AEM
Association of
Equipment Manufacturers

Washington, DC Office
1300 I Street NW
Suite 520 West
Washington, DC 20005-3314
T: 202.898.9064

aem.org
aem@aem.org
Toll free: 866.236.0442

The Honorable Michael Webert
Chairman, Subcommittee #2, Commerce and Energy Committee
Pocahontas Building, Room E418
900 East Main Street
Richmond, Virginia 23219
Via email: DelBWiley@house.virginia.gov

January 27, 2022

Dear Chairman Webert:

I write you on behalf of the Association of Equipment Manufacturers (AEM), the North American-based international trade association representing more than 1,000 companies in the off-highway agricultural, construction, industrial, utility and forestry equipment and machinery markets. AEM members and our industry contribute over $2.7 billion to the state economy in Virginia.

AEM is opposed to HB 143, *A BILL to amend and reenact §§ **59.1-354** and **59.1-359** of the Code of Virginia, relating to the Heavy Equipment Dealer Act; agreements and exclusivity*, as written. The legislation is an unnecessary intrusion into preexisting business relationships between original equipment manufacturers and their dealers. The bill purportedly is a solution to a problem that we understand has been voiced by one dealer, and the bill will unnecessarily impact all heavy equipment OEMs, dealers and equipment users in Virginia.

AEM believes that there is absolutely no need for these sections of the Heavy Equipment Dealer Act – **enacted in Virginia 34 years ago in 1988** – to be changed at the request of one business. Certainly this legislative history alone strongly suggests that this bill is not necessary or appropriate for the intervention of the Commonwealth in what appears to be a disagreement between parties who freely negotiated a commercial contract. The parties to the contract, not the Legislature, are in the best position to resolve their differences, and as a matter of policy, OEMs and dealers should be able to freely negotiate terms under the status quo.

Moreover, to the extent HB 143 could arguably apply retroactively to existing supplier-dealer agreements, it is in clear violation of the Contracts Clause of the U.S. Constitution, Article I, Section 10, Clause 2, as a substantial impairment of existing contracts. (*Association of Equipment Manufacturers v. Burgum*, (8th Cir. 2019) https://ecf.ca8.uscourts.gov/opndir/19/08/181115P.pdf. See also *Equipment Manufacturers Institute v. Janklow*, 300 F.3rd 842 (8th Cir. 2012).

HB 143 also would violate the Constitution of Virginia, Article I, Bill of Rights, Section 11, " ... that the General Assembly shall not pass any law impairing the obligations of contracts;" HB 143 attempts to convert an agreement under the Heavy Equipment Dealer Act into a perpetual contract despite a termination time agreed to by the parties is an unconstitutional impairment.

Most equipment manufacturers distribute their products through an independent network of authorized dealers. Over the decades, these relationships have been embodied by contractual terms, which define each party's obligations. But, it is a fallacy to think that those contracts are static; the contracts evolve as a function of the type of products, the nature of their markets, the customers, and the combined business needs of both the manufacturer and the distributor.

These mutually agreed upon contracts share the duties and responsibilities in such a way that both parties can make their best contributions toward a long-term relationship that will succeed in supporting and serving the product users. Both parties need to be committed to work out isolated disagreements and conflicts that may arise and not seek wide sweeping legislative solutions.

This legislation would interfere with these established contractual relationships between the original equipment manufacturers and their dealers with respect to the agreed-upon terms. Specifically, we have concerns with the following:

1. Changes to § 59.1-354. Cancellation. HB 143 would make an existing dealer agreement perpetual unless a supplier can prove good cause. Existing law—which to our knowledge is more favorable in terms of cancellation provisions than any other state in the nation—only allows for one exemption: a new contract for all dealers in all states. The bill removes that exception, which could potentially create a situation where suppliers have one "national" contract, and one "Virginia" contract, placing an undue burden on equipment manufacturers and its dealership network.

Generally speaking, when looking to expand their dealer networks, manufacturers look for places where it is conducive to do business. Increasing the red tape burden on equipment manufacturers could lead to a stalled expansion of the Virginia dealers, leading to Virginians having to wait longer, and drive further to purchase and service their equipment.

Heavy duty equipment manufacturers support hundreds of thousands of family-sustaining jobs in rural areas through independent dealer networks. Dealers are small business owners who employ nearly 300,000 trained workers in stable, high-paying jobs across America. Legislation that puts further restrictions on manufacturers could send those jobs to West Virginia, Kentucky, or even Maryland.

2. Changes to § 59.1-359. Management; exclusivity. AEM's membership is diverse, and comprised of large, iconic corporations and smaller family operations. Some members make complete product lines, and have exclusivity clauses in their contracts, to protect the integrity of and investment in their brand. Other members may produce only a few items (a "shortline"), and sell their products through dealers that sell other, complementary equipment. Whether or not it is appropriate to

include exclusivity provisions in a contract is best left to the business needs of the parties entering into a contract, not the government.

While the amended language in new subsection B of § 59.1-359 does give some concession to manufacturers, and is adapted from so-called "model legislation", it should be noted that in order to be fair, the model legislation was developed to adopt in full, not to cherry pick the provisions that one party or another likes.

This is bad public policy that offers no benefits to users of our members' products in Virginia--in fact, the restrictions could adversely affect our members' ability to service the end user's equipment through their dealer networks.

3. The process by which this legislation has been negotiated. AEM has strong working relationships with the many equipment dealer associations across the country. AEM and regional dealer associations regularly attempt to negotiate legislation prior to introduction in order to save time for the organizations, the legislators, and their constituents. Over the past five years, we have been successful reaching agreements in several states, and presenting legislators with mutually-supported legislation. This is not the case, here.

AEM, and many its members did not learn about HB 143 until shortly before its initially-scheduled hearing. The Midwest-Southeastern Equipment Dealers Association (MSEDA) briefly consulted two original equipment manufacturers, who agreed to be neutral on the amended legislation. But, to be certain, AEM and its other major whole-good manufacturers—including those manufacturers who have a distribution agreement with Winchester Equipment – were <u>not</u> consulted. This was hardly the "industry agreement" that bill's patron and his constituent were led to believe by MSEDA.

While we are very appreciative of the week-long delay granted by Delegate Wiley, our industry still feels it has not had the appropriate opportunity to come to the table to negotiate this legislation.

We respectfully urge you to table this legislation, and we will work with you to convene all stakeholders to negotiate terms that can be agreed upon.

Respectfully submitted,

Kip Eideberg
Senior Vice President, Government and Industry Relations

Cc: Members of Subcommittee #2, House Commerce and Energy Committee