e., the MSRP. Competition and choice give a consumer negotiating power—options not available in Tesla's current pricing and distribution model. The Tesla distribution model is again one price from both the producer and the seller; consequently, there is no competition and no consumer choice—reasons to oppose Tesla's distribution model.

Tesla's final argument for their distribution model is that the electric vehicle should entirely replace the gasoline-powered vehicle and they are the only entity which can communicate this message.

Tesla's concern regarding a conflict of interest for a dealership selling gasoline and electric vehicles is unjustified. A franchised dealership looks to the needs of their consumer—whatever those needs may be. To suggest that a dealership cannot take care of an electric vehicle customer as well as a customer who wants a hybrid vehicle, such as the Chevrolet Volt or a Porsche Panamera S E-Hybrid, or an electric Nissan Leaf in the same dealership that is selling gasoline-powered vehicles is inaccurate and most importantly, contrary to sales history.

Whether the electric vehicle should entirely replace the gasoline-powered vehicle is a decision best left to the consumer—not the manufacturer of that product. Consumer choice involves weighing their vehicle options and deciding which vehicle is best for them—a van, coupe, truck, SUV, hybrid, electric, or gasoline vehicle, to name but a few of the available vehicle options.

None of Tesla's stated reasons for demanding an exception to a state's proven dealer distribution system give rise for an exception. In fact, their rationale limits consumer choice and competition. Tesla's reasons are Tesla-centric not consumer-centric.

Although Texas does not provide for a manufacturer or distributor to directly or indirectly own an interest in a dealership; operate or control a dealership; or act in the capacity of a dealer, Texas does recognize an exception. This statutory exception is for the purpose of allowing a manufacturer or distributor to broaden the diversity of its dealer body and enhance opportunities for qualified persons who are part of a group that has been historically under-represented in the dealer body.⁷⁰

⁷⁰*Id.* § 2301.476(g).

Another statutory exception is allowed if a person is qualified, according to the manufacturer's and state's enumerated requirements, but lacks the resources to purchase a dealership outright.⁷¹

In these exceptions, a manufacturer or distributor may temporarily own an interest in a dealership if their participation is in a bona fide relationship with a franchised dealer who has made a significant investment, subject to loss; has an ownership interest in the dealership; and, operates the dealership under a plan to acquire full ownership within a reasonable time and under reasonable terms.⁷²

These reasoned exceptions, available to every manufacturer or distributor, including Tesla Motors and Elio Motors, encourage business in all communities and also expand the dealer body; thus, enhancing choice and competition.

This state's legislature is intent on a competitive environment and consumer options. The stated exceptions continue this fundamental and allow for additional representation in the dealer body for qualified but under-represented groups to become a franchised dealer.

Again, this state's dealer distribution system, re-visited each regular legislative session, is optimum. It brings balance between the parties, consumer choice, and a competitive environment—the stated vision and mission of the FTC.

CONCLUSION

The consumer's interest is reviewed by the state legislature at every step in the legislative process. The consumer's interest is statutorily required for consideration, directly or indirectly, throughout the Texas statute. It is contemplated in the establishment of a new dealership point, a dealership relocation, a dealership termination, a dealership transfer, as well as in warranty reimbursement.

There is a recognition that the distribution and sale of motor vehicles vitally affects the general economy of this state in addition to the public interest and welfare of the citizens. Accordingly, the statute balances agreements with the state's concerns, the manufacturer's needs, a competitive environment, and the dealer's investment.

The legislature requires a sound system of distributing and selling motor vehicles in order to "provide compliance with manufacturer's warranties and to prevent fraud, unfair practices,

⁷¹*Id.*

⁷²*Id.*

discrimination, impositions, or other abuse of the people of this state.”⁷³

Advancing these legislative requirements, the agency also enforces a “lemon law,” requiring a notice to a buyer of their rights as well as a disclosure statement;⁷⁴ enforces the factory warranty;⁷⁵ and adopts and prosecutes advertising requirements.⁷⁶

The state legislature continually balances competition and customer choice and passes a bill only after public comment and hearings and then it must be voted upon and signed by the Governor before becoming effective. The statutes are re-visited each regular session of the legislature for the public interest and for reasonableness. To suggest otherwise is to undermine and belittle the state’s legislative process.

Many of the issues regarding the electric vehicle 100 years ago are still with us today--inexpensive gasoline; cost, as the electric vehicle is currently more expensive than the internal combustion engine vehicle; the limited driving range of the electric vehicle versus the gasoline-powered vehicle; and, the limited charging infrastructure as well as the time to re-charge.

