1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888
Contact Person: Nicole Angulo
www.nmvb.ca.gov

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
MINUTES

The New Motor Vehicle Board ("Board") held a General meeting on December 11, 2014, in Hearing Room #1, at the Board's offices.

2. ROLL CALL

Glenn Stevens, President and Public Member, called the meeting of the Board to order at 10:36 a.m.

Present:
Anthony A. Batarse Jr.
Ryan L. Brooks (arrived 10:49 a.m.)
Kathryn Ellen Doi
Rahim Hassanally
Bismarck Obando
Glenn E. Stevens

William G. Brennan, Executive Director
Robin P. Parker, Senior Staff Counsel
Danielle R. Vare, Staff Counsel
Matthew W. Kubicek, Deputy Attorney General

Absent:
Ramon Alvarez C.
David C. Lizárraga
Victoria Rusnak

3. PLEDGE OF ALLEGIANCE

Ms. Doi led the members and staff in the Pledge of Allegiance.

4. APPROVAL OF THE MINUTES FROM THE JULY 15, 2014, GENERAL MEETING, AND SEPTEMBER 17, 2014, AND SEPTEMBER 19, 2014, SPECIAL MEETINGS

Mr. Obando moved to adopt the July 15, 2014, General Meeting minutes, and September 17, 2014, and September 19, 2014, Special Meeting minutes. Mr. Hassanally seconded the motion. The motion carried unanimously.

5. INTRODUCTION AND WELCOME OF RECENTLY APPOINTED BRANCH CHIEF OF OCCUPATIONAL LICENSING FOR THE DEPARTMENT OF MOTOR VEHICLES, TIM CORCORAN - BOARD DEVELOPMENT COMMITTEE

Mr. Stevens welcomed Tim Corcoran, newly appointed Branch Chief of Occupational Licensing for DMV. Bill indicated that Tim previously worked at the Bureau of Automotive Repair so he was familiar with the industry. Mr. Corcoran indicated that he is new to the department but not to the state and automotive industry. He is familiar with the Board, and new and used motor vehicle dealers with his past experience.

Mr. Brennan also welcomed Mike McGowan, a DMV Deputy Director who functions as a "trouble shooter." Three new Board staff were introduced to the members: Danielle Vare, Staff Counsel; Makalla Turner, Office Assistant; and Holly Xiong, Office Assistant.

6. **ORAL PRESENTATION BEFORE THE PUBLIC MEMBERS OF THE BOARD**

SAN JOSE YAMAHA POWERSPORTS v. YAMAHA MOTOR CORPORATION, U.S.A.
Protest No. PR-2394-14

This matter was postponed until after Agenda Item 11, which was taken out of order.

7. **CLOSED EXECUTIVE SESSION DELIBERATIONS**

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Pursuant to Government Code section 11517(c)(2), the Board could adopt the proposed decision, make technical or other minor changes, reject the proposed decision and remand the case, or reject the proposed decision and decide the case upon the record.

CONSIDERATION OF PROPOSED ORDER

SAN JOSE YAMAHA POWERSPORTS v. YAMAHA MOTOR CORPORATION, U.S.A.
Protest No. PR-2394-14

Consideration of the Administrative Law Judge's Recommendation that Respondent's Motion to Dismiss Protest Be Granted; and Proposed Order Granting Respondent's Motion to Dismiss, by the Public Members of the Board.

This matter was postponed until after Agenda Item 11, which was taken out of order.

8. **OPEN SESSION**

This matter was postponed until after Agenda Item 11, which was taken out of order.

9. **CLOSED EXECUTIVE SESSION**

Pursuant to Government Code section 11126(e)(1), the Public Members of the Board shall convene in a closed Executive Session.

DISCUSSION AND ADVICE FROM LEGAL COUNSEL CONCERNING PENDING LITIGATION

NISSAN NORTH AMERICA, INC. v. CALIFORNIA NEW MOTOR VEHICLE BOARD; SANTA CRUZ NISSAN, INC. dba SANTA CRUZ NISSAN
Sacramento Superior Court No. 34-2014-80001963
Protest No. PR-2358-13

Discussion and advice from the Board's legal counsel concerning pending litigation, by the Public members of the Board.

