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**STATE OF HAWAII
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March 24, 2010

**CONFIDENTIAL/
ATTORNEY-CLIENT MATERIAL**

The Honorable Jon Riki Karamatsu
Chair, House Committee on Judiciary
State Capitol, Room 302
415 South Beretania Street
Honolulu, HI 96813

Re: S.B. No. 2859, S.D. 2, H.D. 1, Relating to the Motor
Vehicle Industry Licensing Act/
Hearing on Thursday, March 25, 2010 at 2:45 p.m.

Dear Chair Karamatsu:

The Department of the Attorney General ("Department") would like to express its legal concerns with S.B. No. 2859, S.D. 2, H.D. 1, Relating to the Motor Vehicle Industry Licensing Act.

The Department has been monitoring this bill since its introduction, and notes that the committee reports and testimony on the bill indicate that the bill has been a work in progress and the relevant stakeholders (i.e., motor vehicle dealers and motor vehicle manufacturers) are continuously attempting to resolve the matter. Because this is the last hearing before the bill goes to conference and the matter does not appear to be resolved, the Department wants to alert you to the following legal concerns:

First, the Department is concerned that the bill may violate Article I, section 10 of the United States Constitution, which states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts", because the amendments appear to alter the rights and liabilities between motor vehicle

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dealers and manufacturers and these amendments specifically apply to all franchise agreements existing as of the date of enactment. To further complicate the matter, this bill expands the definition of a "franchise agreement" in Hawaii Revised Statutes ("HRS") section 437-1.1 to include "agreements relating to dealership facilities, site control, customer satisfaction index requirements, and sales performance". Thus, some of the bill's amendments (e.g., the amendments to HRS section 437-28(a)(21)(B), (E), (H), (K), (P), (Q), (R), (S), (T), (U), (V), (W), and (X)) may conflict with or "impair" the terms and conditions of these existing "franchise agreements" and other contractual arrangements between the dealers and manufacturers.

In order to determine whether a state law violates the federal constitutional prohibition against impairment of contracts, the Hawaii Supreme Court has stated that the following three criteria must be reviewed:

1. "Whether the state law operated as a substantial impairment of a contractual relationship; (2) whether the state law was designed to promote a significant and legitimate public purpose; and (3) whether the state law was a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose."

See, In re Herrick, 82 Haw. 329, 340, 922 P.2d 942, 953 (1996) (citations omitted).

At this time, the Department is unable to determine the level of impairment, if any, the amendments have on the existing "franchise agreements" because we have been unable to obtain a copy of any "franchise agreement" and compare it to the amendments.¹ However, to assist the Department in defending against any constitutional challenge against the bill, we respectfully request that your Committee specify in its committee report the significant and legitimate public purpose each amendment provides and how the amendment is reasonable and

¹ It is our understanding that each manufacturer may have a different "franchise agreement" with its numerous motor vehicle dealers.
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narrowly drawn to promote that significant and legitimate public purpose.²

Second, the amendment to HRS section 437-28(a) on page 6, lines 7 and 8 appears to eliminate the Motor Vehicle Industry Licensing Board's ("Board") ability to discipline licensees for the grounds specified in paragraphs (1) through (21) because as amended, these grounds only apply to the denial of a license. To avoid this apparent unintended consequence, we recommend deleting the amendments to lines 7 and 8 on page 6 of the bill.

Third, the amendments that require a dealer to file a petition or notify the Board of any grievance (e.g., line 19 on page 16, line 13 on page 19, line 8 on page 33, lines 6 and 17 on page 37, line 12 on page 43, and line 2 on page 46) should be deleted because the language only authorizes the Hearings Officer at DCCA to review the matter and provides that the Hearings Officer's decision is not subject to Board approval. Because the Board is not given any meaningful role in this process, we recommend that the references to the Board be deleted and aggrieved parties go directly to the Hearings Office.

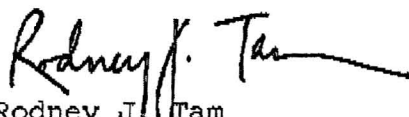
Finally, we suggest that the contested case dispute mechanism that is being proposed throughout paragraph (21) be placed into a separate new section that specifies the grounds to seek a contested case hearing. If the Hearings Office determines that a violation of any of these grounds occurred, the Board could discipline the offending licensee. Thus, we recommend that a violation of any of the grounds for a contested case be made a ground for disciplinary action under HRS section 437-28. Furthermore, we suggest that the contested case dispute mechanism just refer to "chapter 91 and Hawaii Administrative Rules chapter 16-201".

