Alliance OF AUTOMOBILE MANUFACTURERS

Memorandum

To: Members, Assembly Committee on Transportation

From: Amy Brink and Laura Dooley

Date: May 26, 2011

Re: AB 132 (Motor Vehicle Franchise Law).

This memorandum provides the additional information requested by committee members at the May 24 hearing on Assembly Bill 132. Specifically, the Alliance was asked to outline those provisions in the subject bill that are different than those negotiated by WATDA and the Alliance earlier this year.

Attached is a document that on January 17, 2011, WATDA described as "a draft of legislation that has been agreed upon except for the retroactivity issue." More than twenty separate issues were fully negotiated. However, several changes were made to this negotiated language and subsequently introduced in AB 132 when agreement on retroactivity was not reached:

- Definition of Coercion – WATDA previously agreed to delete sweeping language that departs from every known definition of coercion. It would cover all actions or refusals to act that are said to "deprive the coerced dealer of a benefit generally available to other dealers of the same line make of motor vehicles or will otherwise materially harm the coerced dealers."

- Warranty Reimbursement –Significant deviations from the negotiated language are present in the AB 132. Most importantly, WATDA added the "cost recovery" bar (currently the subject of litigation by auto manufacturers in another state) that they had previously agreed to remove.

- Use of Customer Information – Several conditions that were previously agreed to with regard to this language have been deleted

- Termination Benefits/Assistance – The revised bill broadens benefits and look-back timelines that were previously negotiated.

- Waiver Language (Section 39) –This is an entirely new issue and was never previously proposed.

Several other deviations from the Jan. 17 draft were also made prior to AB 132's introduction, however this bulleted list represents the most egregious.

The Alliance's position on retroactivity is clear. Making all 44 substantive sections of AB 132 apply to existing franchise agreements will result in substantial, material and retroactive changes to existing contracts. This would violate the letter and spirit of the Constitution's Contract Clause and sends the message to businesses that Wisconsin elected officials will invalidate lawful contracts.

Regardless of your position on retroactivity, the Alliance strongly encourages you to separate that issue from the other punitive changes made to AB 132 from the Jan. 17 draft when considering this legislation.

Please support an amendment that at a minimum reflects our prior consensus on all but the retroactive provision.

DRAFT LEGISLATION TO AMEND
THE WISCONSIN MOTOR VEHICLE DEALER LAW (ss. 218.0101-218.0163)

Amend 218.0101(22) to read:

(22) "Motor vehicle" means any of the following:

(a) any motor-driven vehicle required to be registered under ch. 341 except mopeds; or

(b) any engine, transmission, or rear axle manufactured for installation in a vehicle having its primary purpose the transport of a person or persons or property on a public highway and having a gross vehicle weight rating of more than 16,000 pounds, whether or not attached to a vehicle chassis.

Create 218.0116(1)(y) to read:

(y) Being a manufacturer, importer or distributor who, notwithstanding the terms of any agreement, conditions the execution of a franchise agreement, renewal of a franchise agreement, or approval of the addition of a line make, a franchise relocation, an ownership or management change or a transfer of dealership assets on the dealer's or prospective dealer's agreeing to enter into a site control agreement. In this paragraph (y), a "site control agreement" means any agreement giving the manufacturer, importer or distributor or an affiliate of the manufacturer, importer or distributor the right to control the disposition or use of the dealer's dealership facilities or to lease the dealership facilities after the termination, cancellation or nonrenewal of the franchise agreement. The voluntary acceptance of a site control agreement by a dealer or prospective dealer in return for separate and valuable consideration shall not constitute a violation of this par. (y).

