

July 2016
Edition

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California State
Transportation Agency

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New Motor Vehicle Board

In-Site

13th INDUSTRY ROUNDTABLE

The Board hosted its annual Industry Roundtable event on Thursday, March 17, 2016, at the Department of Motor Vehicles' Headquarters in Sacramento. The Board holds this event annually to present topics of interest to industry associations, dealers, manufacturers, lobbyists, private sector vendors as well as other government officials. This year's event had over 70 attendees.

DMV Director, Jean Shimoto, gave some welcoming remarks to kick off the event. The first presenter was Norma Ortega, Chief Financial Officer of CalTrans. She gave an informative update on California's Road Charge Pilot Program and the status of its implementation. Ms. Ortega explained the need for the Road Charge program given the aging road infrastructure, increased repair requirements along with shrinking funding as well as more fuel efficient vehicles on the road. The culmination of these four circumstances result in more funding needed for repairs with less funding being collected via the current gas tax due to more

fuel efficient vehicles on the road. In addition, inflation also erodes the value of taxes collected over time and the gas tax has not been raised in over 20 years.

In 2014, the California Legislature responded with Senate Bill 1077. This bill directed the California Transportation Commission to establish a Technical Advisory Committee ("TAC") to provide a report with recommendations to California State Transportation Agency ("CalSTA") so that CalSTA can implement a pilot program by July 2016 and make a final report of findings and recommendations by July 2017.

The TAC had the following recommendations to CalSTA regarding implementation of the pilot program: there should be 5,000 participants statewide with a diverse range of vehicle types, account managers should include both commercial and State managers, there should be multiple methods for users to provide their mileage and there should be privacy and data security protections.

Finally, the pilot program should be independently evaluated.

After a short break, Halbert Rasmussen, a Partner at Arent Fox, made a presentation regarding the Federal Trade Commission's ("FTC") public workshop held January 19, 2016, in Washington D.C. Mr. Rasmussen's presentation asked the question: Is the FTC grabbing for the wheel of the vehicle franchise system? Mr. Rasmussen began with a summary of the discussion held at the workshop, including a discussion of termination and add-point laws, their effect on bargaining power among dealers and manufacturers, the need for laws to protect investments and a discussion of whether these laws are pro consumer. Additional discussion at the workshop included warranty reimbursement regulation, direct distribution/sales of vehicles to consumers and finally, future trends in regulation of the automotive industry.

The latter part of Mr. Rasmussen's discussion on this topic included the FTC's (cont. on p. 3)

JUNE 28, 2016 MEETING OF THE BOARD

The Board met on June 28, 2016, at Momentum Chevrolet in San Jose, California. The meeting agenda contained administrative matters only, and no dealer/manufacturer disputes were discussed.

The full agenda can be found on the Board's website at www.nmvp.ca.gov.

Following the meeting of the Board, the members toured the Momentum Chevrolet dealership and were provided with information on all facets of the dealership including sales, parts and F&I. This tour is part of the Board's on-going commitment to providing educational opportunities to its members so that they can stay current on the ever changing new motor vehicle industry in California.

2016 BOARD OFFICERS

At its February 10, 2016, General Meeting, the New Motor Vehicle Board ("Board") elected Glenn E. Stevens, Public Member, to serve a third term as the Board's President. Mr. Stevens was appointed by Governor Gray Davis in March 2000, and reappointed in May 2003. He was reappointed by Governor Arnold Schwarzenegger in January 2008, and again reappointed by Governor Jerry Brown in September 2013 and March 2015. Mr. Stevens previously served as the Board's Vice President in 2002 and 2011, President in 2003 and 2004, and is currently chair of the Executive Committee and a member of the Government and Industry Affairs Committee.

Ramon Alvarez C., a Dealer Member, was unanimously elected to serve as the Board's Vice President. He was appointed by Governor Arnold Schwarzenegger in March 2007, and reappointed in November 2010. Governor Jerry Brown reappointed Mr. Alvarez on April 22, 2014. Mr. Alvarez C. has served as a member of the Administration Committee, and as chair and a member of the Fiscal Committee, Board Development Committee, and Government and Industry Affairs Committee. Previously he served two terms as Vice President, and one term as President.