² We understand that the stakeholders are still discussing the final contents of the bill and request that your Committee specify the legitimate public purpose for any resulting amendments made by your Committee.
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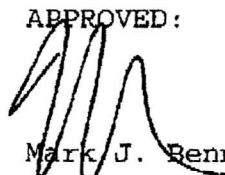
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If you have any questions on the above, please do not
hesitate to contact me at (808) 586-1180.

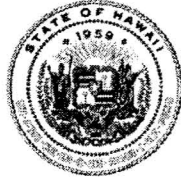
Very truly yours,


Rodney J. Tam
Deputy Attorney General

APPROVED:


Mark J. Bennett
Attorney General

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PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
REGULATED INDUSTRIES COMPLAINTS OFFICE

TO THE HOUSE COMMITTEE ON
JUDICIARY

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2010

THURSDAY, MARCH 25, 2010
2:45 P.M.

TESTIMONY ON SENATE BILL NO. 2859 S.D.2 H.D.1
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT

TO THE HONORABLE JON RIKI KARAMATSU, CHAIR,
AND TO THE HONORABLE KEN ITO, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs' Regulated Industries Complaints Office ("RICO") appreciates the opportunity to testify on Senate Bill No. 2859 S.D.2 H.D.1, Relating To The Motor Vehicle Industry Licensing Act. My name is Jo Ann Uchida, RICO's Complaints and Enforcement Officer. RICO offers the following comments on the bill.

Senate Bill No. 2859 S.D.2 H.D.1 proposes numerous amendments to the Motor Vehicle Industry Licensing Act, Chapter 437, Hawaii Revised Statutes ("HRS"). These amendments revise the substantive requirements for franchise and

ancillary contracts between manufacturers and dealers and set forth new procedural requirements for certain manufacturer-dealer disputes.

RICO's comments are limited to Section 3 of the bill that revises §437-28(a), HRS. This is the section of the motor vehicle dealer licensing law that sets forth the grounds the Motor Vehicle Licensing Board may consider when suspending, revoking, fining, or denying a license renewal or application for licensure. There is an analogous section in most of Hawaii's other professional licensing laws.

RICO understands that the bill's stakeholders are still in discussions and, as such, recognizes that this draft is a work in progress. However, inasmuch as this may be the last opportunity to articulate specific concerns, and in light of the comprehensive nature of the proposed revisions, RICO wishes to note the following:

(1) The bill as drafted eliminates the Board's ability to take disciplinary action against **any licensee** under Chapter 437, HRS. The revision on page 6 lines 7-8 breaks the first sentence of §437-28(a), HRS, into two sentences. Section 437-28(a), HRS, sets forth the grounds for discipline under Chapter 437, HRS. By creating two sentences, the bill limits the application of subsections (1) to (21) to license denials only, and there are no specific grounds for discipline that would apply to existing licensees under Chapter 437, HRS. This language is further complicated by the language at page 2 lines 10-13 of the bill that makes §§437-1 to 437-41, HRS, as amended from time to time, remedial.

(2) In most licensing laws, standing to enforce licensing violations and take disciplinary action is limited to the board. This is because the board determines whether there are violations and what, if any, licensing sanctions (e.g., revocation, suspension, restriction, corrective action, payment of fines, etc.) may be appropriately ordered.

The bill as drafted differs from other licensing laws in that provisions that set forth the criteria and procedures for handling private manufacturer-dealer disputes would be housed in the section that governs licensing violations. In particular, subsections E, K, S, T, and U provide for private standing to file administrative actions. Those actions would be determined by a hearings officer and not be subject to Board approval. The placement of these private actions in the section of the law that governs the Board's enforcement authority creates confusion as to which process applies and to what extent these private administrative actions preclude concurrent or separate Board action.

(3) To reduce confusion as to which enforcement mechanism applies, RICO suggests that the provisions in the bill that are intended to involve private administrative action between manufacturers and dealers not be located in the section of the law that sets forth the grounds for disciplinary action by the licensing Board.

Thank you for this opportunity to testify on Senate Bill No. 2859 S.D.2 H.D.1. I will be happy to answer any questions that the members of the Committee may have.



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PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
OFFICE OF ADMINISTRATIVE HEARINGS

TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2010

THURSDAY, MARCH 25, 2010
2:45 P.M.

