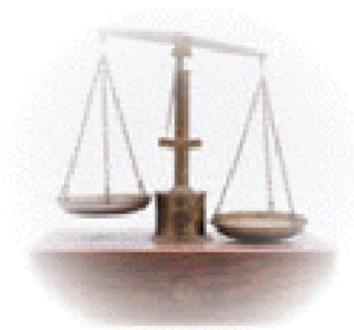




State of California
NEW MOTOR VEHICLE BOARD

***Export or Sale-For-Resale Prohibition
Policy Protest Guide***

Vehicle Code section 3085, et seq.



February 2016

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

1507 21st Street, Suite 330
Sacramento, California 95811
Phone: (916) 445-1888
Facsimile: (916) 323-1632
E-mail: nmvp@nmvb.ca.gov
Web site: <http://www.nmvp.ca.gov>

State of California
EDMUND G. ("JERRY") BROWN JR., Governor

California State Transportation Agency
BRIAN P. KELLY, SECRETARY

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EXECUTIVE STAFF

WILLIAM G. BRENNAN
Executive Director

LEGAL STAFF

ROBIN P. PARKER
Senior Staff Counsel
DANIELLE R. VARE
Staff Counsel

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PREAMBLE

The materials contained herein are intended to be informative and not advisory, limited in scope, and are not intended to be a substitute for careful reading of the specific statutes and regulations that may apply to your particular situation.

All correspondence and protests should be sent to:

New Motor Vehicle Board
ATTN: Legal Department
1507 21st Street, Suite 330
Sacramento, California 95811

Correspondence can also be sent via e-mail at nmvp@nmvp.ca.gov or facsimile at (916) 323-1632. The telephone number of the Board is (916) 445-1888 and the website address is www.nmvp.ca.gov. Detailed information can be found on the Board's website. Please feel free to contact the Board's staff for further information.

All statutory references are to pertinent sections of the Vehicle Code unless otherwise specified. The full text of pertinent sections of the Vehicle Code is available at <http://leginfo.legislature.ca.gov/faces/codes.xhtml> on the Board's website. References to regulations are to Title 13 of the California Code of Regulations. The referenced sections will be noted in the following manner, for example, 13 CCR § 550, et seq. The regulations are also available on the Board's website or at the Office of Administrative Law's ("OAL") website (www.oal.ca.gov). Once you reach the OAL site, under "Sponsored Links", select California Code of Regulations. You will be taken to the California Code of Regulations and can search by title; the Board's regulations are in Title 13. As the Board is a quasi-judicial agency that holds administrative hearings, statutes comprising the administrative adjudication provisions of the Administrative Procedure Act ("APA"; Gov. Code § 11400 through 11529) are applicable. The provisions of the APA are available at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>. Citations to relevant court decisions are interspersed throughout.

The Board also publishes a *Guide to the New Motor Vehicle Board* which details Article 4 (cars, motorcycles, and ATVs) and Article 5 (recreational vehicles) protests, petitions and appeals. An *Informational Guide for Manufacturers and Distributors* is also published to assist manufacturers and distributors in clarifying California's vehicle franchise laws. Both guides are available free from the Board's offices at the above address, or can be accessed and downloaded from the Board's website at www.nmvp.ca.gov.

INTRODUCTION

Assembly Bill 1178, (Stats. 2015, Ch. 526) effective January 1, 2016, was sponsored by the California New Car Dealers Association. It establishes an export or sale-for-resale prohibition protest in Article 6 of the Vehicle Code. An association, which is defined as an organization primarily owned by, or comprised of, new motor vehicle dealers and that primarily represents the interests of dealers, may bring a protest challenging the legality of an export or sale-for-resale prohibition policy of a manufacturer, manufacturer branch, distributor, or distributor branch (herein “manufacturer” or “distributor”) at any time on behalf of two or more dealers subject to the challenged policy pursuant to subdivision (y) of Section 11713.3. (Veh. Code § 3085) The Board’s authority to hear protests submitted by an association sunsets on January 1, 2019. (Veh. Code § 3085.10) The purpose of this publication is to familiarize the reader with these protests.

