UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Economics

March 26, 2014

The Honorable James Oberweis
Senator, 25th District
105 A State House
Springfield, IL 62706

Re: Request for Comment on Senate Bill 2629

Dear Senator Oberweis:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] appreciate this opportunity to respond to your invitation to provide comments on the likely competitive impact of Illinois Senate Bill 2629 ("S.B. 2629").[2] S.B. 2629 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.[3] As is explained more fully below, the Federal Trade Commission ("FTC" or "Commission") staff believe that repeal of these mandatory Sunday closing provisions will likely be procompetitive and beneficial to consumers.

The existing Code provisions effectively ban the sale or long-term lease of both new and used automobiles (except private sales) on Sunday throughout Illinois. They therefore eliminate the possibility of competition among dealers to determine the hours of operation on Sunday that might be most responsive to consumer preferences and most beneficial to automobile dealers. Further, because automobile dealers also provide repair services and sell replacement parts, the probable effects of mandatory Sunday closing laws extend beyond vehicle sales. The principal harms to competition from such laws likely include: (1) increased consumer search costs that impede comparison shopping; (2) a market that is unresponsive to consumer preferences for hours of operation; and (3) diminished competition among dealers for both automobile sales and

[1] This staff letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

[2] S.B. 2629, 98th Gen. Assemb. (Ill. 2013).

[3] *See* 625 ILL. COMP. STAT. 5/5-100, 5/5-102.1, 5/5-106 (2013). Section 5-106 provides: "No person may keep open, operate, or assist in keeping open or operating … any place of business for the purpose of buying, selling … or leasing for … 1 year or more … any motor vehicle, whether new or used, on the first day of the week, commonly called Sunday ….") Section 5-100 contains the words "excluding Sundays" in the definition of an "off site sale," and Section 5-102.1(a)(3) states "An off-site sale permit does not authorize the sale of vehicles on a Sunday." The bill would delete these words, as well as the entire Section 5-106.

a range of related services. Collectively, these effects may lead to higher prices and reduced output for sales of new and used automobiles and related automobile services than would otherwise be the case.

I. Interest and Experience of the Federal Trade Commission in Competition Advocacy

The FTC is an independent administrative agency charged with protecting consumers by preventing anticompetitive, deceptive, and unfair business practices, enhancing informed consumer choice and public understanding of the competitive process, and accomplishing this without unduly burdening legitimate business activity.[4] To secure these goals, since its creation, the FTC has played a significant role in promoting competition and consumer protection law and policy through both law enforcement and the study of industries and business practices. The FTC's enabling statute confers a range of research, education, and outreach tools to support the FTC's policy and scholarship function, in addition to its enforcement authority.[5]

To further the agency's mission to protect consumers by supporting competitive markets, and to share our learning with other policymakers, the FTC and its staff regularly engage in various forms of competition and consumer protection advocacy. One important type of advocacy is the submission of staff comments on proposed state legislation or regulation. When a state legislator requests a comment regarding a bill under active consideration by a state legislature, or when an open public comment opportunity exists with respect to a proposed regulation, FTC staff may respond with a comment that evaluates the potential competition and consumer protection issues raised by the pending bill or proposed regulation.

Competition is at the core of America's economy, and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, and greater innovation.[6] The goal of our advocacy program is to enhance understanding of the competitive process and provide a framework for thinking about public policy issues from competition and consumer protection perspectives. We urge decision makers to consider the likely competitive impact of proposed legislation or regulations; how they might affect consumers; what justifications might exist for any restrictions on competition; and whether less restrictive alternatives would adequately protect consumers and fulfill other public policy goals.[7]

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[4] *See generally* Federal Trade Commission Act, 15 U.S.C. § 45.

[5] Sections 6(a) and (f) of the FTC Act authorize the FTC "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce," and "[t]o make public from time to time such portions of the information obtained by it hereunder as are in the public interest …." 15 U.S.C. §§ 46(a), (f).

