



DEPARTMENT OF MOTOR VEHICLES

INVESTIGATIONS DIVISION

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**REPORT OF INVESTIGATION
CONFIDENTIAL**

DATE: 02/11/2020
CASE #: 19C4L30570

SUBJECT:

Volvo Group North America, LLC, Volvo Car USA
Care by Volvo



CONFIDENTIAL

REPORT PREPARED BY: Gary Costantino, Investigator #501

Synopsis – Executive Summary

Procedural Setting: On August 15, 2019, the New Motor Vehicle Board (NMVB) heard a California New Car Dealers Association (CNCDA) petition, and answer by Volvo, regarding Volvo's implementation of a "subscription" service called Care by Volvo (CbV). The NMVB then granted the relief CNCDA requested and directed the Department of Motor Vehicles (DMV) to investigate and determine whether implementation of CbV violated laws. This investigation included a review of the record before the NMVB, interviews with Volvo dealers, review of Volvo's website, review of CbV contracts and an interview with Volvo representatives.

Volvo Entities and Franchisees: There are a variety of relevant Volvo entities involved that are wholly owned subsidiaries of Volvo Car Corporation: Volvo Cars North America (VCNA), Volvo Cars USA (VCUSA), Volvo Car Financial Services Auto Leasing Company (VCFSALC), and Volvo Car Financial Services (VCFS). The acts of these entities derive from and are imputed to Volvo (they are collectively referred to as "Volvo"). Volvo also has a "franchise agreement" with each of 26 independently owned and DMV licensed retail dealers (Dealers) in California.

What is Care by Volvo? On November 29, 2017, Volvo Car USA launched CbV in the United States. CbV is marketed as a "subscription" but is substantially a 2 year lease for a monthly fee that includes use of the vehicle for 15,000 miles per year, auto insurance, maintenance, excess wear protection, road hazard, tire and wheel protection, and an option to upgrade to a newer model after 12 months, but excludes tax, title and registration fees. From the CbV website, customers select a participating Volvo model and trim level under the "subscription" program. As part of the process Volvo confirms the customer's credit and insurance eligibility. Afterwards, a Volvo Concierge member will coordinate the date and time for vehicle delivery at the customer's preferred Volvo dealership. The dealer will assist the customer in completing all paperwork and execute delivery of the vehicle to the customer.

CbV Implementation: Volvo began to offer the CbV "subscription" directly to consumers via Volvo's website. Volvo released a "hot" new model XC40 allocated to Dealers through a routine formula but also through port stock reserved for priority allocation to CbV subscribers. Prior to CbV and continuing through and after CbV's launch, the Dealers also leased Volvo cars to consumers typically through traditional 3 year leases. To implement CbV participating Dealers were required to sign a dealer lease agreement addendum (Addendum) that made Dealers limited agents of Volvo. Without signing the Addendum Dealers would not get allocated port stock XC40's. The Addendum allowed

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Volvo to control how the Dealers offered CbV and to use dealer employees to consummate CbV transactions.

According to the January 16, 2019, complaint filed with the New Motor Vehicle Board (NMVB), the CNCDA contends CbV's subscription program and the implementation of the program, violates California law. CNCDA's petition requested the NMVB direct the Department of Motor Vehicles (DMV) to conduct an investigation into Volvo's "Subscription" program, CbV. In the petition the CNCDA alleged:

1. CbV creates competition between the manufacturer and the dealers, in violation of Vehicle Code section 11713.3.
2. Volvo failed to give written notice to franchisees and the NMVB prior to the implementation of CbV, in violation of Vehicle Code section 3060(b).
3. CbV gives preferential treatment in allocating vehicles and referring sales to dealerships controlled in part by Volvo, in violation of Vehicle Code section 1173.3(u).
4. CbV undermines the purpose of Vehicle Code section 11713.19, which prohibits payment packing.