Create 218.0116(1)(z) to read:

(z) Being a manufacturer, importer or distributor who, notwithstanding the terms of any agreement, conditions the execution of a franchise agreement, renewal of a franchise agreement, or approval of the addition of a line make, a franchise relocation, an ownership or management change or a transfer of dealership assets on the dealer's or prospective dealer's willingness to enter into a facility improvement agreement, unless reasonably necessary to accommodate the adequate sale and service of a vehicle based on the technology of the vehicle or unless justified by the reasonable business considerations of the manufacturer and the dealer. The manufacturer, importer or distributor shall have the burden of proof to demonstrate that the facilities improvement agreement is reasonable in light of such considerations. The voluntary acceptance of a facility improvement agreement by a dealer in return for separate and valuable consideration shall not constitute a violation of this par. (z)

Create 218.0116(1)(aa) to read:

(aa) Being a manufacturer, importer or distributor who, notwithstanding the terms of any agreement, requires or coerces a dealer to provide or maintain exclusive facilities for a particular line make or line makes of motor vehicles or refuses to permit or approve a dealer's proposed addition of another line make of motor vehicle to the dealer's dealership facilities if the provision or maintenance of exclusive facilities or the refusal is unreasonable taking into consideration the reasonable business considerations of the manufacturer, importer or distributor and the dealer. The manufacturer, importer or distributor shall have the burden of proof to demonstrate that the provision or maintenance of exclusive facilities or the refusal to permit or approve the addition of another line make is reasonable in light of such considerations.

Create 218.0116(1)(ab) to read:

(ab) Being a manufacturer, importer or distributor who, notwithstanding the terms of any agreement, charges back, withholds payment, denies vehicle allocation, or takes other adverse action against a dealer for charging a service fee to a retail customer in any amount which is permitted under ss. 218.0101 to 218.0163 or under rules promulgated by the department of transportation under ss. 218.0101 to 218.0163.

Create section 218.0116(1)(ac) to read:

(ac) Being a manufacturer, importer or distributor who, notwithstanding the terms of any agreement, charges back, withholds payment, denies vehicle allocation or takes other adverse action against a dealer when a motor vehicle sold by the dealer has been exported to a foreign country unless the manufacturer, importer or distributor can demonstrate that the dealer knew or reasonably should have known that the purchaser intended to export or resell the vehicle. There shall be a rebuttable presumption that the dealer had no such knowledge if the vehicle is titled or registered in any state in this country.

Create 218.0116(1)(ad) to read:

(ad) Being a manufacturer, importer or distributor who, notwithstanding the terms of any agreement, requires or coerces or attempts to require or coerce a dealer to provide the manufacturer, importer or distributor with information regarding the dealer's retail customers unless the information is necessary for the sale and delivery of a new motor vehicle to a consumer, to validate and pay consumer or dealer incentives, for reasonable marketing purposes or for the submission to the manufacturer, importer or distributor for any services supplied by the franchisee for any claim for warranty parts or repairs. Nothing in this section shall limit the manufacturer, importer or distributor’s ability to require or use customer information to fulfill the manufacturer's, importer's or distributor's safety, recall, or other legal obligations. A manufacturer, importer or distributor may not share, sell or transfer customer information obtained from a dealer and not otherwise publicly available, to other manufacturer-franchised dealers while the originating dealer is still a manufacturer-franchised dealer, unless otherwise agreed to by the dealer. A manufacturer, importer or distributor may not use any nonpublic personal information, as that term is used in 16 CFR Part 313, which is obtained from a dealer,

unless such use falls within one or more of the exceptions to opt out requirements under 16 CFR §§ 313.14 or 313.15.

Amend 218.0116(10) to read:

(10) In addition to the licensor's authority to deny, suspend or revoke a license under ss. 218.0101 to 218.0163, the division of ~~banking~~ hearings and appeals, after public hearing, may issue a special order enjoining any licensee from engaging in any act or practice which is determined by the division of ~~banking~~ hearings and appeals to be in violation of any provision of sub. (1), and the division of hearings and appeals may be petitioned to issue such a special order after notice and hearing thereon.

Amend 218.0125 (title) to read:

218.0125 Warranty reimbursement; product liability.

Amend 218.0125 (1) to read:

(1) In this section:

(a) "~~d~~Dealer cost" means the wholesale cost for a part as listed in the manufacturer's, importer's or distributor's current price schedules or, if the part is not so listed, the dealer's original invoice cost for the part, including all standard shipping and other customary charges.