[6] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."); Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

[7] FTC and staff advocacies take many forms, including letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, and amicus briefs. *See, e.g.,* FTC Staff Comments Before the District of Columbia Taxicab Commission Concerning Proposed Rulemakings on

II. Past Federal Trade Commission Involvement in Automobile Distribution Issues

The FTC has a longstanding interest in the automobile industry and FTC staff have specifically examined and opposed limits on hours of operation by automobile dealers, whether imposed by state law or through agreement among dealers. This includes prior experience with Sunday closing laws in Illinois. In 1988, FTC staff submitted an advocacy letter to the Governor of Illinois opposing a bill that would have amended the Illinois Vehicle Code to extend the already existing prohibition of buying or selling new and used motor vehicles on Sunday[8] to include a ban on long-term leasing.[9] Earlier, in 1985, staff of the FTC's Chicago Regional Office testified in favor of repealing the Illinois Sunday closing laws for automobile dealers.[10] Staff testified that mandated Sunday closing made it more difficult for consumers to comparison shop and thus might lead to increased prices and less favorable terms of sale. FTC staff took the position that prohibiting long-term leasing of automobiles would have similar adverse effects on consumers and therefore should not be added to the existing Code provisions. The FTC staff's position that Sunday closing laws are harmful to consumers, as stated in the previous letter and testimony, has been consistent over time and remains the same today.

The FTC also has used its enforcement authority to oppose anticompetitive restrictions on hours of operation. In the late 1980s, the FTC investigated and issued a complaint against several automobile dealerships in the Detroit area and the Detroit Auto Dealers Association ("DADA") for imposing similar restrictions on hours of operation. These dealers had reached an agreement, orchestrated by the DADA, to limit the number of hours that they would be open for business. The FTC concluded that the agreement was anticompetitive, a conclusion that was later affirmed by the U.S. Court of Appeals for the Sixth Circuit.[11]

In addition to specific consideration of regulations and agreements relating to hours of operation, the FTC has more broadly been concerned with state-level regulations that limit the scope of competition for automobile sales. In 1986, for example, the FTC's Bureau of Economics issued a report on the effect on retail automobile markets of state regulation that restricts the establishment of new automobile dealerships in the vicinity of present dealers selling

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Passenger Motor Vehicle Transportation Services (June 7, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf; FTC Staff Comments to The Electronic Payment Association Concerning Proposed Revisions to the NACHA Operating Rules (Jan. 13, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-nacha-electronic-payments-association-regarding-proposed-revisions-nacha-operating/140124nachastaffcomment.pdf.

8 However, this prohibition did not extend to motorcycles or motor homes. *See* 625 ILL. COMP. STAT. 5/5-106 (5), (7).

9 Comment from FTC Staff to James R. Thompson, Governor of Illinois (Dec. 22, 1988), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-governor-james-r.thompson-concerning-s.b.1870-limit-auto-base-rental-charges-alter-allocation-costs-and-risks-damage-or-theft-and-ban-long/v890008.pdf.

10 *See id*. at n.4.

11 Detroit Auto. Ass'n v. FTC, 955 F.2d 457 (6th Cir. 1992).

cars of the same make.[12] The report found that these state laws caused automobile prices to rise, and therefore harmed consumers. In 2001, then-Commissioner Thomas Leary expressed concern about decades-old state laws that insulate automobile dealers from competition from automotive manufacturers. While dealers at one time tended to be small businesses, he observed, in 2001 they were frequently much larger entities; meanwhile, the once highly concentrated automobile manufacturing industry had become far more competitive. Commissioner Leary questioned, therefore, whether continued regulatory protections for dealers could still be justified, especially because they tended to interfere with the development of new and potentially more efficient methods of motor vehicle distribution, such as e-commerce.[13]

III. Discussion and Analysis of the Likely Effects of S.B. 2629

In almost all other industries, suppliers independently decide how and when to promote and sell their products or services, based on competition and their interaction with consumers. In states where automobile sellers are not subject to Sunday closing laws, the competitive process determines automobile dealers' hours of operation – just as competition also determines prices, inventory of available automobiles, showroom appearance and facilities, availability of trained salespeople, and perceived quality of service. Under current Illinois law, in contrast, auto dealers are deprived of the discretion to determine their own hours of operation on Sunday. In considering repeal of the current Sunday closing laws, we urge the Illinois legislature to consider the likely effects on competition of the current Sunday sales restrictions, the probable effects of repeal, and any legitimate justifications for retaining the Sunday closing laws.

A. Anticompetitive Effects of Sunday Closing Laws

As explained above and in the FTC's prior advocacy efforts related to Illinois' Sunday closing laws, such laws reduce competition among automobile dealers. Indeed, an agreement among automobile dealers not to open on Sunday would be a clear antitrust violation. FTC staff recognize that Sunday automobile dealer closings in Illinois appear to be a function of state law, and we are currently unaware of any allegations of private agreements among competing dealers in Illinois to limit their hours of operation. Still, the case law on unlawful agreements to limit hours is instructive, because the anticompetitive effects are identical, whether the restriction is imposed by legislative command or by agreement.

