NEW YORK AUTOMOBILE LEASING BROKERS ASSOCIATION ("NYABA")

MEMORANDUM OF OPPOSITION

S. 7553 (THOMAS) / A. 3499-A (CARROLL)
"AUTOMOBILE BROKER BUSINESS"

January 4, 2024

The NYABA is strongly opposed to Senate Bill 7533 and Assembly Bill 3499-A ("Bill"). This new bill is the 8th iteration of a bill sponsored by Assembly Person Carroll and Senator Thomas and spearheaded by auto dealers to put auto brokers out of business. Notably, dealers' activities continue to top the list of consumer complaints in New York State. Dealers ranked 5 of the top 10 consumer fraud complaints in 2022 for the third year in a row on the Attorney General of the State of New York ("AG") press release dated March 7, 2023, with 2,590 complaints. This represents a 13% increase over 2021. The AG press release does not contain any reference to complaints against brokers. Moreover, dealers have been admonished by manufacturers to stop price gauging consumers. See GM and Ford article. In fact, dealers made a fortune taking advantage of consumers and low inventory as a result of the pandemic. See nytimes.com/2022/04/02.

The alleged justification for the Bill is a "proliferation of broker businesses in recent years and it is important to ensure consumer confidence." Since when do increased business volume, jobs and tax revenue for the State of New York create a need to restore consumer confidence. There is no justification for this Bill.

A. TOP REASONS AGAINST THIS BILL

1. Brokers help consumers.
2. The Bill will put brokers out of business.
3. The Bill is anti-competitive.
4. Dealers have a history of anti-trust activities against brokers since at least 1995.
5. There are no complaints against brokers.
6. The AG already has jurisdiction over the brokers under the General Business Law.
7. NY State already requires broker licensing under the General Business Law.

This broker Bill is bad for New York State for several reasons: it is anti-consumer and creates dealer protection instead of consumer protection; it will put automobile brokers out of business including qualified dealers, leasing companies, used car dealers, and internet companies that broker deals in New York; part of the automobile market that generates revenue and creates jobs in New York will be destroyed; the Bill violates the U.S. and New York Constitutions; there is no evidence of unlawful deceptive practices by brokers prior to and since the law that regulates automobile brokers was amended six years ago.

B. BROKER BUSINESS

Automobile brokers are a key part of the auto market. They are a trusted intermediary between customer and dealer, often speak the customer's language and explain the deal terms. Brokers assist disabled customers who need special accommodations, are unable to visit a dealership or require extra assistance to obtain vehicle conversion accessories. Qualified dealers and brokers in business for more than 40 years have developed clientele whom they service for the life of the car. Broker business depends on repeat customers and word of mouth. Bad practices will lead to losing customers. Brokers search out the best deal for the consumer, so the consumer spends less on a car. Without brokers, consumers likely will pay more. This is the opposite of consumer protection. This is dealer protection at its worst.

C. DEALER ANTI-TRUST ISSUES

In 1995, the National Automobile Dealers Association ("NADA") entered into a consent decree with the United States Department of Justice ("DOJ") as a result of a complaint brought against the NADA alleging anticompetitive practices designed to lessen competition among car dealers. U.S. v. National Automobile Dealers Association, Civil Action No. 95-1804 (HHG) (D.D.C.) Among the practices alleged was urging dealers to boycott auto brokers. Dealers sought to keep brokers out of the auto market because brokers were able to create transactions for consumers at lower cost to the consumer. The NADA Reduced Margins Task Force Report in 1994 recommended: "Refuse to do business with brokers or buying services. They inevitably do harm to new vehicle gross margin potential." In the consent decree, the NADA agreed to abstain from such anticompetitive practices for 10 years. Just 15 years after the consent decreed expired, the Greater New York Automobile Dealers Association ("GNYADA") has taken up where the NADA left off. GYNADA's March 4, 2021 Legislative Update stated: "[t]his week, the Association took another step forward in its effort to curtail this industry [brokers] by forming a special committee with the single task of passing sorely needed broker reform legislation." Nowhere in the GNYADA newsletter and no memorandum in support of the Bill contains concrete factual information explaining why broker activities require reform. The Bill is just a sweeping measure to put the brokers out of business, thereby removing any competition against dealers.

D. BILL ANALYSIS

Section 1 of the Bill seeks to amend existing §736 of the General Business Law ("GBL") which defines the "automobile broker business" as a "person who for a fee offers to provide, provides or represents that he or she will provide a service of" arranging the purchase or lease of an automobile as an intermediary for a consumer. The current GBL provision exempts all dealers from being required to register as automobile brokers in order to broker a transaction with a consumer. The proposed amendment now requires that all dealers including new car dealers, qualified dealers, wholesale dealers and retail dealers, among others, shall register as an automobile broker and comply with all attendant laws governing automobile brokers. The amendment states: ""[a]utomobile broker business" does not include any person registered as a dealer pursuant to article sixteen of the vehicle and traffic law, only when operating in a manner pursuant to such registration under article sixteen of the vehicle and traffic law." Therefore, a dealer can only act as a dealer and cannot broker a transaction without a broker license. It means the dealers that act as brokers will need both a surety bond under the GBL requirements for automobile brokers and a separate bond as a licensed dealer under the Vehicle and Traffic Law (VTL). This also means that every dealer that brokers an automobile transaction will be

subject to all of the GBL requirements with respect to brokered transactions as well as the VTL. Careful analysis must be made to determine which provisions of the VTL and GBL are rendered contradictory by this amendment.