(b) "Qualifying nonwarranty repairs" means nonwarranty repairs that would be covered by the manufacturer's, importer's or distributor's warranty if the vehicle being repaired was still covered by such warranty. "Qualifying nonwarranty repairs" do not include routine maintenance.

Amend 218.0125(2) to read:

(2) A manufacturer, importer or distributor shall, for the protection of the buying public, specify the delivery and preparation obligations of its dealers before delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations of its dealers shall be filed with the department of transportation by every licensed motor vehicle manufacturer, importer or distributor and shall constitute the dealer's only responsibility for product liability as between the dealer and the manufacturer, importer or distributor. Any mechanical, body or parts defects arising from any express or implied warranties of the manufacturer, importer or distributor shall constitute the manufacturer's, importer's or distributor's product or warranty liability. A manufacturer, importer or distributor shall defend, indemnify and hold harmless its dealers against any claims, judgments or settlement for damages, court costs, expert witness fees,

attorneys' fees, and other expenses arising out of complaints, claims or lawsuits to the extent caused by defective or negligent manufacture, assembly or design of motor vehicles, parts or accessories by the manufacturer, importer or distributor. If the complaint by a third person alleges that the acts or omissions of both the manufacturer, importer or distributor and the dealer caused the damage or injury, the manufacturer, importer or distributor shall not be obligated to defend the dealer against claims based on the dealer's alleged acts or omissions and shall not be obligated to indemnify the dealer against any part of a judgment or settlement which is attributable to causal negligence by the dealer. ~~The manufacturer, importer or distributor shall reasonably compensate any authorized dealer who performs work to rectify the manufacturer's, importer's or distributor's product or warranty defects or delivery and preparation obligations or who performs any other work required, requested or approved by the manufacturer, importer or distributor or for which the manufacturer, importer or distributor has agreed to pay, including compensation for labor at a labor rate equal to the effective labor rate charged all customers and for parts at an amount not less than the amount the dealer charges its other retail service customers for parts used in performing similar work by the dealer.~~

Repeal and recreate 218.0125(3) to read:

(3) A manufacturer, importer or distributor shall reasonably compensate any authorized dealer who performs work to rectify the manufacturer's, importer's or distributor's product or warranty defects or delivery and preparation obligations or who performs any other work required, requested or approved by the manufacturer, importer or distributor or for which the manufacturer, importer or distributor has agreed to pay. If a dealer requests reimbursement for such work subject to the provisions of this section, the manufacturer, importer or distributor shall make payment for labor and parts at amounts equal to those charged non-warranty customers for qualifying nonwarranty repairs. Compensation for labor under this sub. (3) shall be equal to the dealer's effective nonwarranty labor rate as substantiated under sub. (4) multiplied by the number of hours allowed for a repair under the manufacturer's, importer's or distributor's time allowances used in compensating the dealer for warranty work. Only manufacturer time guides may be used in calculating the dealer's compensation. Compensation for parts under this sub. (3) shall be equal to the dealer cost for such parts multiplied by the sum of 1.0 and the dealer's average percentage markup over dealer cost for parts as substantiated under sub. (4).

Repeal and recreate 218.0125(4) to read:

(4) To be eligible for compensation for labor or parts under sub. (3), a dealer shall submit to the manufacturer, importer or distributor a written notice of its claimed effective nonwarranty labor rate or average percentage markup over dealer cost for parts and 100 sequential repair orders for qualifying nonwarranty repairs or 90 days of repair orders for qualifying nonwarranty repairs, whichever is less, covering repairs made no more than 180 days before the submission. At the option of the dealer, the submission of repair orders may be made electronically or using paper records. The manufacturer, importer or distributor shall notify the dealer in writing within 45 days from receiving the properly submitted repair orders whether it disputes the dealer's claimed effective nonwarranty labor rate or average percentage markup over dealer cost for parts and, if