Government expenditure is attempting to make the electric vehicle more competitive through rebates provided by states up to \$2,500.00, federal tax credits of \$7,500.00,⁷⁷ and government installed charging stations.⁷⁸

In 2011, it was predicted that the U.S. would have a million electric vehicles on the road by 2015. While federal spending on electric vehicles is forecast to total \$7.9 billion through 2019, it

⁷³*Id.* § 2301.001.

⁷⁴*Id.* §§ 2301.601 - 2301.613.

⁷⁵*Id.* § 2301.204.

⁷⁶43 TAC §§ 215.241 - 215.271.

⁷⁷Jeffrey Sparshott, Wall Street Journal, “The Wealthiest Households Claim 90% of Tax Credits for Buying Electric Cars,” (September 24, 2015–3:11 p.m. ET). The federal government offers up to \$7,500 in tax credits to purchase an electric vehicle and “almost all of those benefits are going to the wealthiest U.S. households, according to an analysis by University of California, Berkeley, professors Severin Borenstein and Lucas Davis.” The article also states that “from 2006 to 2012, tax credits totaled \$18.1 billion. Taxpayers with an adjusted gross income greater than \$75,000 received about 60% of those credit dollars for energy efficiency, residential solar and hybrid vehicles, and about 90% for electric cars.”

⁷⁸Barbara Hollingsworth, “Obama’s Prediction of a Million Electric Vehicles on Road by 2015 Off by 72%,” www.cnsnews.com/print/882901 (February 2, 2015–5:51 p.m.).

was reported in February, 2015, that the one million prediction fell short by 72% as there were 286,390 plug-in vehicles on the road, as reported by the Electric Drive Transportation Association.⁷⁹

According to Ms. Hollingsworth, with the exception of the all-electric Tesla Model S, which lost market share, total sales of plug-in vehicles increased 35% in 2014. This increase came from franchised dealerships.

Whether it is an electric, gasoline, hydrogen, natural gas, solar, hybrid, or other-fueled vehicle, the franchised dealer distribution model provides the consumer, the community, the state, the manufacturer, and the dealer with the best motor vehicle distribution system as it brings the consumer competition and choice—the FTC's mission and vision.

The axiom as to the benefits of the franchised new motor vehicle dealer distribution model was learned decades ago, remains true today, and continues to prove itself.

Respectfully submitted,

Karen Phillips
General Counsel/EVP

Also enclosed: *Attachment 1*
 Attachment 2
 Attachment 3

⁷⁹*Id.*

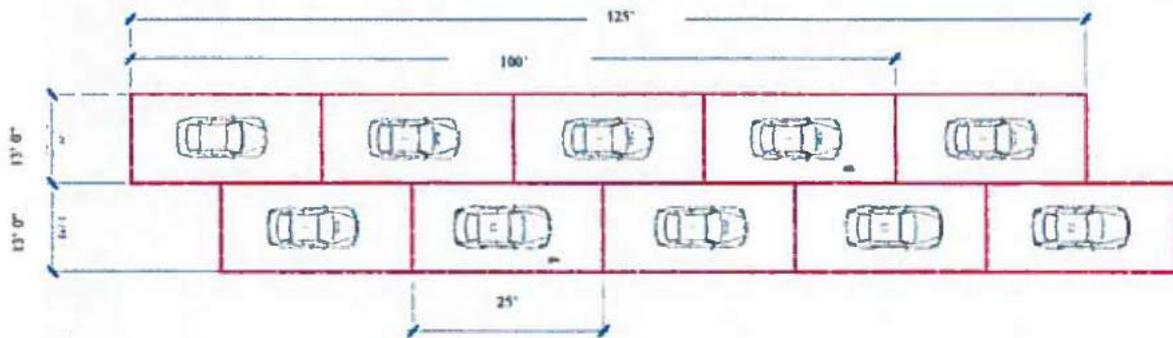
Attachment 1

3. Sales Areas

3.1- Showroom Vehicle Display

The objective of your Center's Showroom display is to showcase BMW products in a comfortable selling environment to highlight all vehicle attributes. This is so the BMW customer can move around the showroom comfortably without feeling crowded. Electrical outlets for charging units must be located under each vehicle on the showroom floor and used for every vehicle on display. Showrooms without permanent chargers located under the vehicles should be charging these display vehicles over night.

The interior showroom display requirement for 2015 is a minimum of 8-10 units with a minimum of 325 square feet allocated per unit. The minimum dimensions of the 325 sq. ft. vehicle display on the "Driving Gallery" must be laid out measuring 13 feet by 25 feet. The vehicles must be positioned in an offset configuration on the Driving Gallery so the vehicles on display are not directly side by side and are staggered half the distance of the vehicle on display.



Showroom Vehicle Layout with 325 Sq Ft per vehicle Display (BMW Minimum)

There are a minimum number of new BMW vehicles required to be on display on the showroom floor. The number is determined using your Center's base Sales Planning Guide (SPG) group numbers as a guide. The SPG groups and the number of required display vehicles are as follows in Section 3.2.

3.2 - SPG Groups

The requirement for the minimum number of vehicles on display in the showroom will be assessed according to the Center's Base SPG number.

<p>Group A SPG of 1 - 800 Requires minimum of: 8 Cars</p>

<p>Group B SPG of 801 - 1400 Requires minimum of: 9 Cars</p>
--

<p>Group C SPG of 1401 & Up Requires minimum of: 10 Cars</p>
--

3.3 - Showroom Design / Layout

Whether constructing a new facility or renovating an existing location, consideration should always be given to the overall needs of the business and customer base to determine the actual size of the showroom display area.

Attachment 2

Exhibit 5: Consumers' Views of Facilities (1) SURVEY RESULTS

Question: What matters most to you when it comes to selecting a new vehicle?

Percent selecting top three factors

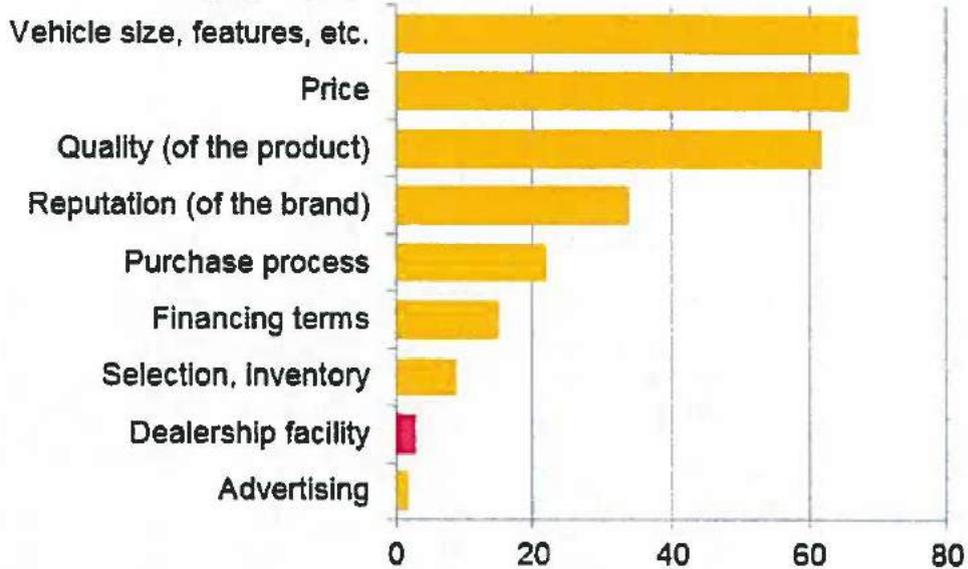
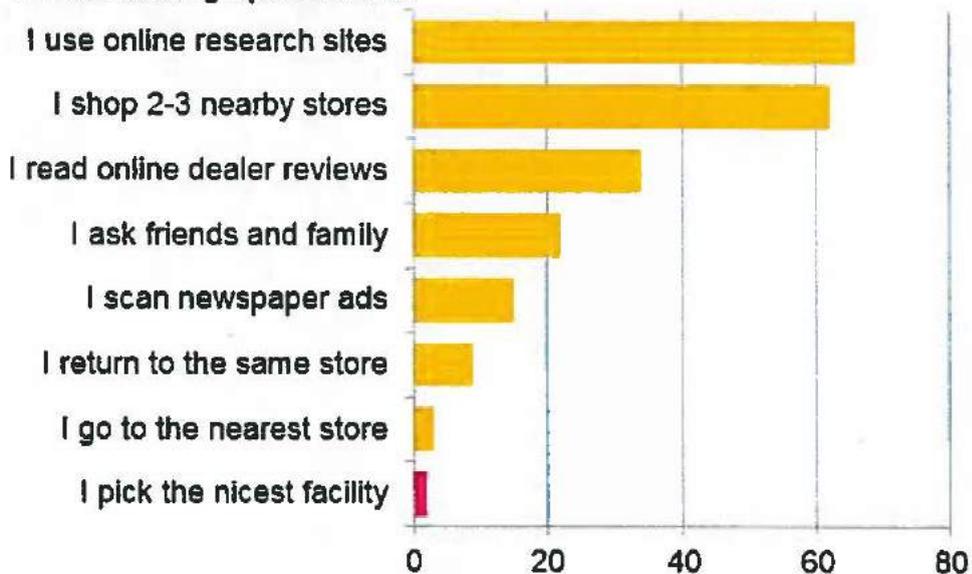


Exhibit 6: Consumers' Views of Facilities (2) SURVEY RESULTS

Question: What matters most when it comes to selecting a dealer (once you've picked out a car)?

Percent selecting top three factors



Attachment 3

January 19, 2016

AMERICAN COMMITMENT

AMERICANS
for TAX REFORM

CFIF
CENTER FOR INDIVIDUAL FREEDOM



Edith Ramirez, Chairwoman, Federal Trade Commission
Julie Brill, Commissioner, Federal Trade Commission
Maureen K. Ohlhausen, Commissioner, Federal Trade Commission
Terrell McSweeney, Commissioner, Federal Trade Commission
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairwoman Ramirez and Commissioners Brill, Ohlhausen and McSweeney:

As groups that advocate for competitive markets, we are concerned about the Federal Trade Commission's (FTC) January 19, 2016 workshop on the retail automotive market.

While the FTC's mission is to "prevent business practices that are anticompetitive or deceptive or unfair to consumers," both economic theory and empirical evidence show with little doubt that the retail automotive market is extraordinarily competitive. Thousands of franchised automobile dealers compete on pricing, financing and servicing, and empirical research shows that this competition drives down prices for consumers. In short, the FTC appears to be trying to find a problem in a market where no evidence of a problem exists.

In March 2015, the Phoenix Center for Advanced Legal & Economic Public Policy Studies released a report that examined large data samples of transactions for ten of the most popular new cars purchased in the state of Texas for the years 2011, 2012, and 2013 and found that intra-brand price competition between franchised new-car dealerships significantly lowers prices for consumers. According to the research, which has not been challenged or rebutted in the public sphere, intra-brand price competition by multiple dealers has the effect of lowering prices on new cars substantially – in the case of a new Honda Accord or Toyota Camry sold in Texas, by approximately \$487 per automobile when multiple same-brand dealers compete in a given radius.

This matches the economic theory that when multiple sellers of a good or service compete on price, prices will drop. Eliminate sellers, and prices will rise.

Similarly, the National Automobile Dealers Association's annual report on dealer profitability show that profits on new cars average only 2.2% per cars – far lower than many other retail businesses, even on high-priced or durable items like furniture or appliances. All evidence suggests that the retail automobile market is competitive, that intra-brand price competition drives down prices for consumers, and that eliminating dealerships will hurt consumers by driving prices higher.

Finally, we find it a bit ironic that the FTC is investigating the effect of state dealer franchise laws when it was the federal antitrust laws that motivated the enactment of such laws in the first instance. As you know, auto retailers are prohibited by federal antitrust laws from collectively negotiating their contracts

with manufacturers, and this artificial intrusion created an imbalance that disadvantaged dealers. Because exercising their collective economic power is prohibited by federal law, dealers had no choice but to turn to state legislatures to level the playing field while bargaining with manufacturers. A truly free marketplace would not have these antitrust prohibitions against auto retailers, nor state franchise laws. But eliminating one and not both would create an imbalance in the manufacturer-retailer relationship, and is tantamount to the government picking winners and losers.

Bottom line: there is no fact-based evidence in the public sphere that the current franchised dealer distribution system does not benefit consumers. All available evidence says that consumers will pay more for their vehicles if intra brand price competition through dealers is eliminated. Given these facts, and the lack of any real world evidence to the contrary, it is troubling that the FTC would spend valuable time and resources looking into an issue where no evidence of a problem exists.

We await your response to the fact-based research in the Phoenix Center study.

Sincerely,

Grover Norquist
Americans for Tax Reform

Andrew Langer
Institute for Liberty

Phil Kerpen
American Commitment

George Landrith
Frontiers of Freedom

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cc. Patrick Roach, Office of Policy Planning
James Frost, Office of Competition