Glenn and Ramon will also serve as the Board's Executive Committee.

WHAT'S NEW ON THE BOARD'S WEBSITE?

Decisions on dispositive motions are now available on the Board's website. There is a searchable log of all such Decisions from 2000 to the present as well as a PDF of each Decision (http://www.nmvp.ca.gov/dispositive/0-dispositive_motions_list.htm).

2016 COMMITTEE MEMBERS

ADMINISTRATION COMMITTEE

Bismarck Obando, Chair
Rahim Hassanally, Member

BOARD DEVELOPMENT COMMITTEE

David C. Lizárraga, Chair
Kathryn Ellen Doi, Member

EXECUTIVE COMMITTEE

Glenn E. Stevens, Chair
Ramon Alvarez C., Member

FISCAL COMMITTEE

Anthony A. Batarse, Jr., Chair
Victoria Rusnak, Vice President

GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE

Ramon Alvarez C., Chair
Glenn E. Stevens, Member

POLICY AND PROCEDURE COMMITTEE

Kathryn Ellen Doi, Chair
Ryan Brooks, Member

NEW PROTEST MAILING LIST

If you would like to receive an e-mail with a PDF of each new protest filed with the Board, please contact Eugene Ohta at (916) 327-7261 or eohta@nmvp.ca.gov.

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(cont. from p. 1) advocacy work via letters or amicus briefs in which “the FTC provides its expertise and advocates for policies that protect consumers and promotes competition.” In this way, some may view the FTC’s advocacy initiatives as an attempt to regulate an area that is already being regulated by states, like the automotive industry. There was good discussion on both sides of these arguments and time can only tell what the future may bring for the many changes that are coming in the automotive industry and how they will be regulated in the future.

The next presentation at the Industry Roundtable also discussed future trends in the automotive industry, specifically autonomous vehicles. Mr. Bernard Soriano, Deputy Director of the Enterprise Risk Management Division of the California Department of Motor Vehicles (“DMV”), gave an update on the current state of autonomous vehicle regulations. The California Legislature tasked the DMV with adopting regulations setting forth requirements for manufacturers’ testing, as well as the operation of, autonomous vehicles on public roadways via Senate Bill 1298 in 2012. An autonomous vehicle is one that is equipped with autonomous technology that has the capability to drive the vehicle without the active physical control or monitoring by a human operator. Testing regulations for manufacturers have been set forth as the following:

- the manufacturer must have \$5 million in insurance, bond or self-insurance,
- a test driver must be in the driver seat during testing and must meet certain requirements,
- the manufacturer must report any accidents to the DMV within 10 days, and
- the manufacturer must also report any unanticipated disengagements of the autonomous technology annually to the DMV.

The manufacturer’s testing permit is valid for one year and certain vehicles are excluded from testing, for example commercial vehicles and motorcycles. Mr. Soriano also gave an update as to the number of crashes that have occurred since testing has begun. The DMV is currently working on drafting regulations regarding the deployment of vehicles for public use on public roads. The DMV also held two public workshops in January and February throughout the state of California to receive public comment and input regarding drafting the autonomous vehicle regulations. The DMV continues to work on the final draft of regulations regarding allowing autonomous vehicles to be driven on our roadways by the public.

After a lunch break there was short presentation by Danielle Vare, Staff Counsel at the New Motor Vehicle Board, describing the Board’s notices, protest filings and statistics. The number of notices, as well as the number of protests, filed in the last nine (9) years was

presented. Notices were broken down by type of notice, vehicle type and manufacturer. Protests were also broken down by type, as well as type of product and manufacturer. Current statistics for 2016 year-to-date were also provided to keep the public informed regarding the status of the industry and work by the Board.