so, provide the dealer with a written explanation of the basis for the dispute, including the effective labor rate or average percentage markup for parts that the manufacturer, importer or distributor has determined is substantiated by the submitted repair orders . The effective nonwarranty labor rate substantiated by the the submitted repair orders shall be the rate determined by dividing the total customer labor charges under those repair orders by the total number of hours allowed for the repairs for which the charges were made under the manufacturer's, importer's or distributor's time allowances used in compensating the dealer for warranty work. The average percentage markup over dealer cost for parts substantiated by the submitted repair orders shall be the total charges for parts under those repair orders divided by the total dealer cost for such parts. A manufacturer, importer or distributor may not require a dealer to establish its effective nonwarranty labor rate or average percentage markup by another methodology. A manufacturer, importer or distributor may not require information that is unduly burdensome or time consuming to provide, including, but not limited to, part-by-part or transaction-by-transaction calculations. The manufacturer, importer or distributor shall begin compensating the dealer based on the effective nonwarranty labor rate or average percentage markup over dealer cost for parts substantiated by the submitted repair orders effective within 45 days of submission of such repair orders.

Amend 218.0125(5) to read:

(5) A manufacturer, importer or distributor who ~~fails to~~ compensates a dealer for parts or labor at ~~an~~ amounts ~~not~~ less than the amounts ~~the dealer charges its other retail service customers for parts used to perform similar work~~ required by sub. (3) and (4) shall not be found to have violated this section if the manufacturer, importer or distributor shows that the ~~amount~~ dealer's effective nonwarranty labor rate, in the case of compensation for labor, or the dealer's average percentage markup over dealer cost, in the case of compensation for parts, is not reasonably competitive to the ~~amounts~~ rates or markups charged to retail service customers by other similarly situated franchised motor vehicle dealers in this state ~~for the same parts when used by those dealers to perform similar work~~ in performing qualifying nonwarranty repairs.

Amend 218.0133(2)(a) to read:

(a) Except as provided in sub. (5) and subject to sub. (3), when a grantor or motor vehicle dealer terminates, cancels or does not renew an agreement a grantor shall pay a motor vehicle dealer all of the termination benefits under pars. (b) to ~~(e)~~ (f).

Amend 218.0133 (2)(b)1. b. and c.

b. The motor vehicle has not been operated more than ~~300~~ 500 miles for manufacturer's tests, predelivery tests, ~~and~~ motor vehicle dealer exchange ~~in addition to~~ or operation required for motor vehicle delivery from the grantor or another dealer of the same line make in the ordinary course of business.

c. The motor vehicle was acquired as part of the motor vehicle dealer's

original inventory or from the grantor or from another motor vehicle dealer of the same line make in the ordinary course of business who acquired the motor vehicle from the grantor.

Repeal and recreate 218.0133(2)(b)2 to read:

2. A grantor may not be required to repurchase a motor vehicle under this paragraph unless the vehicle is of the current or one year prior model year.

Create 218.0133(2)(f) to read:

(f)The grantor shall reimburse the motor vehicle dealer for the amount of any continuing obligations that the dealer will have after the effective termination date under contracts for computer hardware, software, maintenance or other computer-related services entered into by the dealer and required by the grantor up to 18 months or the remaining term of such contracts, whichever is less, provided that such hardware, software, maintenance or other computer-related services were not used to support the operations of a franchise other than the terminated franchise.

Amend 218.0133(4)(a) to read:

(4) (a) Except as provided in sub. (5) and subject to par. ~~(d)~~ (e) and (f), when a grantor terminates, cancels or does not renew an agreement due to a line-make discontinuation or a dealer's unsatisfactory sales or service performance, a grantor shall, upon request, pay a motor vehicle dealer the termination benefits under par. (b) or (c) and, if applicable, (d). If a motor vehicle dealer receives benefits under par. (b) or (c) for all of the dealership facilities, the grantor shall be entitled to the possession and use of the dealership facilities for the period that the termination benefits payment covers. This entitlement does not apply if the termination benefits are received for only part of the dealership facilities pursuant to par. (f).

Renumber existing 218.0133(4)(d) as 218.0133(4)(e) and recreate 218.0133(4)(d) to read:

(d) If the dealer completed construction or renovation of the dealership facilities in order to comply with a requirement of the grantor within 18 months preceding the notice of the franchise termination, cancellation or nonrenewal, the grantor shall, upon request, pay the motor vehicle dealer an amount equal to the dealer's actual cost for the construction or renovation, less any allowances or credits given the dealer by the grantor and less any tax savings as a result of depreciation write-offs relating to the construction or renovation that accrue to the dealer's benefit prior to the notice of the franchise termination, cancellation or nonrenewal.

