



**OUTDOOR POWER EQUIPMENT
INSTITUTE**

March 4, 2016

TO: Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington DC 20580

ATTN: Auto Distribution Workshop, Project No. P131202

Dear Sir/Madam:

The attached are comments by the Outdoor Power Equipment Institute (“OPEI”) to the Federal Trade Commission (the “Commission”) in connection with its January 19, 2016 workshop exploring competition and related issues in the context of state laws that regulate motor vehicle distribution in order to promote a more informed analysis of how these regulations affect consumers and competition in the marketplace.

OPEI represents over 100 manufacturers of outdoor power equipment. Our members employ approximately 70,000 people and sell approximately \$9 billion worth of outdoor power equipment in the United States each year. The outdoor power equipment industry contributes over \$13 billion annually to the United States’ gross domestic product. OPEI members manufacture diverse lines of outdoor tools and equipment that are used to improve and maintain yards, gardens, trees, shrubbery, commercial turf and golf courses. OPEI’s members include companies that manufacture “handheld” tools including chainsaws, trimmers, blowers and cut-off machines as well as companies that manufacture “ground-supported” equipment like snow throwers, pressure washers, generators and walk-behind and riding mowers. OPEI’s members do not include on-road motor vehicles or motorcycles which are registered with State motor vehicle divisions. Most outdoor power equipment and tool consumers are extremely price-sensitive, and products have relatively tight profit margins. A substantial portion of these products sell at retail for less than \$500. Because of the tight margins, manufacturers cannot afford to create specialty products for particular markets.

I. Executive Overview

The FTC is evaluating potential harm to consumers in the context of state laws that are primarily designed to protect dealers of motor vehicles by imposing restrictions on motor vehicle manufacturers. The FTC has previously recognized that state’s auto-franchising “laws operate as a special protection for these [in-state dealers]—a protection that is likely harming both competition and consumers...[T]he law should permit automobile manufacturers to choose their distribution method to be responsive to the desires of car buyers.”¹ In that letter, three FTC Office and Bureau Directors warned the New Jersey Legislature that:

- Past studies by both academic researchers and FTC staff have concluded that state-imposed restrictions on automobile manufacturers’ ability to negotiate with their dealers increased the prices paid by consumers without leading to notable improvements in service quality.
- In our view, the well-developed body of research on these issues strongly suggests that government restrictions on distribution are rarely desirable for consumers.

¹ See link with the 2014 letter from the FTC Office of Planning, the FTC Bureau of Economics, and the FTC Bureau of Competition to the Chair of the New Jersey Consumer Affairs Committee in the State General Assembly <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/05/ftc-staff-comment-new-jersey-general-assembly>

- When they are adopted, at a minimum, such restrictions should be clearly linked to specific policy objectives that the legislature believes warrant deviation from the beneficial pressures of competition, and should be no broader than necessary to achieve those objectives.

In this letter, the FTC Directors relied on a 1986 Report issued by the FTC Bureau of Economics on the adverse effect of state laws that restrict the establishment of new motor vehicle dealerships near existing dealers selling cars of the same make.² This report found that these state laws harmed consumers because they caused motor vehicle-prices to rise. These types of adverse consumer impacts and price increases will be even more severe as a result of the expansion of state laws designed to protect motor vehicle dealers to entirely separate and distinct dealers of relatively inexpensive lawn and garden equipment. Because of the unique characteristics of the manufacture and distribution of lawn and garden equipment, the application of motor vehicle dealer protection laws impose extraordinary burdens on inter-state commerce, which harm consumers and impose costs without any public benefits.

II. New Hampshire Dealer Protection Law

In 2013, the State of New Hampshire amended its Motor Vehicle Dealer Act (“MVDA”), which governs the relationship between motor vehicle manufacturers, and retailers—so that the MDVDA would apply to non-road equipment manufacturers, distributors and dealers. The New Hampshire law limits the ability of non-road equipment manufacturers to select the most efficient and cost-effective means to distribute and sell their products which will increase the costs to consumers, and ultimately make the markets operate less efficiently. OPEI’s very recent experience with the application of this onerous motor-vehicle distribution law to the non-road equipment industries will be instructional as the FTC considers the effect of these laws on other non-road industries in addition to the motor vehicle industry.

III. Statutory Background

From 1995 until 2013, yard and garden equipment manufacturers have reasonably relied on the well-established provisions in New Hampshire’s pre-existing Equipment Dealers Act (“EDA”) in negotiating their existing dealer contracts. For the previous forty years, New Hampshire separately regulated the relationship of motor vehicle dealers and manufacturers differently from other non-road equipment, including yard and garden equipment. The MVDA governed a discrete number of contractual issues (on a prospective basis) between manufacturers and their franchisees and dealers.

The MVDA created a highly complex regulatory regime and administrative process that is specifically tailored to respond to specific concerns with the relationship between motor vehicle manufactures and their dealers that frequently sell a single brand of vehicles supplied by a sole-source manufacturer. The wholesale repeal and replacement of the existing statutory scheme established in New Hampshire under the EDA was a massive change in the existing statutory framework.