Next, Jonathan Morrison, President of Auto Advisory Services, gave a presentation about “The Struggle to Effectively Respond to Recall Notices”. Mr. Morrison first described recalls and why they arise. Either the National Highway Traffic Safety Administration (“NHTSA”), or a vehicle manufacturer, can trigger a recall on a vehicle for safety or performance defects in a vehicle or a component of a vehicle. There has been a massive increase in vehicle safety recalls, especially in the last seven (7) years. Mr. Morrison went on to describe the issues an automaker faces when attempting to notify a consumer of a recall on his or her vehicle. As a result of safety issues, some automakers have instructed their dealers not to sell any recalled used vehicles in order to protect public safety and maintain control over their product. However, the effects of this land on the dealer, who is left with inventory on their lots that are unsaleable. This results in clogged inventory, storage issues, frozen working capital, depreciation of the vehicle and more. Often-times recalls are made without fixes available for the issue. This leaves dealers unable to effectively manage the recall and consumers concerned about their vehicle’s safety. Mr. Morrison went on to discuss what should be considered by NHTSA and regulators moving forward. Changes need to be made so that the industry has improved access to current recall information and recalls should not be oversimplified for the sake of speed.

Next, Robin Parker, Senior Staff Counsel at the New Motor Vehicle Board, gave an interesting presentation on legislation and new laws affecting the motor vehicle industry in California. There were two (2) new bills mentioned that are of interest to the motor vehicle industry: Assembly Bill (“AB”) 759 and AB 1178. AB 759 cleaned up a number of inconsistencies in the Vehicle Code, it clarified that the good cause factors in Section 3073 apply to both establishment and relocation protests, it deleted references to Article 5 protests for Recreational Vehicles (“RV”) in Sections 3066 and 3067 and added parallel provisions in Sections 3080 and 3081. Further, Section 11705 allows the DMV to suspend or revoke a dealer, manufacturer or distributor license for willful violations of Sections 3064 and 3065. References were added to make this section application to the RV industry as well. Section 11713.3 provides, in part, that it is unlawful to modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 pertaining to motor vehicles. It adds a reference to Article 5 protests so that this Section is also applicable to RV protests. Finally, Section 11713.23 now allows any new RV inventory purchased by an RV dealer, or shipped by the manufacturer, during the period that a written franchise was in effect to be sold even after that franchise has been terminated, cancelled or not renewed. The Board did not anticipate that there will be an increase in the number of protests filed as a result of these amendments.

AB 1178 established a new protest regarding export or sale-for-resale prohibition policies. This new type of protest can be filed by an association. An association is one that is primarily owned by, or comprised of, new motor vehicle dealers and that primarily represents the interests of dealers. This new protest can be brought at any time on behalf of two (2) or more dealers subject to the challenged policy. The Board's authority to hear these protests sunsets on January 1, 2019. As a result of this new protest type which is able to be brought by associations, the Board is also amending its regulations to include associations within the definitions of "protest" and "protestant".

Vehicle Code section 11713.3(y) describes when a manufacturer/distributor is allowed to take an adverse action against a dealer for violating an export or sale-for-resale prohibition policy. In a proceeding challenging an adverse action taken against a dealer, the manufacturer/distributor has the burden of proof. In addition, there is a rebuttal presumption that the dealer did not have reason to know of a customer's intent to export or resell a vehicle in violation of the policy if the dealer caused the vehicle to be registered in California or any other state and the dealer collects or causes to be collected any applicable sales/use tax due to California. This Vehicle Code section also specifies that the manufacturer/distributor's prohibition policy cannot include provisions that expressly or implicitly require a dealer to make further inquiries into a customer's intent, identity or financial ability to purchase or lease a vehicle based on any characteristics defined in the "Unruh Civil Rights Act" found in Section 51 of the Civil Code. Relief for a Section 3085 protest is limited to a declaration that an export or sale-for-resale prohibition policy violates the prohibitions of Vehicle Code section 11713.3(y). No monetary relief may be sought on behalf of the association or any dealers represented by the association. The association has the burden of proof to show that the challenged export or sale-for-resale prohibition policy violates Vehicle Code section 11713.3(y).

In all previous protests heard by the Board regarding automobiles, motorcycles, ATVs, heavy duty trucks or RVs, a hearing is set within 60 days of the order of time and place of hearing. However, in the new Section 3085 protest, the Board is required to fix a time and place of hearing within 60 days of receiving the protest. This does not allow a lot of time for discovery or depositions. However, there are no applicable continuance restrictions placed upon this type of protest, therefore parties may be able to stipulate to a hearing date beyond 60 days from the filing of the protest. The Board is in the process of hearing its first protest under the new legislation with an expected decision in early 2017.