Create 218.0133(4)(f) to read:

(f) If the termination, cancellation or nonrenewal relates to fewer than all of the franchises operated by the new motor vehicle dealer at a single location, the amount of facilities assistance that the grantor is required to pay the dealer under this subsection (4) shall be

based on the percentage of total square footage attributed to franchise being terminated, canceled or not renewed at the time of the termination, cancellation or nonrenewal.

Amend 218.0133(5) (a) to read:

(a) Subsections (2) and (4) do not apply to any of the following:

1. A motor vehicle dealer if a court, a licensor or the division of hearings and appeals determines that the motor vehicle dealer engaged in fraud or theft against the grantor in connection with the operation or management of its dealership under an agreement.

2. A motor vehicle dealer who terminates or cancels an agreement without giving the grantor 60 days' notice or the notice required under the agreement, whichever is less.

3. A motor vehicle dealer who does not give the grantor a written request for termination benefits that specifies the benefits sought within 60 days after the effective date of the termination, cancellation or nonrenewal.

4. A motor vehicle dealer who sells its dealership assets to a 3rd party who becomes a successor motor vehicle dealer under an agreement with the grantor.

5. Revocation of any license under which the new motor vehicle dealer is required to have to operate a dealership.

6. A termination, cancellation or nonrenewal based on the failure of the new motor vehicle dealer to conduct his or her customary sales and service operations during his or her customary business hours for 7 consecutive business days unless the failure is caused by an act of God, by work stoppage or delays due to strikes or labor disputes or other ereason beyond the dealer's control or by an order of the department of transportation or the division of hearings and appeals.

7. A termination, cancellation or nonrenewal based on the conviction of the new motor vehicle dealer or its principal owners of a crime, but only if the crime is punishable by imprisonment in excess of 1 year under the law under which the dealer was convicted, or the crime involved theft, dishonesty, or false statement regardless of punishment.

8. A termination, cancellation or nonrenewal based on the filing of any petition by or against the new motro vehicle dealer under any bankruptcy or receivership law if such petition is not dismissed within 30 days of the filing date.

~~5~~8. A motor vehicle dealer who terminates, cancels or fails to renew an agreement to sell motor homes, as defined in s. 340.01(33m), unless a court, a licensor or the division of hearings and appeals determines that the grantor has not acted in good faith or has materially violated the agreement or a provision of ss. 218.0101 to 218.0163 and determines that the motor vehicle dealer has not acted in bad faith or has not violated the agreement or a provision of ss. 218.0101 to 218.0163.

~~6~~9. An agreement under which a motor vehicle dealer sells a camping trailer, as defined in s. 340.01(6m), or a trailer, as defined in s. 340.01(71), but only to the extent that the agreement covers camping trailers or trailers.

Renumber 218.0133(6) as 218.0133(7) and recreate 218.0133(6) to read:

(6) If a grantor cancels or fails to renew a franchise pursuant to s. 218.0132(2), it shall, in addition to the termination benefits provided in subsection (2) and (4), compensate the dealer, within 90 days of the effective date of the cancellation or failure to renew, in an amount at least equivalent to the fair market value of the franchise terminated or failed to be renewed on the date immediately preceding the date the manufacturer, importer or distributor of the subject line make first publicly announced the termination, cancellation or discontinuation of the motor vehicle line make that caused the franchise cancellation or failure to renew.

Amend 218.0163(1)(a) to read:

(a) A violation by any other licensee of s. 218.0116 (1) (bm), (f), (h), (hm), (i), (km), (L), (Lm), (mm), (pm), (q), (qm), (r), (rm), (s), (sm), (t), (u), (v), (w), (x), (y), (z), (aa), (ab), (ac), or (ad).

Add the following language at the end of the bill:

"This act first applies to an agreement that exists or is entered into on the effective date of this Section."

(rev. 01/17/10(2)-prn)