Section 4 of the Bill contains an amendment to §738 of the GBL to require that the broker enter into a contract with the consumer prior to the purchase or lease of an automobile. The proposed amendment contains a new §738(1)(e) that requires a statement in the contract that the broker will not accept payment from anyone other than the dealer. There are transactions that occur where the consumer pays the broker's commission and/or where a part of the commission is paid by the consumer and part is paid by the dealer. In these instances, the broker will not be able to collect its commission as proposed by the amendment. Moreover, the broker is required to disclose the amount of the broker fee in its contract with the customer. If the vehicle should change before or even at delivery to the consumer, the broker will only be entitled to the fee specified in the contract even if the amount changed due to a change in the price for a different vehicle.[1]

Section 5 of the Bill amends §741-a to change the lead in paragraph to subsection (1) which requires broker advertisements to place all disclosures in the top half of the advertisement. There is no justification for this restriction that is likely unconstitutional.

Section 5 of the Bill also contains an amendment to §741-a(1) to add a new subsection (e) requiring the broker to disclose in all of its advertising that the "automobile broker business is not affiliated with any manufacturer, dealership, or dealership group." This provision is impossible, anti-competitive and unconstitutional. There are licensed dealers that act as brokers, such as the qualified dealers and there are dealers where a principal owner in the dealership may also have an interest in a separate broker company and vice versa. This proposed disclosure will put the qualified dealers and wholesale dealers out of business (they cannot broker deals and be affiliated with a dealership), it will prevent brokers from being able to purchase a motor vehicle dealership if so desired and this will also prevent dealers from having separate leasing broker companies.

Section 7 of the Bill amends §415 of the VTL to require brokers to retain dealer rate sheets. Brokers do not receive rate sheets from dealers.

Section 7 of the Bill further amends §415 of the VTL to require compliance by dealers and brokers with certain of the privacy law sections enumerated in the GBL. The Bill also proposes a new VTL §415(22) to require the dealers and brokers to comply with 16 CFR §314, known as the Safeguards Rule. This law applies to financial institutions as defined in the CFR. The CFR provisions apply to financial institutions that have a continuing relationship with a consumer. 16 CFR §314.2(e). Under that section, there is no continuing relationship if the financial institution only enters into isolated transactions with the consumer. Id. Assuming without conceding the broker is considered a financial institution, the broker does not have ongoing transactions with the consumer, the broker only arranges the sale or lease of the vehicle and the transaction is over. It is isolated. The broker may help the consumer by filling out a credit application, but the only party to the transaction that arranges the credit is the dealer that submits the credit application to the lender. The lender may be a captive finance company, a bank, credit union or other financial institution. The broker does not submit any information to the lender, only the dealer does. Therefore, the broker should not be considered a

[1] Furthermore, see discussion below of §§7, 9 and 10 of the Bill, all of which prohibit the broker from being paid unless the fee is disclosed at the time of taking the order, in the contract or in a retail instalment contract or lease. The set up of these provisions as drafted absolutely precludes the broker from being paid at the whim of the dealer who controls and prepares the documentation.

financial institution under this federal law and accordingly, New York law should not expand the obligations of brokers to create a burdensome requirement to comply with federal law intended for much larger institutions.