POWERS AND DUTIES IN GENERAL

The powers and duties of the Board are set out in Vehicle Code sections 3050 and 3051. As a quasi-judicial body, the Board has authority under Vehicle Code section 3050.1(a) to:

- Administer oaths;
- Take depositions;
- Certify to official acts; and,
- Issue subpoenas to compel attendance of witnesses and the production of documents.

Enforcement of Board Orders

There are provisions for sanctions and penalties for violating orders of the Board or the requirements of those sections of the Vehicle Code within the Board’s authority. Obedience to subpoenas and the compliance with discovery procedures can be enforced by application to the Superior Courts. (Veh. Code § 3050.2(a)) Vehicle Code section 3050.2(b) gives the Executive Director authority, at the direction of the Board, upon a showing of failure to comply with authorized discovery without substantial justification, to dismiss a protest or suspend the proceedings pending compliance.

Mandatory Settlement Conferences

In a protest filed with the Board, the Board, its Executive Director, or an Administrative Law Judge (“ALJ”) may order a mandatory settlement conference. (Veh. Code § 3050.4) For any particular proceeding, the settlement conference judge is precluded from hearing the proceeding on the merits or other motions in the case without stipulation by the parties. (13 CCR § 551.11) The failure of a party to appear, to be prepared, or to have the authority to settle the matter at such a conference may result in the Board taking action adverse to that party. (Veh. Code § 3050.4)

EXPORT OR SALE-FOR-RESALE PROHIBITION POLICY PROTEST

Statutory Authority

Vehicle Code section 3050(e) provides for the Board to hear and decide a protest presented by an association challenging a policy of a manufacturer or distributor pursuant to Section 3085.

Filing a Protest

There is no specific statutory time period in the Vehicle Code within which to file a protest involving an export or sale-for-resale prohibition policy protest.

A protest is deemed filed upon its receipt by the Board via regular mail, e-mail or facsimile, or upon mailing of the protest, if it is sent by either certified or registered mail. Accordingly, it is suggested that all protests be either personally filed or mailed by certified or registered mail.

Manufacturer's or Distributor's Notice of Appearance

The respondent shall file a written notice of appearance within 15 days of receipt of the protest. (13 CCR § 585.1) Failure to timely file a notice of appearance shall result in the proceedings being suspended until such time as a notice of appearance is filed.

Filing Fee

A filing fee of \$200, which should be in the form of a check, money order or an authorized credit card charge payable to the New Motor Vehicle Board, must accompany the protest and notice of appearance. In the event of a financial hardship, either the protestant or respondent may submit a request for a fee waiver, requesting that the Executive Director, upon a showing of good cause, waive the \$200 filing fee. Samples are available on the Board's website. (13 CCR § 553.40)

Interested Individuals

Pursuant to Vehicle Code section 3085.2, any interested individual may apply to the Board for permission to appear at the hearing on any protest for the purpose of submitting direct evidence concerning the issues raised in the protest.

Motion for Intervention

Any person, including a Board member, concerned with the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch or representative may file a motion to intervene in a pending proceeding subject to the conditions set forth in 13 CCR § 551.13.

Challenge to Presiding Officer

A party may request disqualification of a Board member or an ALJ for cause prior to the taking of evidence by filing an affidavit stating the grounds for the request. (13 CCR § 551.1) Further, 13 CCR § 551.12(b) entitles a party in a Board proceeding to one disqualification without cause (peremptory challenge) of an assigned ALJ by filing the peremptory challenge with the Board no later than either 20 days from the date of the order of time and place of hearing identifying the ALJ or 20 days prior to the date scheduled for commencement of the hearing, whichever is earlier. (13 CCR § 551.12(b)(1)) Parties are not entitled to a peremptory challenge in any proceeding relating to applications for temporary relief or interim orders. Except for the convenience of the Board or for good cause shown, no hearing shall be continued by the filing of a peremptory challenge.