This matter was postponed until after Agenda Item 11, which was taken out of order.

10. **OPEN SESSION**

This matter was postponed until after Agenda Item 11, which was taken out of order.

11. **ANNUAL UPDATE CONCERNING THE DEVELOPMENT AND USE OF THE BOARD'S WEBSITE - ADMINISTRATION COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Eugene Ohta updating the development and use of the Board's website. Mr. Ohta reported that there weren't many changes from the previous report other than a couple of icons were added to the home page to assist consumers with locating the consumer mediation form and we are now able to keep track of how many hits we get per page through our web master. Mr. Brennan indicated that the emphasis on the Consumer Mediation Program has shown positive results by the increasing number of cases. Mr. Obando suggested that the Board work with DMV through their social media to promote the mediation program. Mr. Brennan indicated that he will look into this and report back at the next meeting. As indicated in the memo, the chart below reflects the top 10 pages that were viewed during fiscal year 2013-2014:

	Website Pages	Annual Hits
1	Home Page	9,610
2	Mediation	6,794
3	Forms	929
4	Protest	798
5	Agenda/Meetings	794
6	Board Members	775
7	Statutes	555
8	Regulations	487
9	FAQ	477
10	Site Map	117

6. ORAL PRESENTATION BEFORE THE PUBLIC MEMBERS OF THE BOARD

Mr. Stevens read the following statement "comments by the parties or by their counsel that are made regarding any proposed decision, ruling, or order must be limited to matters contained within the administrative record of the proceedings. No other information or argument will be considered by the Board." Furthermore, he indicated that since this is an adjudicative matter as described in Government Code section 11125.7(e), therefore members of the public may not comment on such matters.

SAN JOSE YAMAHA POWERSPORTS v. YAMAHA MOTOR CORPORATION, U.S.A.
Protest No. PR-2394-14

Oral comments were presented before the Public Members of the Board. John Masi in Pro Per for the Protestant did not make an appearance. Colm A. Moran, Esq. of Hogan Lovells US LLP represented Respondent.

7. CLOSED EXECUTIVE SESSION DELIBERATIONS

Pursuant to Government Code section 11126(c)(3), Vehicle Code section 3008(a), and Title 13, California Code of Regulations, sections 581 and 588, the Board convenes in closed Executive Session to deliberate the decisions reached upon the evidence introduced in proceedings that were conducted in accordance with Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Pursuant to Government Code section 11517(c)(2), the Board could adopt the proposed decision, make technical or other minor changes, reject the proposed decision and remand the case, or reject the proposed decision and decide the case upon the record.

CONSIDERATION OF PROPOSED ORDER

SAN JOSE YAMAHA POWERSPORTS v. YAMAHA MOTOR CORPORATION, U.S.A.
Protest No. PR-2394-14

Consideration of the Administrative Law Judge's Recommendation that Respondent's Motion to Dismiss Protest Be Granted; and Proposed Order Granting Respondent's Motion to Dismiss, by the Public Members of the Board.

The Public Members of the Board deliberated in closed Executive Session. Mr. Obando moved to adopt the Administrative Law Judge's findings and the Executive Director was directed to dismiss the Protest with prejudice. Mr. Brooks seconded the motion. The motion carried unanimously.

8. **OPEN SESSION**

The Public Members returned to Open Session. Ms. Parker announced the decision in *San Jose Yamaha.*

9. **CLOSED EXECUTIVE SESSION**

Pursuant to Government Code section 11126(e)(1), the Public Members of the Board shall convene in a closed Executive Session.