It is well established that an agreement among competitors to limit their hours of operation is anticompetitive. Both courts and commentators have concluded that such a restriction is a form of output reduction that violates federal antitrust laws. In discussing the FTC's case against the Detroit automobile dealerships, a leading antitrust treatise explains why:

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[12] ROBERT P. ROGERS, BUREAU OF ECON., FED. TRADE COMM'N, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS (1986) (Bureau of Economics Staff Report), *available at* http://www.ftc.gov/sites/default/files/documents/reports/effect-state-entry-regulation-retail-automobile-markets/231955.pdf.

[13] Thomas B. Leary, Comm'r, Fed. Trade Comm'n, State Auto Dealer Regulation: One Man's Preliminary View, Speech at The International Franchise Association 34th Annual Legal Symposium (May 8, 2001), *available at* http://www.ftc.gov/public-statements/2001/05/state-auto-dealer-regulation-one-mans-preliminary-view.

> [A]n agreement among automobile dealers to restrict showroom hours was an 'output' reduction warranting presumptive condemnation. As the FTC had noted, automobile dealers do not merely sell cars. They sell packages of automobile service, plus other amenities, and a decision to reduce showroom hours reduced relevant output just as much as a decision to reduce warranty service, to eliminate test drives, or simply to fix prices of the cars themselves.[14]

The imposition of the equivalent restraint by law or regulation is likely to result in similarly anticompetitive effects.

Sunday closings impair competition and harm consumers by making it more difficult for consumers to search for the vehicle that best meets their needs and the dealer who offers their desired car at the lowest price and best terms of sale.[15] Especially for consumers who work on weekdays, cutting the available weekend shopping time in half may leave consumers with no choice but to shop at less convenient (and hence costlier) times, possibly causing them to curtail the scope of their search for the best possible match for their needs and the best deal. In economic terms, a law requiring automobile dealers to close on Sunday may increase a consumer's "search costs," which can lead the consumer to pay more for the car of his or her choice.[16] The way this effect could occur is straightforward: if comparison shopping is more difficult because Sunday shopping is unavailable, consumers' ability to compare prices of the same (or similar) automobiles among various dealers is diminished and they may not locate the lowest price in the market. Furthermore, if consumers shop fewer hours, then dealers may have less incentive to compete on price, leading to higher prices overall or a greater range between the highest and lowest prices in the market.[17]

Mandatory Sunday closing laws can also restrict the availability of ancillary services, such as parts and repair services, leading to the same types of anticompetitive effects with

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[14] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1912(f) (3d ed. 2011); *See also* Leech v. Highland Memorial Cemetery, Inc., 489 F. Supp. 65 (E.D. Tenn. 1980) (agreement by cemeteries not to perform burials on Sundays was a violation of Section 1 of the Sherman Act).

[15] *See* Fiona Scott Morton, et al., *What Matters in a Price Negotiation: Evidence from the U.S. Auto Retailing Industry*, 9 QUANTITATIVE MARKETING & ECON. 365 (2011), *available at* http://link.springer.com/content/pdf/10.1007%2Fs11129-011-9108-1.pdf.

[16] *See* Jennifer F. Reinganum, *A Simple Model of Equilibrium Price Dispersion*, 87 J. POL. ECON. 851 (1979), *available at* http://www.jstor.org/stable/pdfplus/1831011.pdf; Dale O. Stahl II, *Oligopolistic Pricing with Sequential Consumer Search*, 79 AM. ECON. REV. 700 (1989), *available at* http://www.jstor.org/stable/pdfplus/1827927.pdf. For a review of economic theory and empirical evidence concerning the effect of search costs on price, *see* Michael R. Baye, et al., *Information, Search, and Price Dispersion*, *in* HANDBOOKS IN ECONOMICS AND INFORMATION SYSTEMS 323 (T. Hendershott ed., 2006). In economic terms, making some task, such as searching for a car, more difficult is considered to be a "cost" to the consumer.

[17] For empirical evidence that consumers with higher search costs pay more for the cars they purchase, *see* Morton et al., *supra* note 15. For empirical evidence that higher search costs lead to higher prices in other markets, *see* Alan T. Sorensen, *Equilibrium Price Dispersion in Retail Markets for Prescription Drugs*, 108 J. POL. ECON. 833 (2000), *available at* http://www.jstor.org/stable/pdfplus/10.1086/316103.pdf; and Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002), *available at* http://www.jstor.org/stable/pdfplus/10.1086/339714.pdf.

respect to such services. Consumers will not be able to comparison shop as easily for these services, which may reduce competition and lead to higher prices.