Amicus Curiae Briefs

The Board, its Executive Director, or an ALJ may, in his or her discretion, allow the filing of amicus curiae briefs. (13 CCR § 551.13)

Required Elements of Protest

The required content of a protest under Vehicle Code section 3085 is as follows:

Content Requirements	Authority
Must be in writing and conform to the provisions of Article 6 commencing with 13 CCR § 593.1.	13 CCR § 583
The association shall simultaneously deliver a \$200 filing fee in the form of a check, money order or authorize a credit card charge payable to the New Motor Vehicle Board, or a request for a fee waiver.	13 CCR § 553.40
The association shall serve a copy of the protest on the manufacturer or distributor and proof of service shall accompany the protest submitted to the Board.	13 CCR § 551.24

Determination of Protest

If there is a hearing, the association has the burden of proof to show that the challenged export or sale-for-resale prohibition policy violates subdivision (y) of Section 11713.3. The relief sought in this protest is limited to a declaration that an export or sale-for-resale prohibition policy of a manufacturer or distributor violates the prohibitions of subdivision (y) of Section 11713.3. No monetary relief may be sought on behalf of the association or any dealers represented by the association.

HEARING PROCEDURES

Pre-Hearing Procedure

Upon receiving a protest, the Board shall institute hearing proceedings similar to those of a formal civil trial, including the scheduling of various pre-hearing conferences, settlement conferences, arrangements for discovery, identification of witnesses, and so on. The Board may impose sanctions if a party fails to comply with the Board's discovery orders or fails to participate properly in a settlement conference.

Discovery

Pursuant to Vehicle Code section 3050.1, the Board may authorize the parties to engage in the civil discovery process. Discovery is limited to requests for depositions and demands for production of documents (Code Civ. Pro. § 2016.010, et seq.), with the exception of provisions for written interrogatories (Code Civ. Proc. § 2030.010). Section 551.6 of the Board's regulations implements and makes specific the Board's procedures for requesting depositions where the witness resides within California or outside of California.

Subpoenas

Authority for issuing subpoenas in Board proceedings is found in Vehicle Code section 3050.1 and 13 CCR § 551.2. Unlike the civil courts, the parties cannot issue their own subpoenas. On the request of any party, the Board, its Executive Director or an ALJ may issue subpoenas for the production of papers, records, and books by a witness or a deponent, and the appearance of a non-party witness or deponent. Hearing subpoenas are issued in accordance with 13 CCR § 551.2(b) and an affidavit is not required to support the request. For a hearing subpoena duces tecum, an affidavit must accompany the request.

Subpoenas for the attendance and testimony of a non-party deponent, or for a subpoena duces tecum for deposition of a non-party, are issued by the Board in accordance with Code of Civil Procedure section 2016.010, et seq., excepting the provisions of section 2020.210, subdivisions (a) and (b). (13 CCR § 551.2(c)) No affidavits are required. Counsel for the parties can issue notices of depositions to parties. (Code Civ. Proc. § 2025.010, et seq.) Subpoenas for out-of-state, non-party witnesses or deponents will be issued by the Board, but need to be enforced in the out-of-state court. (Code Civ. Proc. § 2026.010, et seq.)

Government Code section 11450.30 and 13 CCR § 551.2(e) permit a person served with a subpoena or a subpoena duces tecum to object to its terms by a motion for a protective order, including a motion to quash. The assigned ALJ would resolve the objection. The ALJ may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy.