The last presentation of the day was made by John P. Swenson, an attorney at The Scali Law Firm, regarding the impact of autonomous vehicles on the insurance industry. A report by KPMB, a global auditing company, reported that the \$200 billion per year insurance industry will

will be profoundly disrupted by autonomous vehicles in the future. Mr. Swenson first described the three pathways in which autonomous vehicle technology will be enabled: through manufacturers incremental implemental of technology, via high-tech companies implementing self-driving cars and through connected cars which will have vehicle to vehicle and vehicle to infrastructure communication. Currently, there are 30,000-40,000 people killed on the roadways in the United States every year, with 11 million accidents occurring in 2009. 90% of these accidents are caused by driver error. However, autonomous technology is projected to decrease accident frequency by 80% by the year 2040. Vehicles that are equipped with crash prevention technology have 7-15% lower claim frequency under property damage liability coverage. Accident frequency involving late model cars which include improvements in design and safety technology have resulted in lower fatality rates. When there are lower losses claimed in accidents, competition will drive insurance companies to drop prices in order to stay competitive. It has been suggested that premiums paid by consumers could drop as much as 60% in the next 15 years as more autonomous vehicles are on the roads. Autonomous vehicles may save the United States economy up to \$1.3 trillion per year, including savings from accident costs, productivity gain and fuel loss from congestion. Overall it will be interesting to see what the future of driverless cars brings for all industries, including the insurance industry. All presentations made at the Board's Roundtable event can be found on our website at www.nmvb.ca.gov.



NAMVBC WORKSHOP

Two term president of the National Association of Motor Vehicle Boards and Commissions (NAMVBC), Bill Brennan is promising a value packed workshop in Denver this September (September 14 - 17). The NAMVBC Executive Committee is putting final touches to a schedule that includes national automotive authorities MaryAnn Keller and Glenn Mercer. Ms. Keller will discuss current trends in the global automotive industry and Mr. Mercer will focus on the "dealership of tomorrow". Denver's most famous car dealer and former Bronco MVP Super Bowl quarterback, John Elway, will kick-off the workshop at Wednesday's welcoming reception at the offices of Wheeler Trigg O'Donnell LLP. You can view a complete agenda of speakers and panelist at www.NAMVBC.org. The NAMVBC has purposely priced the registration fee at the reasonable amount of \$150.00 (early registration). For first time state regulators, the association will waive the registration fee.

CASE MANAGEMENT UPDATES

Protests:

So far this year there have been 16 protests filed with the Board as follows:

- 4 termination protests (Veh. Code § 3060);
- 2 relocation protests (Veh. Code § 3062);
- 4 establishment protests (Veh. Code § 3062);
- 5 warranty protests (Veh. Code § 3065); and,
- 1 export or sale-for-resale prohibition policy protest (Veh. Code § 3085).

Notices of Termination:

The following table summarizes the number of notices of termination filed this year:

Manufacturer	15-day Notice	60-day Notice	Product
American Honda	0	1	Cars
Infiniti	0	1	Cars
Isuzu Commercial Trucks	0	1	Commercial Trucks
KTM	0	1	Motorcycles
Mitsubishi Motors	0	1	Cars
Pacific Coach Works	1	1	Recreational Vehicle
SSR Motorsports	2	0	Motorcycles, ATVs/UTVs, Scooters
Suzuki Motor	1	0	Motorcycles/ATVs
Thor Motor Coach	0	1	Recreational Vehicle
TOTAL	4	7	

Merits Hearings:

On April 8, 2016, the telephonic merits hearing in *California New Car Dealers Association v. Jaguar Land Rover North America, LLC* (Protest No. PR-2363-16) was held before Administrative Law Judge Diana Woodward Hagle. This is the first Vehicle Code section 3085 protest. The hearing will likely resume in late 2016 or early 2017.

A 10-day merits hearing was set for April 25, 2016, in *Hayward Nissan Corporation dba Hayward Nissan v. Nissan of North America, Inc.* (Protest Nos. PR-2374-13 and PR-2381-13) before ALJ Victor D. Ryerson. However, the termination protests settled after oral arguments on the pre-hearing motions.