Section 7 of the Bill also contains a new §415(25) of the VTL. This provision does not permit a dealer to pay a broker other than compensation disclosed under §738 or §741-b of the GBL or §332 of the Personal Property Law ("PPL") or §337 of the PPL. This will prevent the brokers from being paid whatsoever and put the brokers out of business. First, the amendment set forth above in Section 4 of the Bill with respect to adding a new GBL §738(1)(e), prohibits the broker from being paid by anyone other than the dealer and is limited to the fee disclosed in the contract between the broker and the consumer. If the vehicle is changed at the last minute, the price of the vehicle may change, but the broker's fee is limited to the fee disclosed in the contract which may not cover the broker's expenses. Existing GBL §741-b requires disclosure of the amount of the commission at the time the order is taken from the consumer to find a vehicle if known at that time and certain other criteria are satisfied. At the time the customer initially places the order with the broker, most often by a telephone call, the broker cannot disclose the commission because he/she does not even know which vehicle will ultimately be obtained. The commission is only fixed when the transaction is finalized. Therefore, the commission is not known at the time of taking the order and it is not disclosed then. Second, §332 of the PPL is part of the NY Motor Vehicle Instalment Sales Act ("MVRISA") that requires all vehicle retail instalment sale contracts ("RIC(s)") to contain all disclosures mandated under federal law, specifically the Truth in Lending Act and Regulation Z. The dealer is the party that executes the RIC with the consumer and thereby sells the vehicle to the consumer. The dealer fills out the RIC and controls its contents. If the dealer does not disclose the broker fee in the RIC, the broker will not get paid under this proposed amendment. Third, §337 of the PPL is part of the NY Motor Vehicle Retail Leasing Act ("MVRLA"). Similar to MVRISA, MVRLA requires the motor vehicle retail lease ("Lease") to contain all of the disclosures mandated under the Truth in Lending Act and Regulation M. The dealer is the party that executes the Lease with the consumer and thereby leases the vehicle to the consumer. The dealer fills out the Lease and controls its contents. If the dealer does not disclose the broker fee in the Lease, the broker will not get paid under this proposed amendment. The broker is not a party to either the RIC or the Lease. The broker does not prepare the RIC or Lease forms. Therefore, if the dealer does not make the disclosure, the broker will not get paid. This will put the brokers out of business.

Section 9 of the Bill would amend §741-b of the GBL to require that the broker disclose to the consumer at the time of taking the order to lease or purchase a vehicle that if the amount of the broker fees or commission is not known when taking the consumer's order, the broker's commission shall be disclosed on the executed lease or purchase contract or finance agreement under §332 or §337 of the PPL. As stated above with respect to §7 of the Bill, amending §415 of the VTL, the amount of the commission is not known when the broker takes the initial order for a vehicle, and therefore payment of the broker's commission under this amendment is made contingent upon the dealer making the disclosures in the RIC or the Lease, the dealer is the one that fills out the RICs and the Leases and as such, if the dealer does not disclose the fee, the broker will not get paid.

Section 10 of the Bill contains a new §741-c of the GBL covering prohibited acts by brokers. Proposed §741-c (2) prohibits the broker from advertising "any price figure in an advertisement unless such figure represents the actual price of the advertised automobile…" First, the reference to "actual price" is vague, amorphous and subject to interpretation. Second, the broker cannot advertise a specific vehicle because the broker does have a stock of vehicles. Third, as drafted, §741-c (2) will present an enforcement issue with the Department of Motor Vehicles ("DMV"). The law permits brokers to advertise a make and model of vehicle—e.g. "great deals on Mazda CX's-call us for information".

However, if the DMV inspector sees such an advertisement due to the vague wording of proposed §741-c (2), it is likely that brokers may be cited for DMV violations because the inspectors will not understand the brokers cannot advertise a specific vehicle, but may advertise in general. A further limitation of the brokers' ability to advertise likely will be unconstitutional.

Section 10 of the Bill contains a new §741-c (3) of the GBL that prohibits a broker from starting or completing any financing or credit application. As stated above, brokers do prepare credit applications on behalf of customers. It is part of the service provided by the brokers, the dealers are well aware of this as are the consumers who do not want to be burdened with filling out the information either because they do not have the time or they have difficulty navigating the English language. While the brokers help with preparation of the applications, they only give the applications to the dealers and the brokers do not submit the applications to the lender sources—submission of the applications is only done by the dealers. Therefore, this provision is against customary practice in the industry.

Section 10 of the Bill contains a new §741-c (4) of the GBL that prohibits the broker from accepting payments other than as disclosed under GBL §738 or §741-b of the GBL. As set forth above with respect to the amendment of §741-b in §§7 and 9 of the Bill, if the amount is not known and cannot be disclosed when the consumer first requests the broker service, or the dealer does not disclose the broker commission in the RIC or the Lease, the broker does not get paid.

Section 11 amends the enforcement provision of the Bill to permit a court or justice to issue injunctive relief without requiring proof of injury or damages, This contravenes well settled New York law standards for granting injunctive relief.

Section 11 also amends the enforcement provision of the Bill to permit local concurrent enforcement by a municipal consumer affairs office in addition to the AG. This is outrageous and will result in inconsistent enforcement of the broker law, open the brokers to possible harassment at the local level and will empower a local municipal agency to analyze and enforce significant federal laws: the Truth in Lending Act and attendant Regulations Z and M as well as the Safeguards Rule. Ultimately this will place a great burden on these small broker businesses that will be required to expend hard earned money on legal fees and litigation to overturn incorrect violations, fines and penalties due to incorrect enforcement and interpretation of the law.

The message from this proposed Bill is clear: no dealers will be permitted to conduct broker business, no broker can contemplate purchasing or developing a new car dealership or any other type of dealership, no dealer can own a broker business and no brokers can be paid unless the dealer who controls the Leases and RICs makes the correct disclosure of the broker fee. This Bill is a blatant attempt to put the brokers out of business in the State of New York.

How does putting the broker out of business help the consumer?