TESTIMONY ON SENATE BILL NO. 2859 S.D.2, H.D.1
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT

TO THE HONORABLE JON RIKI KARAMATSU, CHAIR,
AND TO THE HONORABLE KEN ITO, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs, Office of Administrative Hearings ("OAH"), appreciates the opportunity to testify on Senate Bill No. 2859 S.D.2, H.D.1 Relating to the Motor Vehicle Industry Licensing Act. My name is Sheryl Nagata, and I am the OAH Acting Senior Hearings Officer. OAH offers the following comments on the bill.

Senate Bill No. 2859 S.D.2, H.D.1, among other things, requires the OAH to conduct contested case hearings when: 1) a dealer receives notice that the manufacturer or distributor intends to terminate, discontinue, cancel or fail to

renew a franchise agreement and wants a determination of whether such action is being taken in good faith and supported by good cause, 2) a dealer wants to protest the manufacturer or distributor's proposed chargeback amount for sales or warranty payments, 3) an affected dealer wants a determination of whether the manufacturer or distributor has good cause to establish or relocate an additional franchise within the dealer's relevant market area,¹ 4) a dealer wants to protest the manufacturer or dealer's denial of a dealer's proposed sale, assignment or transfer of the franchise² and 5) when a dealer's proposed successor receives notice from the manufacturer or distributor that they will refuse to honor the dealer's designated successor whether designated by will or other estate planning document or written notice while the dealer is living or within ninety days of the dealer's death or incapacity.³

While we appreciate the confidence that the supporters of Senate Bill No. 2859 S.D. 2, H.D.1 have in OAH's ability conduct fair and impartial hearings regarding manufacturer-dealer disputes, because of current economic conditions, OAH is currently very short-staffed. Consequently, without having clear and reliable data regarding the number, complexity, and duration of these hearings, which appear to be primarily private contractual disputes, it would be difficult for OAH to add to its responsibilities at this time without having some kind of negative

¹ The decision must be issued 180 days from receipt of protest, except for good cause.

² The hearing must take place within 90 days from the date the complaint is filed.

³ The hearing must be conducted within 90 days from the date the complaint is filed.

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impact on OAH's ability to continue processing all of the other cases within OAH's jurisdiction on a timely basis.

As previously noted, items 3, 4 and 5 above have mandated time limitations to the hearings process, and these time constraints will further compromise the ability of OAH to continue to hear those kinds cases that the legislature has previously determined to be appropriate for expedited disposition such as procurement hearings. While we recognize that in certain specific situations, expedited hearings may be necessary, it is unclear whether the kinds of disputes identified in Senate Bill No. 2859 S.D. 2, H.D.1 all require expedited hearings in every case, at the cost of displacing other kinds of cases that OAH is currently responsible for hearing. This situation is further exacerbated because Senate Bill No. 2859 S.D.2., H.D.1 imposes no obligation on the private parties to these disputes to pay for their proportionate costs of the hearings.

Because of OAH's limited staff and resources, as well as OAH's current statutory obligations, OAH is not in a position to accept the responsibility to hear an undetermined number of these private disputes, on an expedited timeline, on a permanent basis.

Thank you for this opportunity to testify on Senate Bill No. 2859 S.D.2., H.D.1. I will be happy to answer any questions that the members of the Committee may have.



Stan Masamitsu, President
Dave Rolf, Executive Director

**Testimony in STRONG SUPPORT of SB2859 SD2 HD1
Substituting the HADA amended language version --which is submitted with this
testimony**

RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT

**Presented to the House Committee on Judiciary
For the public hearing 2:45 p.m. Thursday, March 25, 2010
In Conference Room 325
At the Hawaii State Capitol**

Chair Karamatsu and Vice Chair Ito, and members of the committee:

I am David Rolf, representing the members of the Hawaii Automobile Dealers Association, Hawaii's franchised new car dealers, who strongly support SB2859 SD2 HD1 with the inclusion of HADA's amended language attached.

HADA's current draft of SB2859 contains proposed statute language relating to the Motor Vehicle Industry Licensing Act and represents how the stakeholders, through negotiations, have come to agreement on many of the issues brought forward. Please see the attached language. Annotations in the right margin show language incorporated at the suggestion of the Alliance of Automobile Manufacturers, Honda Motor Company, and General Motors.