Following service of the subpoena on the witness or deponent, a copy of the subpoena and executed proof of service shall be filed with the Board. (13 CCR § 551.2(d))

Summary of Board Action

Hearings on protests filed pursuant to Vehicle Code section 3085, may be considered by the entire Board or may, at its discretion be conducted by one of the Board's ALJs. At the hearing, oral argument is heard, evidence is admitted, testimony is received, and a written decision is rendered. The procedures are described in detail in Vehicle Code section 3085.2. The Board, on receiving a protest, does the following:

Step	Action
1	By order fix a time within sixty (60) days of receipt of the protest.
2	Send a copy of the order to the manufacturer or distributor, the protesting association, and all individuals and groups that have requested notification by the Board of protests and decisions by the Board.
3	The Board or an ALJ designated by the Board presides over merits hearings on protests. (See also 13 CCR § 590)

NOTE: Vehicle Code section 3050(e) prohibits a dealer member of the Board from participating, hearing, commenting, advising other members upon, or deciding any matter that involves a protest filed "pursuant to Article 6 (commencing with Section 3085), unless all parties to the protest stipulate otherwise." Vehicle Code section 3085.2(c) states: "[a] member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, a matter involving a protest filed pursuant to this article [Article 6, i.e., protests filed by an association] unless all parties to the protest stipulate otherwise." These constraints ensure procedures that preclude any suggestion of bias or partiality of Board decisions.

Stipulated Decisions

The Board may adopt stipulated decisions and orders without a hearing pursuant to Vehicle Code section 3085.2 to resolve one or more issues raised by a protest filed with the Board. (Veh. Code § 3050.7)

Hearings Open to the Public; Protective Orders

Hearings before the Board or an ALJ designated by the Board are open to the public. For good cause shown, a party may seek an order closing all or part of the hearing or for other protective orders as set forth in Government Code section 11425.20 and 13 CCR § 551.20. The motion may be in writing or made orally on the record. It may be made at the commencement of or during the course of the hearing but must be made as early as is practicable. The motion shall clearly identify the relief sought; the facts, circumstances, and legal authority; and shall include declarations or evidence that support the motion. The ALJ has discretion to allow an oral or written opposition to the motion. When ruling on the motion, the ALJ shall specifically set forth the facts, legal basis, and findings that support any protective order, order to seal parts of the record, or order to close the hearing to the public. The motion, opposition, and any resulting orders then become part of the record.

Failure to Appear at a Hearing

Any party who fails to appear at a hearing will not be entitled to a further opportunity to be heard unless good cause for such failure is shown to the Board or to the ALJ within five (5) days thereafter. The lack of such a showing may, in the discretion of the Board or the ALJ, be interpreted as an abandonment of interest by the party in the subject matter of the proceeding. (13 CCR § 589)

Decision of the Board

When matters are submitted to the Board for decision, or the Board receives a proposed decision of the ALJ, the Board shall take the matter under submission and conduct deliberations in executive session. The deliberations of the Board shall be in private and shall not be reported. (Veh. Code § 3008; 13 CCR § 588)

The decision of the Board shall be in writing, contain findings of fact, and a determination of the issues presented. The Board shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. The decision becomes final when delivered or mailed to the parties and there are no provisions for reconsideration or rehearing. The Board shall act within 30 days after the hearing, within 30 days after the Board receives a proposed decision when the case is heard before an ALJ, or within a period necessitated by Section 11517 of the Government Code, or as may be mutually agreed upon by the parties. (Veh. Code § 3085.4)

Court Reporting and Transcripts of Board Proceedings

The Board arranges for a court reporter for all hearings on the merits of a protest and for all hearings on motions that may be dispositive. Parties to actions before the Board may order transcripts of hearings and arrange for delivery and payment directly from the court reporter.