In sum, Sunday closing laws directly interfere with the interaction of supply and demand between automobile dealers and consumers. They impede the ability of dealers to compete in response to perceived consumer demand and prevent the competitive process from determining hours of operation, along with related sales and service activities.

B. There Are No Cognizable Efficiencies to Support the Ban

Government restrictions on competition may be justified if they are narrowly tailored to serve some important public purpose, such as consumer safety. In addition, it has long been recognized that some privately imposed restrictions on the distribution of products, such as automobiles, may be procompetitive. For example, manufacturers can designate exclusive territories for their dealers in an effort to provide them with the incentive to invest in an attractive showroom and training employees, which can benefit consumers and promote competition with dealers of other brands.

FTC staff are unaware, however, of any procompetitive efficiencies or other justifications for mandatory Sunday closing laws for automobile dealers. As noted above, in virtually all other industries, hours of operation are determined by the competitive process. We urge Illinois legislators to consider whether there is anything unique about the automobile industry to support arguments that limiting hours of operation will decrease costs, expand output, improve quality, or provide any other consumer benefits that would justify such a significant restraint on dealers' hours of operation.

We are aware that Illinois state and local dealer associations have expressed their support for the current law and their opposition to S.B. 2629. As we understand it, some dealers have expressed the view that if the ban on Sunday closing is repealed, some dealers will choose to open on Sundays – presumably in response to consumer demand – and most others likely will follow. FTC staff believe this argument demonstrates exactly why more competition, not less, is good for consumers. If the Sunday closing laws were repealed, dealers would have to compete to determine their hours of operation. Each dealer would make an independent decision, based on its own assessment of profitability and responsiveness to consumer preferences.

To the extent that opponents of repeal cite other justifications to prohibit Sunday sales, these, too, appear to reflect the anticompetitive consequences of the current ban. For example, opponents argue that automobile salespeople would have to work seven days a week, and since most workers cannot (or do not want to) work all seven days, it would be difficult to hire qualified, competent sales staff. In addition, opponents have argued that Sunday bank closings make it difficult or impossible for dealers to complete the financing on an automobile; dealers expect to sell a certain set number of cars per week, regardless of whether they are closed on Sunday, and therefore they can reduce their overhead by being closed on that day; and customers prefer to have one day in which they can look at the available cars without being hounded by salespeople.[18] These arguments directly challenge the value of competition and the competitive process.[19] At best, they may constitute reasons an individual dealership might choose not to open on Sunday, but they are not arguments for why a total ban imposed by the state on all Sunday sales benefits consumers. In addition, it is impossible to reconcile these arguments with the fact that many other businesses chose to open on Sunday, including many automobile dealers in states that do not mandate Sunday closings.

C. Conclusion

Based on our prior experience with the automobile industry, our competition and economic expertise, and our analysis of Illinois Senate Bill 2629, FTC staff believe that its passage would enhance competition and provide significant benefits for Illinois consumers. Repealing the Sunday sales ban would ensure that the competitive process, not legislative directive, determines auto dealers' hours of operation and the availability of other related services. The current law makes it more difficult for Illinois consumers to comparison shop and raises their search costs, which may lead to higher prices, less favorable terms of sale and lease, reduced output of sales and service, and a market that is unresponsive to consumer preferences.

Respectfully submitted,

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[18] *See generally* John Cody, State Senator Oberweis Wants to End Ban On Sunday Car Sales in Illinois, CBS CHICAGO (Nov. 20, 2013, 3:24 PM), http://chicago.cbslocal.com/2013/11/20/state-sen-oberweis-wants-to-end-ban-on-sunday-car-sales-in-illinois/ (quoting David Sloan, president of the Chicagoland Automobile Trade Association); Kurt Erickson, Car Dealers Don't Buy Plan to Allow Sunday Sales, PANTAGRAPH (Nov. 20, 2013, 10:00 AM), http://www.pantagraph.com/news/state-and-regional/illinois/government-and-politics/car-dealers-don-t-buy-plan-to-allow-sunday-sales/article_310fa162-51a8-11e3-a4a6-0019bb2963f4.html (quoting Peter Sander, president of the Illinois Automobile Dealers Association.)

[19] In Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978), the Supreme Court ruled that the Sherman Act precludes inquiry into whether competition is "good" or "bad." *See also* Editorial: *Sunday car sales? Not in Illinois*, CHICAGO TRIBUNE (Nov. 26, 2013), *available at* http://articles.chicagotribune.com/2013-11-26/opinion/ct-sunday-car-sales-edit-1126-20131126_1_illinois-supreme-court-sunday-car-sales-auto-dealers (endorsing S.B. 2629).