Beginning on May 16, 2016, ALJ Woodward Hagle presided over a 5-day merits hearing in *HC Automotive, Inc., dba Hooman Chrysler Jeep Dodge Ram v. Fiat Chrysler Automobiles* (Protest Nos. PR-2429-15, PR-2430-15, PR-2431-15 and PR-2432-15). The consolidated protests pertain to franchisor incentive program claims. It is anticipated that the Proposed Decision will be considered by the Public Board Members in September.

There are four additional hearings tentatively scheduled for the remainder of 2016. The hearings are held at the Board's offices in Sacramento and are open to the public.

PENDING LEGISLATION

Current legislation of interest to the automotive industry in the California legislature includes Assembly Bill 287. This bill is sponsored by the California New Car Dealers Association ("CNCDA") and authored by Assembly Members Gordon, Eggman and Stone. This bill is called the Consumer Automotive Recall Safety Act ("CARS Act") and would prohibit a dealer or rental car company from loaning, renting, or offering for loan or rent a vehicle that is subject to a manufacturer's recall after receiving notice of the recall until the vehicle has been repaired. The act would also prohibit the dealer from advertising or selling a vehicle as "certified" until the recall repair has been made. Finally, the DMV would also be required to include special language in all vehicle registration renewal notices to inform consumers that their vehicle is subject to a recall. If enacted the bill would become operative July 1, 2017, with the exception of Vehicle Code section 11758, which does not become operative until the DMV Director certifies that the DMV has appropriate access to the necessary data within a recall database and available funding to include a recall disclosure statement on the notice of registration renewal for a vehicle subject to a manufacturer's recall. The bill is currently in the Senate's Committee on Transportation and Housing.

A related federal bill just passed called the Fixing America's Surface Transportation Act of 2015 ("FAST Act"). It became effective June 1, 2016, and requires that rental car agencies must fix all open safety defects before renting a vehicle to a consumer. This federal law now prohibits any company with fleets greater than 35 vehicles from renting any vehicle with an unrepaired recall. More information regarding vehicle recalls can be found at www.safercar.gov.

PRESIDENT'S PERSPECTIVE

It is an honor to serve on this Board as its President, and for that I thank my fellow Board Members for again electing me. I also thank the staff, who really do make the President's job so much easier, by being as prepared as they are for all eventualities. So far, 2016 has been an active year. In March, besides its General Meeting, the Board sponsored the 13th annual Industry Roundtable, at the DMV Headquarters. The event was very well attended. During the afternoon session, a member of the audience suggested that new protests filed with the Board be posted on the Board's website. An additional suggestion was made after the meeting, to have dispositive motions posted on the website as well. (See related articles on the Board's new protest mailing list and dispositive motion availability on the website.) If you have any difficulty accessing the Board's website, please contact our staff.

This year, the Board's jurisdiction to hear cases was expanded by AB 1178, sponsored by the California New Car Dealers Association. AB 1178 establishes an export or sale for resale prohibition policy protest and is discussed in greater detail in this publication.

In March, and as the Board's representative, I attended the National Automobile Dealers Association (NADA) annual meeting in Las Vegas. After seeing the NADA floor in good years as well as bad, I can categorically state that this year is going to be a "good year." The participants' energy was high, and the convention was very close to "full." This is bolstered by NADA's Chief Economist Steven Szakaly, who predicts record sales for 2016 of 17.7 million new cars and light trucks.

Finally, new vehicle sales in California continue to be strong. As a consequence, protests between dealers and manufacturers are trending in the "moderate range," as only 16 protests have been filed through June 21, 2016. With a strong economy, and strong new car sales, fewer dealer protests are being filed.

On behalf of the Board, I look forward to successful third consecutive term as your President.

UPCOMING BOARD MEETINGS

- ⇒ September 13, 2016, General Meeting, Sacramento, California
- ⇒ January 18, 2017, General Meeting, Sacramento, California
- ⇒ March 15, 2017, General Meeting, Sacramento, California

In-Site

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