Violation #1 – Manufacturer Competition With Dealers: When Volvo offered the same line-make XC40 directly to consumers for "subscription" lease, then Volvo began competing with the Dealers. When Volvo offered the XC40 subscription through its website, which is accessible and exchanges information with consumers everywhere in California, then Volvo was competing in the same line-make of vehicle in each dealer's relevant market area (RMA). When Volvo used dealer employees Volvo controlled to consummate CbV transactions, this constituted Volvo competing with the Dealers from inside each dealership, which is within the RMA. Volvo's competition in the same line-make within a 10 mile RMA of each dealer violated Vehicle Code § 11713.3(o)(1).

Violation #2 – Franchise Modification Without Notice/Protest: When Volvo had the Dealers sign the Addendum, making the Dealers agents of Volvo, rather than independent of Volvo as in the franchise agreement, then Volvo modified the Dealers franchise agreement. A franchise agreement modification required notice to the NMVB and each dealer to give them an opportunity to protest. Volvo did not give notice to the NMVB or the Dealers. This violated Vehicle Code § 3060(b)(1) and Title 13, California Code of Regulations § 593.1.

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Allocation of XC40's and Factory Controlled Dealers: Dealers were required to sign the Addendum to participate in CbV. When a dealer signed, they became an agent of Volvo. This made signatories factory controlled Dealers; not because Volvo owned them but because Volvo, in part, controlled them. Not all Dealers signed the Addendum and participated in CbV. Without participating in CbV Dealers would and did not receive the port stock XC40's reserved for CbV. "Millennials" are understood to demand "subscriptions" in higher proportion than other consumers and tend to be located in certain specific geographic areas. Dealers with an area of responsibility that includes a higher number of millennials would, and did, receive a higher allocation of port stock XC40s.

Violation #3 – Allocation of XC40's Discriminated in Favor of Factory Controlled, In Part, Dealers: When Volvo allocated XC40's from port stock to Dealers offering CbV then Volvo discriminated in favor of factory, in part, controlled dealerships and discriminated against any dealership that did not participate in CbV. When Volvo allocated from port stock XC40's to Dealers in geographic areas with higher numbers of millennials then Volvo did not make XC40's available pursuant to a reasonable allocation formula that is applied uniformly to all Dealers. This violated Vehicle Code §11713.3(u)(1).

Violation #4 - Illegal Price Packing Did Not Occur: All of the goods and services included in a CbV are identified upon initial contact with inquiring consumers. The price or payment for the subscription is not inflated, or the maturity of a sale or lease extended, to disguise actual charges for goods or services added by the dealer to the contract. Therefore, CbV did not violate Vehicle Code § 11713.19.

Other Violations or Concerns Discovered as a Result of the Investigation:

Required Vehicle Lease Contract Disclosures Not Present: The CbV leases examined identify the lease cost and other required disclosures as well as the cost of auto insurance. The costs for maintenance, excess wear protection, road hazard, tire and wheel protection, are also required to be, but are not, separately itemized. This violated Civil Code § 2985.8(c)(2)(D) and (G).

Prohibition Against Waiver of Notice/Protest Obligations/Rights: As previously stated, a franchise agreement modification requires notice to the NMVB and

Dealers, and an opportunity to protest. A dealer lease agreement addendum does not require such notice and opportunity to protest. A manufacturer, distributor, or affiliate thereof, is prohibited from obtaining an agreement or waiver that modifies or disclaims a manufacturer or distributor's obligations, or the

right or privilege of a dealer, to notice or opportunity to protest, set forth in Vehicle Code § 3060 et seq., including Vehicle Code § 3060(b)(1).

Waiver of Obligation to Give Notice and Opportunity to Protest: When VCFS had Dealers sign the Addendum, which changed the relationship of parties as set forth in a franchise agreement from being independent dealers to being agents of Volvo, then Volvo used the Addendum to accomplish a franchise modification. This made the Addendum substantially a waiver of Volvo's obligation to give notice of the franchise modification to the NMVB and Dealers, and the opportunity to protest, and constituted an affiliate of Volvo obtaining a waiver of that obligation which is specifically prohibited under the Vehicle Code. This violated Vehicle Code §11713.3(g)(1)(A).

Concerns "Subscription" May Be "Misleading": Vehicle Code § 11713(a) prohibits use of any untrue or misleading word or statement in an advertisement. Volvo advertises a "subscription" but the contract consumers sign is labeled "California Motor Vehicle Lease Agreement, Care by Volvo." "Subscription" may mislead a consumer to believe they can opt out and cancel the subscription at any time whereas a "lease" is understood to be binding for an extended period of time, which is the duration of the lease. Volvo baiting consumers with the word "subscription" and then switching consumers to a "lease" when executing the contract may be deemed "misleading." This issue was identified even though the DMV was not directed to investigate it. Consequently, DMV does not reach a conclusion on this issue in this report.

Potential Legal Consequences: A violation of Vehicle Code § 11700 et seq., or a rule or regulation adopted pursuant thereto, (violations 1, 2, 3, and 5 above) constitutes cause for license discipline pursuant to Vehicle Code § 11705(a)(10). There are 26 counts of violations 1, 2, 3 and 5.

INVESTIGATION:

Upon receipt of the referral from NMVB, DMV Investigations confirmed the following occupational licenses issued to Volvo affiliates:

The DMV Occupational Licensing database showed OL#: 49551 was issued to Therence Pickett, Ken Trolle and Dennis Slagle, DBA: Volvo Group North America, LLC (A DMV licensed Auto-Commercial Manufacturer), at 7900 National Service Road, Greensboro, NC 27409.

The DMV Occupational Licensing database showed OL#: 95508 was issued to Michael Gregory Thomas, DBA: Volvo Car USA, LLC (A DMV licensed Distributor), at 8835 Research Drive, Irvine, CA 92618.

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VCFSALC and VCFS are not licensed by the DMV Occupational Licensing Branch as these groups do not meet the definition of a dealer or a manufacturer under the Vehicle Code.

The investigation of the complaint began with a review of Volvo's internet site, CbV transactions, contracts, dealer files, Volvo Car Financial Services (VCFS) addendum to lease agreement, Volvo Retail Agreement, and Volvo memos provided to the department by the parties to the complaint. Interviews with Volvo franchise dealers and Volvo representatives were done. As a result, DMV responds to the NMVB directive as set forth below.

Violation #1: Does CbV create competition between the Manufacturer and the dealers, in violation of VC 11713.3?

APPLICABLE LAW

Vehicle Code § 11713.3(o)(1) - *It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:*

To compete with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.

The CNCDA alleged, "CbV creates unlawful competition between manufacturer and dealers: it diverts customers away from dealers to Volvo with the apparent ultimate goal of bypassing the franchise model entirely."

A review of Volvo's website, Volvo Car USA Memo, dated November 22, 2017, and CbV dealer transactions and file reviews, showed that CbV transactions originate with the consumer going online to the CbV website, selecting a participating Volvo model and placing an order. Volvo confirms the consumer is credit and insurance eligible. Volvo confirms the order and a Volvo Concierge coordinates a time and date between the consumer and dealer for delivery. The dealer is recommended to the consumer based on the consumer's zip code, however, the consumer may select a Volvo dealer of their choice.

After a date and time is confirmed for delivery the vehicle is wholesaled and delivered to the dealer. The vehicle is invoiced to the dealer and placed in dealer inventory. The consumer goes to the dealership reviews and signs the "California

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Motor Vehicle Lease Agreement, Care by Volvo" lease contract and takes delivery of the vehicle. The dealer retails the CbV vehicle to VCFS, which is documented on a Bill of Sale. The vehicle is registered showing VCFS Auto Leasing Company as the Lessor and the consumer as the Lessee.

Per the November 22, 2017 Volvo Car USA memo announcing CbV to Volvo representatives and retail dealers, "The margin qualification for CbV is the same for any wholesaled vehicle. As a result, 8% behind the line margin is paid to the dealer in the same way as any car subject to the same qualifications." In other words, CbV alleges dealers are adequately compensated for the subscription transaction. This is also stated in Volvo's response to the CNCDA's petition.

Six different Volvo franchise dealers were interviewed throughout Northern and Southern California. Participating Dealers stated they earned approximately 8% from a CbV transaction. All Dealers stated they would earn more on a traditional lease or sale, approximately \$2,000 to \$4,000 more, than a CbV transaction. Some Dealers interviewed also stated they could not offer a standard lease package equivalent to a CbV lease, for the same price.

This investigation found that VCFS and Volvo Car USA are wholly owned subsidiaries and affiliates of Volvo Car Corporation. These subsidiaries are "Volvo" and each of their acts derive from and are imputed to Volvo. Volvo is both a manufacturer and distributor and VCFS is an affiliate of these entities.

A relevant market area (RMA) is defined as an area within a 10 mile radius of a dealership. Prior to CbV dealers offered leases either financed through VCFS or other financial institutions. CbV is a product offered by Volvo, the manufacturer, and VCFS, an affiliate, directly to consumers. CbV was primarily marketed as available for XC40's the manufacturer would allocate from port stock. Dealers are also allocated XC40's for lease or sale.

The manufacturer and dealers are both competing in leasing the same line-make financed with competing financial products. Volvo offers CbV via the manufacturer's website. Volvo's website exchanges information with consumers statewide, including inside each dealer's RMA. The Addendum makes dealers agents of Volvo and controls how the dealers offer CbV. The dealers, as limited agents of Volvo, are in part controlled by Volvo, the manufacturer. Volvo offers, and controls the offer, of CbV through the dealers.

The manufacturer subscription lease competes against the traditional leases dealers sold because it is less expensive and precludes dealers from add-ons to the transactions. Volvo is competing with each dealer in the RMA through the

dealership property using a dealer employee as its own agent. Volvo is competing in each dealer's RMA via its website marketing CbV. Therefore, Volvo is competing with its franchised dealers in the same line-make in their RMA in violation of Vehicle Code § 11713.3(o)(1). This constitutes cause for license discipline as that section interacts with Vehicle Code § 11705(a)(10).

Violation #2: Did Volvo fail to give written notice to Franchisees and the NMVB about CbV, in violation of VC 3060(b)?

APPLICABLE LAW

Vehicle Code § 3060(b)(1) – Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee written notice thereof at least 60 days in advance of the modification or replacement.

Title 13, California Code of Regulations § 593.1 - All written notices pursuant to Vehicle Code section 3060, 3062, 3070, or 3072 shall be:

(a) Separately issued to each franchisee;

Vehicle Code § 11713.3 - It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:

(g) (1) Except as provided in paragraph (3), to obtain from a dealer or enforce against a dealer an agreement, provision, release, assignment, novation, waiver, or estoppel that does any of the following:

(A) Modifies or disclaims a duty or obligation of a manufacturer, manufacturer branch, distributor, distributor branch, or representative, or a right or privilege of a dealer, pursuant to Chapter 4 (commencing with Section 11700) of Division 5 or Chapter 6 (commencing with Section 3000) of Division 2.

As previously stated, VCFS and Volvo Car USA are wholly owned subsidiaries of Volvo Car Corporation. DMV has issued manufacturer and distributor licenses to Volvo Group North America, LLC and Volvo Car USA. These licensed subsidiaries are "Volvo" and each of their acts derive from and are imputed to Volvo.

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Volvo Car USA has a "franchise agreement" labeled a "Retailer Agreement" with each of its 26 independently owned and operated retail dealerships in California. The franchise agreement defines the dealers as independent of Volvo. To implement CbV the dealers were required to execute an "Addendum to Dealer Lease Agreement." The Addendum made each dealer a limited "Agent" of VCFS, and therefore of Volvo. The Addendum defines and controls how the dealers are to offer consumers CbV. The Addendum defining and controlling CbV caused the dealers to be controlled in part by VCFS and Volvo.

This investigation found the Addendum changed the dealers from being independent of Volvo to being agents of Volvo. The dealers cannot be independent of Volvo and agents of Volvo at the same time. Using the Addendum to convert dealers to agents modified the franchise agreement, which had defined them as independent. A franchise agreement modification requires notice to the NMVB and an opportunity to protest. Volvo gave no notice to the NMVB and dealers of the franchise modification and opportunity to protest and this violated Vehicle Code § 3060(b)(1) and Title 13, California Code of Regulations § 593.1. This constitutes cause for license discipline pursuant to vehicle Code § 11705(a)(10).

Violation #3: Does CbV give preferential treatment in allocating vehicles and referring sales to dealerships controlled in part by Volvo, in violation of VC 11713.3(U)?

APPLICABLE LAW

Vehicle Code § 11713.3(u)(1) - *It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:*

To unfairly discriminate in favor of a dealership owned or controlled, in whole or in part, by a manufacturer or distributor or an entity that controls or is controlled by the manufacturer or distributor. Unfair discrimination includes, but is not limited to, the following:

(A) The furnishing to a franchisee or dealer that is owned or controlled, in whole or in part, by a manufacturer, branch, or distributor of any of the following:

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- (i) *A vehicle that is not made available to each franchisee pursuant to a reasonable allocation formula that is applied uniformly, and a part or accessory that is not made available to all franchisees on an equal basis when there is no reasonable allocation formula that is applied uniformly.*

The CNCDA alleged, "CbV violates VC 11713.3(u) by, among other things, furnishing to CbV dealer vehicles that are not made available to non-CbV dealers pursuant to a reasonable allocation of Formula and effectively directing inventory away from non CbV dealers."

As previously stated, VCFS and VCUSA are wholly owned subsidiaries and affiliates of Volvo Car Corporation. These subsidiaries are "Volvo" and each of their acts derive from and are imputed to Volvo. Volvo is both a licensed manufacturer and distributor and VCFS is an affiliate.

This investigation found that when CbV was implemented, the XC40 was the "hottest" most marketable new vehicle. CbV subscriptions were marketed as primarily available for the XC40. Dealers were compelled to sign the Addendum to offer CbV to receive XC40s reserved for subscribers from port stock. Dealers that signed the Addendum would receive priority allocation of XC40's from port stock. Dealers who declined to sign the Addendum, or not participate in CbV, would not receive XC40s from port stock.

Dealers that signed the Addendum agreed to be agents of Volvo and became in part controlled by Volvo. Dealers with higher numbers of younger affluent customers, considered "millennials" would have greater demand for CbV subscriptions. Allocation of XC40's from port stock based on demand of "millennials" in a dealer's area of responsibility is not a formula applied uniformly to all dealers. Dealers did not complain that XC40's were allocated unfairly but that they were difficult to obtain. One dealer that did not participate in CbV received no port stock XC40's. If half the dealers did not offer CbV than half of the dealers would have been denied port stock XC40's.

The structure of CbV resulted in Volvo unfairly discriminating in favor of dealerships controlled in part by Volvo, which offered CbV, in allocating XC40's from port stock, and to dealers with high demand from "millennials" for subscriptions and those are not an allocation formula uniformly applied to all dealers. The structure of CbV distributed XC40's according to an allocation formula not applied uniformly and that violated Vehicle Code § 11713.3(u)(1). This constitutes cause for license discipline as that section interacts with Vehicle Code § 11705(a)(10).

Violation #4: Does CbV undermine the purpose of VC 11713.19, which prohibits payment packing?

APPLICABLE LAW

Vehicle Code § 11713.19 - (a) *It is unlawful and a violation of this code for the holder of any dealer's license issued under this article to do any of the following:*

(1) *Negotiate the terms of a vehicle sale or lease contract and then add charges to the contract for any goods or services without previously disclosing to the consumer the goods and services to be added and obtaining the consumer's consent.*

(2) (A) *Inflate the amount of an installment payment or down payment or extend the maturity of a sale or lease contract for the purpose of disguising the actual charges for goods or services to be added by the dealer to the contract.*

(B) *For purposes of subparagraph (A), "goods or services" means any type of good or service, including, but not limited to, insurance and service contracts.*

Civil Code § 2985.8 - (a) *A lease contract shall be in writing, and the print portion of the contract shall be printed in at least 8-point type and shall contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party.*

(c) *A lease contract shall disclose all of the following:*

(2)(C) *The premium for each policy of insurance.*

(2)(D) *The amount charged for each service contract.*

(2)(G) *An itemization by type and agreed-upon value of each good or service included in the gross capitalized cost other than those items included in the disclosures required in subparagraphs (A) to (F), inclusive.*

The CNCDA alleged "The Care by Volvo program undermines the purpose of VC Section 11713.19, which prohibits payment packing." They went on to state that "CbV's flat monthly rate conceals the actual cost of the CbV vehicle and of bundled services (e.g., insurance maintenance) and fails to disclose cost will vary

between CbV subscribers. When CbV customers go to the dealership to pick up their car, they learn, for the first time, the breakdown of costs upon receipt of the CbV contract."

Through this investigation, a review of CbV website showed everything included in a CbV subscription/lease. The website showed features included in CbV lease are: monthly payment, insurance coverage, factory-scheduled maintenance, excess wear protection, tire and wheel protection, replacement wiper blades, replacement brakes, and 15,000 miles annually.

The consumer selects a vehicle from the CbV website, and before submitting personal information to start the subscription process, they are given a monthly price for that vehicle excluding taxes, title and registration.

A review of approximately 23 CbV lease contracts showed:

- Cost of insurance itemized (section 25).
- The Lessor would pay for regularly scheduled maintenance, repairs, roadside assistance, replacement of wiper blades, brake pads and repair or replacement of tires damaged by road hazards (Section 30).
- The Lessor will waive up to \$1000 in excessive wear and use (Section 31).

Vehicle Code 11713.19(a)(1) states it is unlawful for a dealer to negotiate the terms of a vehicle sale or lease contract and then add charges to the contract for any goods or services without previously disclosing to the consumer the goods and services to be added and obtaining the consumer's consent. No goods or services were added to the contract, after the terms were negotiated and the goods and services advertised by CbV were listed in the CbV Lease Contract.

Also, CbV vehicles are transferred to dealer inventory before the dealer completes a subscription lease between Volvo and the consumer, therefore the statute applies to the dealers.

However, aside from the usual required disclosures for a lease, the lease agreement only discloses the price of the insurance premium to the consumer, but not the cost of maintenance, roadside assistance, and Volvo Concierge, etc.

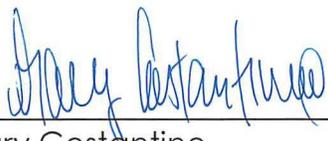
Civil Code §2985.8(c)(2)(D) requires disclosure of "the amount charged for each service contract" (maintenance is included in the "subscription") and (c)(2)(G) requires disclosure roadside assistance and Volvo Concierge if those costs are included in the gross capitalized cost.

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This violation is not cause for license discipline under VC 11705(a)(12), which establishes violations of the Automobile Sales Finance Act as causes for license discipline, but not violations of the Vehicle Leasing Act.

RECOMMENDATIONS:

A copy of this report has been submitted to the California New Motor Vehicle Board for evaluation.



