ALLIANCE FOR AUTOMOTIVE INNOVATION

January 20, 2022

Senator Dick Mazza, Chair
Senate Committee on Transportation

Re: Supplemental comments on the Department of Motor Vehicles' report on amendments to the motor vehicle dealers franchising practices act

Dear Chairman Mazza and Members of the Committee:

Thank you for the opportunity to testify regarding the Alliance for Automotive Innovation's (Auto Innovators) recommendations for amendments to the Motor Vehicle Manufacturers, Distributors, and Dealers Franchising Practices Act, Title 9, Part 4, Chapter 108. The Department of Motor Vehicles report includes Auto Innovators' suggested amendments. The DMV's report also includes suggestions from three other stakeholders. In the interest of the Committee's time, I will focus my oral testimony on Auto Innovators' suggested amendments. This supplemental written statement will comment on the proposed changes in the DMV report from the Vermont Vehicle and Automotive Distributors Association (VADA) and bring to the Committee's attention some--but not all--of the concerning aspects of VADA's proposed changes in order of appearance in the DMV report.

Facility Requirements:

Manufacturers oftentimes offer incentive programs to dealers that provide financial assistance to make improvements to their store. VADA's proposed change to § 4096(9) says that a dealer that completes a construction or renovation would be deemed in compliance with any new facility program that a manufacturer may introduce in the following 10 years. What that means is that manufacturers would be required to pay dealers for work that they did not do.

For example, if Dealer A completes a renovation to its service department, then five years later the manufacturer offers an incentive to help Vermont dealers renovate their showrooms, this bill says that Dealer A must get all of the incentive money even if it does nothing to its showroom. That is unfair both to manufacturers and the other dealers that did do the work. It also harms consumers who do not get the benefit of shopping in modern stores because this language discourages manufacturers from offering incentives to improve stores.

Warranty and Predelivery Obligations:

Vermont's current law that governs how much a manufacturer must pay a dealer to repair a vehicle under the manufacturer's warranty already favors dealers. It requires manufacturers to pay dealers the same rate or higher that they charge retail customers despite the manufacturer buying the largest volume purchaser of service work that a dealer has, and that work has no customer retention or advertising costs associated with it. The current law also makes it difficult for a manufacturer to contest whether the rate that the dealer has come up with is reasonable because the manufacturer can only do so by looking at a minimum of four other dealers in the vicinity. Nonetheless VADA's proposed changes would exacerbate the problems in § 4086.

For example, § 4086 (c) currently says that the retail calculation "may" be established by a dealer submitting copies of repair orders and using the statute's formula. VADA suggests that should be "shall." But what if a dealer does not wish to go through the statutory process and would prefer to stay on the manufacturer's standard reimbursement plan? Does this force the dealer and the manufacturer to go through a process that neither wants?

VADA also proposes a new paragraph (e) which addresses what happens when a manufacturer provides a part to a dealer at no cost or a reduced cost. VADA suggests that the manufacturer still pay the dealer the same retail parts markup that it would pay for any other part. The problem is that the parts that (e) refers to are oftentimes things like entire engine assemblies which a dealer is unlikely to keep in stock. A retail markup on those large parts is typically low. The retail rate calculated by the statute is typically high. Thus the dealer would receive an unrealistically high reimbursement rate for those large parts if this proposed language were adopted.

Unreasonable Standards:

VADA proposes to expand the current prohibition on unreasonable standards beyond the franchise agreement. The proposal also requires the manufacturer to take into account *all* circumstances relevant to the dealer's local market circumstances. That is excessively burdensome on the manufacturer, particularly when applied to the design of a program. What's more, it requires the manufacturer to know *all* of the relevant circumstances in advance. Such a standard invites a protest from a dealer that seeks to argue that another circumstance should have been considered, regardless of whether such circumstance would have been dispositive. This problem would become even more pronounced if coupled with VADA's proposal (discussed below) to assign the burden of proof to the manufacturer in all instances.

VADA's comments indicate that "New York prohibits the application of unreasonable standards to a dealer."[1] However, Auto Innovators notes that New York's law on unreasonable standards is limited in scope to the franchise agreement itself, not all of the manufacturer's voluntary programs as well, which is what VADA proposes.[2] Voluntary programs do not need the same level of state protection or involvement as a franchise agreement.

Data:

The automotive industry is similar to many 21st century industries in that data is critical for smooth efficient operations and to respond to customer demand. As such, policymakers and stakeholders should take great care in legislating on the topic. Among the deficiencies in VADA's proposed language is their proposed § 4097(25)(F), which lists only four circumstances in which a manufacturer may require data from the dealer. The list omits valid reasons for manufacturers requiring data such as market analytics, motor vehicle diagnostic data, product development, and dealer performance evaluations. VADA references Arizona's law on this topic in its summary.[3] Although VADA's proposed four circumstances mirror the first four circumstances in Arizona's law, that law has a total of ten circumstances in which a manufacturer can require data.[4]

Competition with Dealers:

VADA proposes to prohibit manufacturers from "offering or selling software and hardware upgrades or changes to a vehicle function and features."[5] That is extraordinary, unreasonable, and harms consumers. Emerging technology can allow consumers the convenience of updating or changing software on their vehicles from the comfort of their own homes. There is no reason to require that a dealer be involved in that process. For comparison, imagine a law that required consumers to go to their retailer whenever their phone needed an update or new software. The proposed language is not only adverse to consumers' convenience, but their safety as well.

---

[1] VADA Summary of Proposed Amendments, page 2.

[2] N.Y. VEH. & TRAF. LAW § 463(2)(gg).

[3] VADA Summary of Proposed Amendments, page 2.

[4] ARIZ. REV. STAT. § 28-4651(8)(b).

[5] VADA proposed change to § 4085(15) and § 4097(8)(B)(v).

If a change to a vehicle's software can make the vehicle safer, why would the state delay that by unnecessarily inserting a dealer into that process?

Vermont does not restrict manufacturers that do not have franchisees from making maximum use of over the air functionality to serve their customers. Treating manufacturers who do have franchisees differently with respect to such an obviously pro-consumer feature of a modern vehicle will only exacerbate the problems with the state's bifurcated system of regulation vehicle distribution, which is not healthy for competition.

Civil Actions for Violations:

VADA argues in its recommendations that "It is customary in virtually all states that the manufacturer have the burden of proof" in an action under the franchise code.[6] Auto Innovators disagrees with that assessment. Although some states assign the burden of proof to the manufacturer for specific actions (e.g. the termination of a dealer's franchise agreement), it is not common for states to assign the burden of proof to the manufacturer for all claims under the franchise code. Vermont itself is an example of a state that assigns the burden of proof to the manufacturer in the specific instance of termination.[7]

It would be contrary to the norms of American law to require a defendant to bear the burden of proof. Which is why Auto Innovators also disagrees with VADA's argument that the current law is unclear as to which party has the burden of proof. A plaintiff has the burden to prove its case unless the law specifies otherwise. Indeed, requiring a defendant to show that a violation had not occurred is asking a defendant to prove a negative from the outset of a case, which is logically problematic.

Conclusion:

As noted at the beginning of this statement, the issues that Auto Innovators identifies in the preceding paragraphs are not an exhaustive list of the items in VADA's proposed changes with which Auto Innovators disagrees. Instead, I intend this statement to give the Committee a general perspective on the policymaking complexity of amending Vermont's franchise law.

Thank you for the opportunity to testify and to submit this statement to the committee.

Respectfully Submitted,

David E. Bright
Attorney

---

[6] VADA Summary of Proposed Amendments, page 3.

[7] VT. STAT. ANN. tit. 9, § 4089(d).