DISCUSSION AND ADVICE FROM LEGAL COUNSEL CONCERNING PENDING LITIGATION

NISSAN NORTH AMERICA, INC. v. CALIFORNIA NEW MOTOR VEHICLE BOARD; SANTA CRUZ NISSAN, INC. dba SANTA CRUZ NISSAN
Sacramento Superior Court No. 34-2014-80001963
Protest No. PR-2358-13

Discussion and advice from the Board's legal counsel concerning pending litigation, by the Public members of the Board.

The Public Members of the Board convened in closed Executive Session. The members participated in a discussion of this matter with Mathew W. Kubicek, Deputy Attorney General III. An attorney-client work product privilege memorandum from Robin Parker, Senior Staff Counsel was provided to the members to justify the closed Executive Session.

10. **OPEN SESSION**

The members returned to open session and Mr. Stevens announced that no Board action was taken.

12. **ANNUAL REPORT ON BOARD DEVELOPMENT PROGRAM - BOARD DEVELOPMENT COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Robin Parker reporting on the Board Development Program. Ms. Parker reported that the proposed education for 2015 focuses on touring a car dealership, autonomous vehicles, and the Department of Consumer Affairs Arbitration Certification Program.

13. **BOARD FINANCIAL CONDITION REPORT FOR THE PREVIOUS FISCAL YEAR - FISCAL COMMITTEE**

The members were provided with a memorandum from Bill Brennan, Dawn Kindel, and Suzanne Luke concerning fiscal year 2013-2014. Ms. Luke indicated that the Board expended 81% of its appropriated budget through the end of fiscal year 2013-2014. Furthermore, the Board was appropriated $1.6 million but only expended $1.3 million, with an unexpended appropriation of $300,000. As indicated in the memo, the current reserve balance is $881,364 (additional expenditures will be deducted after release of

Governor's Report - Pro Rata and DMV Administrative charges). Ms. Kindel indicated that the dealer fees were up $65,000 from the first quarter for the previous fiscal year. Mr. Brennan mentioned that manufacturer fees were also up $210,000 from the previous fiscal year.

Mr. Brooks inquired whether in light of the increased surplus if it is time to reduce the fees. Mr. Brennan indicated that fees should not be reduced because the Board's reserve balance, while increasing, is not sufficient. It appears to Mr. Brennan that the Board fees are sufficient and no increase is necessary. Mr. Brooks wanted to make sure that the Board's fees do not become a tax if the reserves get too high. He wanted to know what the proper reserve amount was and if there is any legal authority or policy for establishing a reserve. Furthermore, Mr. Brooks suggested that there be a 3% to 4% escalation of the reserve balance to reflect increases in salaries. After a lengthy discussion, Mr. Brennan indicated that he would look into this and report back to the Board.

14. CONSIDERATION OF OUT-OF-STATE TRAVEL PLANS FOR FISCAL YEAR 2015-2016 - FISCAL COMMITTEE

The members were provided with a memorandum from Bill Brennan and Dawn Kindel concerning the out-of-state travel plans for fiscal year 2015-2016. As indicated in the memo, in the current fiscal year of 2014-2015 all of the Board's out-of-state trip requests were denied since they were not "mission critical". The Board was not allocated any funds for this type of travel. Staff expects the same to occur in fiscal year 2015-2016. Should that not be the case, staff needs to be prepared to submit travel approval requests on short notice. In order to do that, Board approval must be secured now. The requests will not be submitted until the Administration lifts the current restrictions on out-of-state travel. Mr. Stevens encouraged the Public Members to attend the NADA Convention in San Francisco on January 22-24. Members Doi, Brooks, Obando, and Stevens expressed interest in attending.

Mr. Brooks moved to approve the six out-of-state trips requested. Mr. Hassanally seconded the motion. The motion carried unanimously.