Under the authority of 13 CCR § 551.7 the Board may assume all or part of the cost of reporting any proceedings or may allocate costs entirely to one of the parties or apportion it among the various parties at its discretion. For all merits hearings and dispositive motions (those that result in a final determination of the protest before the Board), reporting costs will be allocated as follows:

Circumstances	Reporting Costs including Appearance and Transcript Delivery Fees, Per Diem Costs, Realtime Set-Up Fees, Expedite Rates, Cancellation Fees and any other Costs	Transcript Fees
Hearings on the merits and dispositive motions - First Day	Board (excluding Realtime set-up fees)	Board (requesting party or parties may order and pay for copies of official transcripts)
Hearings on the merits and dispositive motions - After First Day	Participating parties	Participating parties
Other motions (venue, consolidation, continuation, etc.)	Requesting party or parties	Requesting party or parties
Pre-hearing conference	Requesting party or parties	Requesting party or parties
Discovery disputes (ruling on objections to production, motions to quash, etc.)	Requesting party or parties	Requesting party or parties

As indicated above, for the first hearing day (merits or dispositive motion), the Board will be responsible for arranging reporting services, paying for the reporter's appearance fee, the delivery fee and any other costs excluding the Realtime set-up fees, and the Board's cost of the hearing transcript. Counsel will remain responsible for purchasing their own transcript, if desired. For each subsequent day, the Board will arrange reporting services and will order the parties, on an equal basis, to pay the contracted court reporter service for the reporter's appearance fee, the delivery fee and any other costs including Realtime set-up fees, and the Board's cost of the hearing transcript. Counsel will remain responsible for purchasing their own transcript(s), if desired.

In any other instance, where any party or parties deem reporting services necessary (including requests for reporter's appearance and for transcripts), the requesting party (or parties on any basis they agree upon) will be responsible for arranging reporter services and will be responsible for payment to the reporting service of the reporter's appearance fees, the delivery fee, and any other costs. Counsel can utilize the Board's contracted reporting service. The requesting party or parties will also be responsible for providing the Board with a certified copy of the transcript. Counsel will remain responsible for purchasing their own transcript(s), if desired.

JUDICIAL REVIEW

Appeal to Superior Court

Judicial review of final orders and decisions of the Board may be sought in Superior Court pursuant to Code of Civil Procedure section 1094.5 via a petition for writ of administrative mandamus. A petition for writ of administrative mandamus questions whether the Board proceeded without or in excess of jurisdiction, whether there was a fair hearing, and whether there was any prejudicial abuse of the Board's discretion. Parties seeking judicial review of a final order or decision should refer to Vehicle Code sections 3085.6.

11	In the Matter of the Protest of)	
)	
12	NAME OF ASSOCIATION,)	Protest No. PR-
)	
13	Protestant,)	PROTEST
)	
14	v.)	[Vehicle Code section 3085]
)	
15	NAME OF MANUFACTURER OR)	
	DISTRIBUTOR,)	
16)	[Dates of the hearing and any
	Respondent.)	future pre-hearing or
17)	settlement conferences]

Introduction:

State the name of the party filing the document, the type of document filed (e.g., protest, response, motion) and the applicable statutory authority.

20 Protestant, [Name of Association], files this protest under the provisions of
 21 California Vehicle Code section 3085, with reference to the following facts:

Body:

Using numbered paragraphs, state the allegations in a clear and chronological order.

22 1. Protestant is an association as defined in Vehicle Code section 3085(b) challenging the legality of an export or sale-for-resale prohibition policy of [manufacturer or distributor] on behalf of [identify two or more dealers subject to the challenged policy]. These dealers are subject to the policy being challenged pursuant to subdivision (y) of Vehicle Code section 11713.3. Protestant's mailing address is [address] and telephone number is [telephone number].

2. Respondent is a licensed [manufacturer or distributor] authorized to do business and doing business in the State of California. Respondent's mailing address is [address] and telephone number is [telephone number].

3. Protestant is represented in this matter by [attorney/law firm], whose address and telephone number are [address and telephone number].

4. [Outline the particulars of the dispute].

5. Protestant and its attorneys desire to appear before the Board. The estimated length of hearing on this matter will take [number of days] to complete.

6. A Pre-Hearing Conference is requested.

7. WHEREFORE, Protestant prays for: (A declaration that an export or sale-for-resale prohibition policy of [manufacturer or distributor] violates the prohibitions of subdivision (y) of Vehicle Code section 11713.3.)

Dated:

Signed:
