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Who Wants to Drive? Is the FTC Grabbing for the Wheel of the Vehicle Franchise System?

Presented by

Bert Rasmussen

Arent Fox LLP

Washington, DC | New York, NY | Los Angeles, CA | San Francisco, CA

March 17, 2016

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Auto Distribution



Current Issues & Future Trends

JAN 19, 2016

9:00AM

CONSTITUTION CENTER

400 7th St SW, Washington, DC 20024 | [Directions & Nearby](#)

TAGS: [Automobiles](#)

EVENT DESCRIPTION

The Federal Trade Commission held a one-day public workshop on January 19, 2016, 9 am - 5:30 pm, to explore competition and related issues in the context of state regulation of motor vehicle distribution, and to promote more informed analysis of how these regulations affect businesses and consumers. The workshop, consisting of presentations and discussion, focused on the following topics: (1) the regulation of dealer location; (2) laws relating to reimbursement for warranty services; (3) restrictions on manufacturers' ability to engage in direct sales to consumers; and (4) new developments affecting motor vehicle distribution, such as autonomous vehicles, connected cars, and the rise of subscription-based automobile sharing services.

9:30 am

State Regulation of Dealer Networks

Most states closely regulate the ability of automobile manufacturers to add new dealerships, shut down existing dealerships or move dealerships to new locations. This panel will explore the purpose and effect of these laws from the perspective of both market participants and consumers. On balance, do these laws benefit or harm consumers and competition?

Panelists:

- Jim Anderson, Founder, President & CEO, Urban Science
- Carl Chiappa, Partner, Hogan Lovells
- Aaron Jacoby, Partner, Arent Fox
- Joseph Roesner, President, Fontana Group
- Professor Henry Schneider, Cornell University

Moderators:

- James Frost, Office of Policy & Coordination, FTC
- Patrick Roach, Office of Policy Planning, FTC

Panel One – Termination & Add-Point

- **Laws address continuing unequal bargaining power**
 - **Laws needed for investment protection**
 - **Laws are pro-consumer**
 - **Bargaining power has changed - Larger dealer groups**
 - **Contractual obligations diluted**
 - **Pro-consumer benefits disputed**
-

Panel One – Termination & Add-Point

- **Nothing shows innovation impeded by these laws**
- **Laws stifle change; are one-size-fits-all; harm innovation**
- **Vehicle distribution of great significance to the states and economy**
- **Vehicle distribution is similar to distribution of other products**

Panel One – Termination & Add-Point

- **Joint action by dealers to negotiate better contractual terms prohibited by antitrust law and unworkable**
- **Dealers could negotiate long-term contracts offering protection similar to termination and add-point statutes.**
- **Create stability**
- **Create inflexibility**

11:15 am

Warranty Reimbursement Regulation

When dealers repair vehicles covered by a manufacturer warranty, manufacturers reimburse the dealer for the cost of the labor and parts used to effectuate the repair. Many states directly regulate this reimbursement process, establishing detailed formulas for calculating reimbursement rates. This panel will discuss both the benefits and drawbacks of state regulation in this area, with a particular focus on consumer welfare considerations.

Panelists:

- James Appleton, President, New Jersey Coalition of Automotive Retailers
- Daniel L. Goldberg, Partner, Morgan, Lewis & Bockius
- Professor David Sappington, University of Florida
- Richard Sox, Partner, Bass Sox Mercer

Moderator:

- Nathan Wilson, Bureau of Economics, FTC
- James Frost, Office of Policy & Coordination, FTC

Panel Two – Warranty Reimbursement

- **Laws prevent OEMs shifting costs to dealers; let dealers help consumers realize full warranty value**
- **Dealers must perform warranty work; can't negotiate rate with OEM**
- **Unusual for any law to set a minimum price on any goods or services**
- **The market or contract should drive the warranty pricing**

2:15 pm

Direct Distribution

Some states restrict the ability of car makers to sell their vehicles directly to the ultimate consumer, mandating the use of independent, franchised dealers. Several new entrants into automobile manufacturing have sought to bypass or overturn these restrictions and deal directly with the public. Are restrictions on direct distribution in this industry in the public interest? This panel will include experts on both sides of this contentious issue.

Panelists:

- Professor Dan Crane, University of Michigan
- Maryann Keller, Managing Partner, Maryann Keller & Associates
- Todd Maron, General Counsel, Tesla Motors
- Steven McKelvey, Partner, Nelson Mullins
- Paul Norman, Partner, Boardman & Clark
- Joel Sheltroun, Vice President of Government Affairs, Elio Motors

Moderators:

- Patrick Roach, Office of Policy Planning, FTC
- Paolo Ramezzana, Bureau of Economics, FTC

Panel Three – Direct distribution

- **Tesla, Elio prohibitions:** “It's a very, very small minority of states that restrict our ability to sell directly” [vs. states prohibiting competition [or dual distribution] with franchised dealers]
- **GM argument:** direct sale exceptions for startups/new technology companies with no-dealers discriminates against GM
- **Flexibility argument:** Dealer model to be used in most cases, but with exceptions for necessity or innovation.

Panel Three – Direct distribution

- **Failed experiments:** Ford’s retail network experiment in 1997 – terminated in 2002; GM Brazil’s Celta in 2000 – terminated in 2006 due to “high cost of selling online and operating distribution centers.”
- **Intra-Brand Competition.** Beneficial to consumers in dealer model, a benefit that is lost in a direct sales only model
- **Unfair competition** - manufacturers can manipulate allocation, pricing, and other aspects of the distribution system to favor their own retail outlets

4:00 pm

Future Trends

If current press reports are accurate, big changes may be coming soon to the ways people use automobiles. As new technologies such as autonomous vehicles, connected cars and car sharing services become more prevalent, how might existing regulatory structures need to change? What will these new ways of using automobiles mean for the traditional, franchised distribution system in place today? How should the interests of competition and consumers be protected?

Panelists:

- Avery Ash, Director of Federal Relations, American Automobile Association
- Ashwini Chhabra, Head of Policy Development, Uber Technologies
- Robbie Diamond, Founder, President and CEO, Securing America's Future Energy
- Professor Fiona Scott Morton, Yale University
- Professor Bryant Walker Smith, University of South Carolina
- Peter Welch, President, National Automobile Dealers Association

Moderators:

- Ellen Connelly, Office of Policy Planning, FTC
- Patrick Roach, Office of Policy Planning, FTC

Panel Four – Future Trends

- **Thoughts about the future:**
 - Autonomous vehicles
 - Ride sharing
 - Vehicle ownership

- **Ownership changes / Regulatory changes?**
 - Expanded customer base (elderly, physically challenged, etc.)
 - Contracting individual customer base?
 - Expanded fleet customer base?
 - Change in miles travelled per year?



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Policy » Public Comments » #632: FTC to Host Public Workshop Examining the U.S. Auto Distribution System Workshop Will Explore Competition, State Regulations, and Emerging Trends in the Industry

#632: FTC to Host Public Workshop Examining the U.S. Auto Distribution System Workshop Will Explore Competition, State Regulations, and Emerging Trends in the Industry

MATTER NUMBER: P131202

COMMENTS

1. Boyer & Ritter LLC - Daniel Thompson - Mar 4, 2016 #24136
2. National Association of Minority Automobile Dealers - Damon Lester - Mar 4, 2016 #26490
3. Peter Ferrara - Mar 4, 2016 #24256
4. Outdoor Power Equipment Institute, Inc. - Daniel Mustico - Mar 4, 2016 #26895
5. Bose McKinney & Evans LLP - Ronald Smith - Mar 4, 2016 #24257
6. Massachusetts State Automobile Dealers Association - Robert O'Koniewski - Mar 4, 2016 #27292

Related Releases

December 14, 2015
FTC to Host Public Workshop Examining the U.S. Auto Distribution System

Related Events

January 19, 2016
Auto Distribution: Current Issues & Future Trends



March 4, 2016

Via Web

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

Re: Auto Distribution Workshop — NADA Comments
Project No. P131202

Dear Secretary:

The National Automobile Dealers Association (NADA)¹ submits the following comments in response to both (1) the Notice entitled "Auto Distribution: Current Issues and Future Trends/A Federal Trade Commission Workshop" (Notice) that the Federal Trade Commission (FTC or Commission) released in the above captioned matter² and (2) the workshop that was conducted in this matter on January 19, 2016 (Workshop).

Introduction

NADA has a long history of working with federal regulatory agencies, including the FTC, to promote improvements to the auto distribution system in the United States. Accordingly, NADA welcomes the opportunity to work with the Commission and members of

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Federal Trade Commission
Auto Distribution Workshop, Project No. P131202
March 4, 2016

Comments of the Association of Global Automakers, Inc.

The Association of Global Automakers, Inc. (“Global Automakers”) appreciates the opportunity to comment on the Federal Trade Commission’s Auto Distribution Workshop (“Workshop”).

Global Automakers represents international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Our member companies have invested \$52 billion in U.S.-based production facilities, have a combined domestic production capacity of 4.5 million vehicles, and directly employ more than 97,000 Americans at more than 275 production, design, R&D, sales, finance and other facilities across the United States.

Dealer termination and RMA law



California New Car Dealers Association

March 3, 2016

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

**Re: Comments of California New Car Dealers Association regarding FTC
workshop on state automobile distribution regulation**

Dear Commission Members:

The following comments are respectfully submitted for the record in the matter of the workshop on state automobile distribution regulation conducted by the FTC on January 19, 2016 (the "Workshop") and are submitted on behalf of the California New Car Dealers Association ("CNCDA"). CNCDA is a non-profit organization whose members are California new motor vehicle dealers. Over 1,100 dealers are CNCDA members, representing approximately 85% of all California new motor vehicle dealers.

automobile dealers generally rely exclusively on
business, powersports dealers



**MOTORCYCLE
INDUSTRY
COUNCIL**



March 4, 2016

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mr. Roach and Mr. Frost:

The Motorcycle Industry Council (MIC) is a not-for-profit, national trade association representing manufacturers¹ and distributors of motorcycles, scooters, motorcycle/ATV parts and accessories and members of allied trades. The Specialty Vehicle Institute of America (SVIA) is the national nonprofit trade association which represents manufacturers and distributors of all-terrain vehicles in the United States. The Recreational Off-Highway Vehicle Association (ROHVA) is a national industry organization representing manufacturers and distributors of recreational off-highway vehicles, also known as side-by-sides. Together, these organizations represent what we herein refer to as the powersports industry which encompasses motorcycles and off-highway vehicles (OHVs).

State Action Doctrine – Supreme Court

- ***Parker v. Brown*, 317 U.S. 341 (1943):** States and state agencies are immunized from liability under federal antitrust laws.
- ***California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980):** State action immunity extends to private parties if they 1) act pursuant to a “clearly articulated and affirmatively expressed” state policy, and 2) are subject to active state supervision when advancing that policy.”

State Action Doctrine – Supreme Court

- Municipalities and “substate governmental entities” receive state action immunity if they meet the clearly articulated state policy requirement. See, e.g., *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010-11 (2013) (applying rule for substate entities); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985) (applying rule for municipalities); see also *N.C. State Bd.*, 135 S. Ct. at 1112-13.
- *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 135 S. Ct. 1101 (2015): upholds state action immunity doctrine; imposes above two private actor requirement on state agencies where a controlling number of decision makers are active market participants in the occupation that the board regulates

State Action Doctrine – Supreme Court

- **New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978)**

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding law prohibiting any producer of petroleum products from operating a retail service station in the state) (doctrine implicitly invoked only as to Robinson Patman Act question)

FTC Competition Advocacy



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When courts, government offices, or other organizations consider cases or policy decisions that affect consumers or competition, the FTC may offer insight through [amicus briefs](#) or [advocacy letters](#). In these matters, the FTC provides its expertise and advocates for policies that protect consumers and promote competition.

In addition, companies, industry groups, consumer organizations, and others petition the FTC to [approve merger remedies](#), and to [revise rule-makings](#), [initiate investigations](#), or [take other action](#).

The [Office of Policy Planning](#) helps to guide the agency's advocacy and policy work and the [Office of General Counsel's amicus briefs](#) provide the courts with the agency's perspective on various issues.

FTC Competition Advocacy

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When government bodies and other organizations consider cases or policy decisions that affect consumers or competition, the FTC may offer insight and expertise to decision makers by filing an advocacy letter. To find a specific filing, use the filters on this page.

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FTC Staff Comment to the West Virginia House of Delegates Regarding SB 597 and the Competitive Implications of Provisions Regarding "Cooperative Agreements" Between -- and Possible Exemptions From the Federal Antitrust Laws For -- Health Care Providers

March 2016

MATTER NUMBER: V160007

 [Text of the FTC Staff Comment \(106.49 KB\)](#)

RELATED RELEASE: [FTC Staff: Proposed Health Care Legislation in West Virginia Would Likely Be Anticompetitive and Harm Consumers](#)

FTC Competition Advocacy

FTC Staff Comment Supporting Michigan Senate Bill 268, And Recommending That the Michigan Legislature Consider Expanding the Bill To Permit Automobile Manufacturers To Sell New Motor Vehicles Directly To Consumers

May 2015

MATTER NUMBER: V150004

 [FTC Staff Comment Regarding Michigan Senate Bill 268 \(170.18 KB\)](#)

RELATED RELEASE: [FTC Staff Urges Michigan Legislature to Repeal Ban on Direct-to-Consumer Sale of Motor Vehicles by Auto Manufacturers](#)

FTC Staff Comment Before the New Jersey General Assembly Regarding Assembly Bills 2986, 3096, 3041, and 3216, Which Would Create Limited Exceptions to New Jersey's Prohibition on Direct-to-Consumer Sales by Manufacturers of Automobiles

May 2014

MATTER NUMBER: V140008

 [Text of the Staff Comment \(174.15 KB\)](#)

RELATED RELEASE: [FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers](#)

FTC Staff Comment Before the Missouri House of Representatives Regarding House Bill 1124, Which Would Expand the Current Prohibition on Direct-to-Consumer Sales by Manufacturers of Automobiles

May 2014

MATTER NUMBER: V140010

 [Text of the Staff Comment \(141.18 KB\)](#)

RELATED RELEASE: [FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers](#)

FTC Competition Advocacy

FTC Staff Comment Before the Illinois State Senate Regarding Senate Bill 2629, Which Would Repeal Certain Provisions of the Illinois Vehicle Code That Currently Prohibit the Sale or Long-Term Lease of New or Used Automobiles on Sunday in Illinois

March 2014

MATTER NUMBER: V140004

 [FTC Staff Comment Before the Illinois State Senate Regarding Senate Bill 2629, Which Would Repeal Certain Provisions of the Illinois Vehicle Code That Currently Prohibit the Sale or Long-Term Lease of New or Used Automobiles on Sunday in Illinois \(80.7 KB\)](#)

RELATED RELEASE: [FTC Staff Comments on Illinois Senate Bill to Repeal Prohibition on Sunday Auto Sales](#)

FTC Staff Comment to the Honorable George W. Miller Concerning North Carolina S.B. 420, an Act to Clarify the Dealers and Manufacturers Licensing Law, and S.B. 419, an Act to Clarify Motor Vehicle Dealer Transfer Rights

June 1999

MATTER NUMBER: V990008

 [FTC Staff Comment to the Honorable George W. Miller Concerning North Carolina S.B. 420, an Act to Clarify the Dealers and Manufacturers Licensing Law, and S.B. 419, an Act to Clarify Motor Vehicle Dealer Transfer Rights \(86.04 KB\)](#)

FTC Staff Comment to the Honorable Ron Stephens Concerning Illinois H.B. 3285 to Repeal Ban on Rental Car Firms Offering Collision Damage Waivers and Imposing Certain Disclosures and CDW Price Caps

December 1996

 [FTC Staff Comment to the Honorable Ron Stephens Concerning Illinois H.B. 3285 to Repeal Ban on Rental Car Firms Offering Collision Damage Waivers and Imposing Certain Disclosures and CDW Price Caps \(74.75 KB\)](#)

FTC Competition Advocacy

- Restraints on international trade
- Restraints on health care advertising
- Regulation issues in airline, rail, and truck transportation
- Regulatory reform in telecommunications, broadcasting, and cable TV
- Restructuring of the electricity generation, transmission, and distribution industry
- Any willing provider / pharmacy groups
- Attorney ethics codes.
- Direct shipment bans on of wine from out-of-state wineries - called the “greatest barrier to e-commerce in wine.”

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