15. DISCUSSION AND CONSIDERATION OF THE UPCOMING INDUSTRY ROUNDTABLE - GOVERNMENT AND INDUSTRY AFFAIRS COMMITTEE

The members were provided with a memorandum from Bill Brennan and Danielle Vare concerning the March 26, 2015, Industry Roundtable. Ms. Vare reported that the staff has a number of potential topics and speakers but welcomes feedback from the members. Mr. Stevens suggested hybrid sales declining in light of falling gas prices. Mr. Brooks mentioned that it is not just the hybrid cars but electric and clean fuel ones as well. Additional topics included privacy and vehicle tracking systems on cars, an investigative report similar to the odometer fraud report last year, and scanning cameras that read license plates. The staff will continue to work with the members to finalize the topics and speakers.

16. **CONSIDERATION OF REVISIONS TO PROPOSED REGULATORY AMENDMENTS TO SECTION 551.21 OF TITLE 13 OF THE CALIFORNIA CODE OF REGULATIONS (SANCTIONS - BAD FAITH ACTIONS) - POLICY AND PROCEDURE COMMITTEE**

The members were provided with a memorandum from Bill Brennan and Robin Parker concerning revisions to proposed regulatory amendments to Section 551.21 of Title 13 of the California Code of Regulations pertaining to sanctions – bad faith actions. Ms. Parker indicated that after the recent request for sanctions in *McConnell Chevrolet Buick, Inc.* v. *General Motors, LLC* (Protest Nos. PR-2382-14 and PR-2383-14), further amendments were necessary to clarify this regulation.

The proposed revisions are as follows:

§ 551.21. Sanctions ~~- Bad Faith Actions~~.

(a) In any proceeding before the board or an ALJ, no party or representative of a party shall engage in or participate in any actions or tactics that are frivolous, or that are intended to cause or will result in unnecessary delay.

(b) For purposes of this section, "party" or "representative of a party" includes, but is not limited to, a party's officer, director, managing agent, dealer principal or the equivalent, or their attorney.

~~(a) The ALJ may recommend ordering a party, a party's representative or both, to pay reasonable sanctions, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.~~

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order or ruling of the board or an ALJ, including a failure to comply timely with a pre-hearing conference order or discovery order.

(2) "Frivolous" includes, but is not limited to ~~means~~:

(A) Totally without merit as there is an absence of reasonable support, under the facts or law, for making or opposing the motion(s), or for the failure to comply; or

(B) For the ~~sole~~ purpose of harassing an opposing party or counsel.

(C) Actions or tactics, whether consisting of affirmative conduct or failure to act or respond, that will result or do result in unnecessary delay or costs, or are otherwise not in good faith.

(c) A party asserting a violation of this section may, by way of written motion in compliance with Article 1, section 551.19, or oral motion made on the record during reported proceedings, request that the board or an ALJ recommend that the board impose sanctions upon a party, or party's representative, or both.

(d) An ALJ presiding over the matter who believes there has been a violation of this section may on his or her own initiative recommend that the board impose sanctions upon a party, or party's representative, or both.

~~(b)~~ (e) The board shall not order sanctions, or an ALJ shall not recommend an award of sanctions, without providing the party or party's representative against whom sanctions are sought notice and an opportunity to be heard.

(f) The board or ALJ shall make determinations as to whether the actions or tactics were frivolous based upon the administrative record and any additional testimony or

documentary evidence presented.

~~(c)~~ (g) ~~Whether there has been bad faith by a party shall be determined by the ALJ based upon testimony under oath or other evidence.~~ Any proposed order recommending sanctions by the ALJ or board order imposing sanctions shall be on the record, or in writing, setting forth the factual findings on which the recommended or board ordered sanctions are based, as well as setting forth the factual findings as to the reasonableness of the sanctions, including the reasonableness of any amount(s) to be paid.

~~(d)~~ (h) A proposed order recommending an award of sanctions shall be considered by the board members at their next regularly scheduled meeting. A determination not to award sanctions ~~is~~ shall not be considered by the board members and is final upon issuance by the ALJ.

~~(e)~~ (i) The board members' consideration to affirm, reject or modify the ALJ's award of sanctions does not alone constitute grounds for continuance of any previously scheduled dates in the proceeding.

(j) If the motion for sanctions is granted, the board may order or an ALJ may recommend that the party or party's representative or both pay the movant's reasonable expenses and attorney's fees incurred in bringing and pursuing the motion. However, attorney's fees and expenses will not be ordered if:

(A) The movant filed the motion before attempting in good faith to obtain compliance by the opposing party without board action;

(B) The opposing party's noncompliance, nondisclosure, response, or objection was substantially justified; or

(C) Other circumstances make an award unjust.

(k) If the motion for sanctions is denied, the board may order or an ALJ may recommend, after giving an opportunity to be heard, the movant or movant's representative or both to pay the party or party's representative who opposed the motion reasonable expenses and attorney's fees in bringing and pursuing the motion for such expenses and attorney's fees. However, attorney's fees and expenses will not be ordered if the motion for sanctions was substantially justified or other circumstances make an award unjust.

(l) If the motion for sanctions is granted in part and denied in part, the board may order or an ALJ may recommend that an award of reasonable expenses and attorney's fees incurred in connection with bringing or opposing the motion be apportioned.

Note: Authority cited: Section 3050(a), Vehicle Code. Reference: Sections 128.5, 2023.010 2023.020, 2023.030, and 2023.040, Code of Civil Procedure; Section 11455.30, Government Code; and Section 3050.2, Vehicle Code.

Mr. Obando moved to adopt the proposed regulation. Ms. Doi seconded the motion. The motion carried unanimously.

Mr. Stevens read the following statement into the record:

> Given the Board's decision to go forward with the proposed regulation, I hereby delegate to the Executive Director the ministerial duty of proceeding through the rulemaking process in compliance with the Administrative Procedure Act. Notice of the proposed rulemaking will be published in the California Regulatory Notice Register and will be sent to the Public Mailing List. During the public comment period, I want to invite and encourage written and oral comments. Additionally, a public hearing at the Board's

offices may be held to accept oral and written comments.

By the Board instructing staff to go forward with the proposed regulation, this does not necessarily indicate final Board action. If any written or oral comments are received, the full Board will consider the comments and reconsider the text of the proposed regulation. Furthermore, if the staff decides that substantive modifications to the proposed text are necessary, the Board will consider those modifications at a noticed meeting. However, non-substantive changes involving format, grammar, or spelling suggested by the Office of Administrative Law or the staff will not be considered by the Board because they are non-regulatory in nature. They will be considered by the Executive Committee and ultimately reported to the Board at a future meeting. If there are no written or oral comments received, then the rulemaking process will proceed without further Board involvement.

17. CONSIDERATION OF 2015 RULEMAKING CALENDAR - POLICY AND PROCEDURE COMMITTEE

The members were provided with a memorandum from Bill Brennan and Ms. Parker concerning the 2015 rulemaking calendar. Mr. Obando noted that the reference to "bad faith actions" in the Rulemaking Calendar needed to be deleted in light of the amendments approved in Agenda Item 16. Mr. Stevens moved to adopt the 2015 Rulemaking Calendar as corrected. Mr. Obando seconded the motion. The motion carried unanimously.

18. ANNUAL REPORT CONCERNING BOARD ADOPTED POLICIES - POLICY AND PROCEDURE COMMITTEE

The members were provided with a memorandum from Bill Brennan and Robin Parker concerning the annual review of Board adopted policies. Ms. Parker indicated the new policies that were approved in 2014 pertain to revisions to the assignment of Board administrative law judges, updated the Board delegations in light of Senate Bill 155, and noted the resignation of Judge Carlson.

19. ANNUAL REPORT ON THE ASSIGNMENT OF CASES TO BOARD ADMINISTRATIVE LAW JUDGES - POLICY AND PROCEDURE COMMITTEE

The members were provided with a memorandum from Bill Brennan, Robin Parker, and Danielle Vare concerning the assignment of cases to Board ALJs in 2014. Ms. Vare indicated in the memo there was one merits hearing which included a telephonic remand hearing, four mandatory settlement conferences, and seven discovery hearings. Ms. Vare indicated that there were four additional law and motions hearings since the memo was prepared for a total of 13 law and motion hearings.