IV. Legislative History

As the legislative history makes clear, the New Hampshire Legislature intended in 2013 to apply the motor vehicle provisions in the MVDA *only* to products where the "business operations" and "the relationship between the equipment dealers and manufacturers is identical to that of car/truck dealers." However, none of the Legislature's concerns would apply to the distribution of yard and garden tools and equipment. In sharp contrast to the motor vehicle industry, over 200 independent dealers in New Hampshire offer a wide array of relatively inexpensive yard and garden products, produced by dozens of competing manufacturers. The automobile industry is fundamentally different from the yard and garden industries in the following respects:

² ROBERT P. ROGERS, BUREAU OF ECON., FED TRADE COMM’N, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS (1986) (Bureau of Economics Staff Report), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/effect-state-entry-regulation-retail-automobile-markets/231955.pdf>

- The relative size and bargaining strength of the different retailers and dealers vis-a-vis their manufacturers and distributors;
- The number of brands sold by a dealer or retailer;
- The level of investments made by the affected dealers and retailers in a particular manufacturer's brand and products;
- The ability of a dealer to drop a brand and shift to a different manufacturer;
- The registration, titling, and use requirements;
- The different warranty-repair and servicing processes and policies.

V. Adverse Impacts on Competition and Consumers

a. Entrenching Existing Dealers

The MVDA amendments subject to the review of the Motor Vehicle Industry Board ("MVIB") an outdoor power equipment manufacturer's decision to add a dealer to another dealer's claimed market area. The MVIB is a regulatory body with no expertise or experience in these products or this retail market. This review could involve any number of different inefficient outcomes including the MVIB nullifying a manufacturer's explicitly non-exclusive dealer agreements. By limiting the ability of a manufacturer to quickly shift product between dealers, the MVDA effectively entrenches inefficient dealers, reducing volume sold and increasing retail prices while depriving consumers of access to product.

Lawn and garden manufacturers generally choose not to grant a dealer an exclusive territory. OPEI manufacturers are continuously improving their distribution models. They will add and delete dealers, as well as lines sold by such dealers in order to most efficiently and effectively meet varying consumer-demands. Some OPEI products are specialized, higher-end products. Certain dealers will invest heavily in promoting particular types of lawn and garden products, but some dealers will not make such investments as yard and garden equipment is only a small portion of their revenues.

The MVDA limits the ability of manufacturers to select dealers that will make these needed investments. Indeed, an entrenched dealer would have little incentive to make such an investment because it could not be effectively disciplined by the manufacturer who could switch to more engaged dealers. The absence of these dealers could leave consumers without adequate knowledge and experience of the products, which, in turn would harm consumers.

Strong competition among dealers contributes to optimum market-penetration for OPEI manufacturers. That competition benefits consumers by ensuring that pricing and after-sale service are driven by meaningful competition among dealers. The MVDA impairs the ability of yard and garden equipment manufacturers to determine the number of dealers needed to provide an adequate supply of yard and garden equipment in a certain market area.

In similar circumstances, courts have found that protests and potential protests from existing dealers have had a "chilling effect" on new dealership openings.³ In one case, the court found that a statutory provision allowing statewide dealer-protest rights unduly burdened interstate commerce and violated the Commerce Clause. The court noted that the provision drove dealers like Yamaha and Harley-Davidson and franchisees to abandon efforts to establish new dealers in Virginia, for fear of losing investments of time, effort, and money, and that protests were "virtually certain" to occur.⁴ The district court found that those corporate decisions result in "a relative reduction in intra-brand and inter-brand competition."⁵ The district court found that the

³ See *Yamaha Motor Corp., U.S.A., v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005).

⁴ See *id.* at 566, 572 (internal citation omitted)

⁵ *Id.* at 566 (internal citation omitted)

provision created “significant economic burdens chilling the opening of new dealerships,” such as troubles in securing financing and securing a location.⁶

b. Selling Less than Full Line of Products

Under existing contracts, manufacturers of yard and garden equipment reserve the right to sell less than their full line of products to a given dealer. The MVDA requires a manufacturer to make its full line of products available to each dealer irrespective of what the manufacturer or distributor wish or believe is optimal. Product can sit unsold in one distributor’s warehouse where it could move quickly at another. By denying the manufacturer’s the ability to shift product to geographic locations where demand is higher, the MVDA effectively leaves demand unmet in certain areas and oversupplied in others. Consumer welfare is reduced for consumers whose demand is unmet. Consumers are further harmed by the inefficient allocation of resources by the manufacturers who could deploy those resources more effectively, for example by investing those resources in research and development.

c. Warranty Reimbursement

Under existing contracts, manufacturers of yard and garden equipment reserve the right to determine how and in what amounts they will compensate dealers for warranty work. The MVDA eliminates the contractually-agreed to right of a manufacturer to determine compensation and does so by setting mandatory reimbursement rates and establishing detailed, extraordinary procedures for handling claims. This approach opens the warranty system up to abuse furthering increases in retail prices. This abuse can constitute an inefficient transfer payment from the manufacturer to the distributor. Consumers are further harmed by the inefficient allocation of resources by the manufacturers who could deploy those resources more effectively, for example by investing those resources in research and development.

VI. Conclusion

New Hampshire has adopted a dealer-statute that: (1) harms competition and consumers through creating a “chilling effect” on new dealership-openings; and (2) burdens an efficient distribution and warranty-servicing system with unjustified restrictions that will increase retail prices. When currently considering the effect of State dealer laws in the automotive sector, the Commission should broadly consider and respond to all the similar anti-competitive harms to consumers of non-road equipment that are summarized in these comments. We would welcome the opportunity to meet with you to proactively discuss our concerns and suggested solutions.

Respectfully submitted,

Daniel J. Mustico
Vice President, Government & Market Affairs

⁶ *Id.* at 572 (internal citation omitted).