Gary Costantino
Investigator

Badge #501

2-28-2020

Date

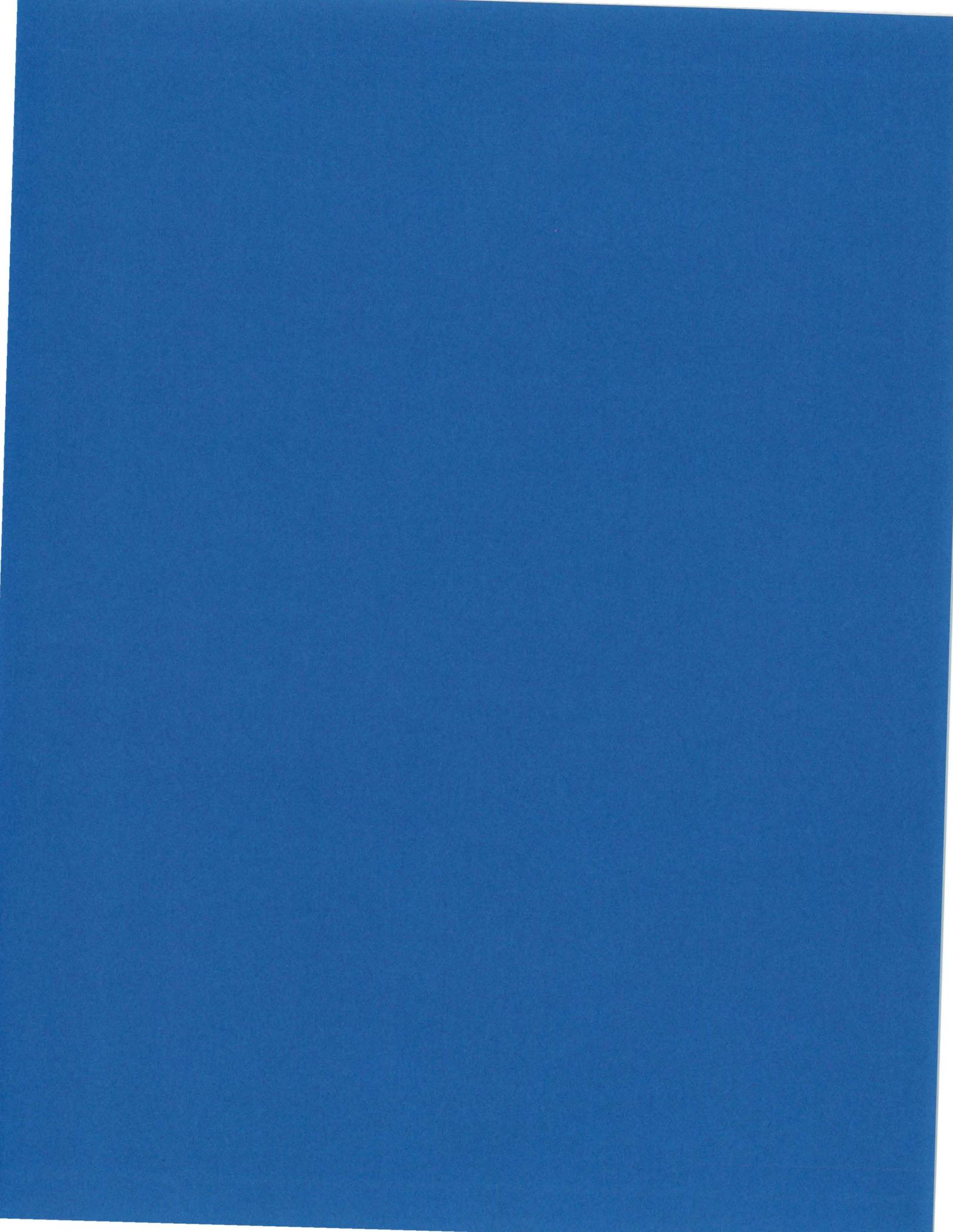


Tom Edwards
Deputy Chief

Badge #93

3/2/2020

Date



ATTACHMENTS:

1. Petition filed by the California New Car Dealers, dated 01/16/2019, requesting the California New Motor Vehicle Board (NMVB) direct the DMV to conduct an investigation into Care by Volvo (CbV).
2. DMV Occupational License printout for Volvo Group North America, LLC (OL#: 49951).
3. DMV Occupational License printout for Volvo Car USA (OL#: 95508).
4. Memo from the NMVB, dated 08/19/2019, requesting DMV conduct an investigation into Care by Volvo.
5. Volvo Car USA memo, date 11/22/2017, announcing the launch of CbV.
6. Volvo Car US Invoice for CbV purchased by Volvo franchise dealer.
7. California Motor Vehicle Lease Agreement, CbV lease contract.
8. Volvo Car Financial Services (VCFS) Bill of Sale for CbV vehicle.
9. Volvo's response to CNCDA's petition to the NMVB.
10. Volvo Retailer Agreement.
11. VCFS, Addendum to dealer lease agreement.
12. Organizational chart for Volvo provided by Volvo.