20. DISCUSSION CONCERNING LEGISLATION - POLICY AND PROCEDURE COMMITTEE

a. Enacted Legislation of Special Interest: Assembly Bill 988 (Assembly Member Jones)

b. Enacted Legislation of General Interest: Assembly Bill 1732 (Assembly Member Stone)

c. Pending Federal Legislation of General Interest: None

The members were provided with a memorandum from Bill Brennan and Robin Parker concerning legislation. Ms. Parker reported that Senate Bill 988 added recreational off-highway vehicles and utility terrain vehicles to the definition of ATV, which makes them within the Board's jurisdiction but it is anticipated that there will be no additional workload as a result. These dealers and manufacturers will also be licensed by DMV. Assembly Bill 1732 pertains to advertising the prior ownership of a vehicle and also the use of the term rebate, which is not within the Board's purview.

21. EXECUTIVE DIRECTOR'S REPORT

A. Administrative Matters.
B. Case Management.
C. Judicial Review.
D. Notices Filed Pursuant to Vehicle Code sections 3060/3070 and 3062/3072.
E. Other.

Mr. Brennan provided the members with a report on Administrative Matters that identified all pending projects, the Board staff and committee assigned, estimated completion dates, and status. Mr. Brennan indicated that the Board was fully staffed and happy that Danielle Vare was on board. Additionally, Mr. Brennan reported that the Board will not be increasing its fees. Finally, in term of a major expenditure the Board will purchase a new copier at a cost of $30,000 to $40,000.

Ms. Parker reported that 27 protests are pending. Additionally, 31 protests have been filed with the majority for terminations and eight for franchisor incentives. Only 29 notices of termination were issued.

With regards to judicial matters, Ms. Parker reported that three writs were pending. Ms. Parker indicated that the Board filed an Answer in Santa Cruz Nissan; Mega RV is in bankruptcy; and a briefing schedule and hearing date have been set in Capacity of Texas although the Board is not participating in that writ.

22. SELECTION OF BOARD MEETING DATES FOR 2015

The members were provided with a memorandum from Bill Brennan concerning Board meeting dates for 2015. The members went off the record for this discussion. Ms. Parker announced that the following meetings were scheduled for 2015:

- February 11, 2015, General Meeting, Glendale/Pasadena area;
- March 25, 2015, General Meeting, Sacramento; and,

- March 26, 2015, Industry Roundtable, Sacramento.

23. **ANNUAL REPORT OF STAFF PARTICIPATION IN THE OUR PROMISE CAMPAIGN FORMERLY THE CALIFORNIA STATE EMPLOYEES CHARITABLE CAMPAIGN (CSECC)**

Eugene Ohta and Suzanne Luke co-chaired the campaign this year. Mr. Brennan indicated that the Board raised a total of $2,400 for the 2014 campaign through generous donations made by Board Members, Administrative Law Judges and staff, and through the fundraising events; it was a very successful campaign.

24. **CLOSED EXECUTIVE SESSION**

Pursuant to Government Code section 11126(a)(1), all members of the Board shall convene in a closed Executive Session.

CONSIDERATION OF ANNUAL PERFORMANCE REVIEW FOR EXECUTIVE DIRECTOR - EXECUTIVE COMMITTEE

The members convened in Closed Executive Session to discuss Agenda Item No. 24.

25. **OPEN SESSION**

The Public Members returned to Open Session. Mr. Stevens announced that no Board action was taken.

26. **PUBLIC COMMENT (GOV. CODE § 11125.7)**

No additional public comment was presented.

27. **ADJOURNMENT**

With no further business to discuss, the meeting was adjourned at approximately 12:50 p.m.

Submitted by

WILLIAM G. BRENNAN
Executive Director

APPROVED:

Glenn E. Stevens
President
New Motor Vehicle Board