The Motor Vehicle Industry Licensing Board, (MVILB) and the Regulated Industries Complaints Office (RICO) HADA made several revisions and we have also incorporated language provided by these stakeholders with the understanding that several issues remain to be resolved and negotiations on these continue.

Some issues remain but HADA and the Alliance hope to have final language by next Wednesday, March 31. The objective of all participants so far seems to be to

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HADA testimony in support of SB2859 SD2 HD1 (amended language attached), page 2

obtain an amicable handshake on all the language and proceed into hearing without objection from the parties if possible.

With regard to MVILB and RICO input, HADA agrees with all the suggestions. All that remains is to find a final format with regard to sections. HADA anticipates that in final form, the bill will contain a separate section relating to manufacturer-dealer contract issues so as to make clear that dealer petitions relating to resolution of such issues will go to an administrative hearings officer—who will handle the hearing expeditiously. The proposal for petitions, under the franchise law to go to a hearings officer for final judgment, with the possibility of appeal to the Circuit Court, was made to accommodate input from the MVILB.

Remaining differences in the manufacturers' proposed language and HADA's proposed language relate primarily to two issues (although there are still other issues to be resolved):

The issue of coerce vs. require

HADA prefers the use of the term "required." The Alliance prefers use of term "coerced" vs "required." HADA points out, however, that "coerced" in effect involves so much proof to substantiate that it takes away in many, if not most cases a dealer's ability to file a protest, while the HADA-preferred term "required" allows the new law to have the law's intended effect of allowing a dealer a reasonable standard for filing a protest.

The issue of exempting certain contracts

Negotiations also continue on the Alliance' proposed language, which, in effect, carves out manufacturer-dealer contracts which were not referenced in the franchise agreement. HADA notes that contracts provided by the manufacturer to the dealer are in effect non-negotiable and thus it is necessary to insure that subsequent manufacturer-dealer contracts are not carved out just because there was no reference to such in the franchise contract.

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HADA testimony in support of SB2859 SD2 HD1 (amended language attached), page 3

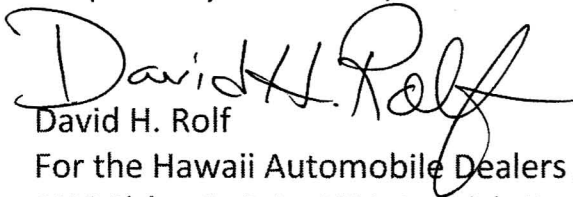
In summary, there is agreement on much of the bill

As mentioned, HADA dropped some language at the request of the Alliance/GM/Honda; in the same amicable fashion the manufacturers agreed to accept some of the language proposed by HADA. All parties so far are agreeing with the MVILB's and RICO's suggestions, and except for final formatting, those suggestions have been incorporated in this HADA draft.

HADA respectfully requests that the committee substitute the HADA proposed language into SB2859, SD2 HD1 with the understanding that formatting changes to accommodate RICO's request for a separate section for language relating to petitions filed by dealers relating to the dealer-manufacturer contract relationships are still to come.

Please see attached SB2859 revised HADA language. Again, we anticipate having final language by Wednesday, March 31, 2010.

Respectfully submitted,


David H. Rolf

For the Hawaii Automobile Dealers Association

1100 Alakea St. Suite 2601, Honolulu Hawaii 96813, Tel: 808 593-0031 Cel: 808 223-6015

A BILL FOR AN ACT

RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 437-1, Hawaii Revised Statutes, is amended to read as follows:

"§437-1 **Legislative findings and declaration.** The legislature finds that:

- (1) The manufacture, distribution, and sales of motor vehicles in the [~~State~~] state vitally affects the general economy of the State and the public interest and public welfare;
- (2) Manufacturers of motor vehicles [~~whose~~] without physical manufacturing facilities [~~are not located~~] within the [~~State,~~] state, and motor vehicle distributors[~~, are doing~~] do business in the [~~State~~] state through their control over, and relationships and transactions with their dealers, branches, and representatives; and

(3) The geographical location of Hawaii makes it necessary to ensure ~~[the availability of]~~ that motor vehicles ~~[and]~~, parts and dependable service ~~[therefor]~~ are available within the ~~[State]~~ state to protect and preserve the transportation system and the investments of its residents.

The legislature declares, on the basis of the foregoing findings, that it is necessary to regulate and to license motor vehicle manufacturers, distributors, dealers, salespersons, and auctions in the ~~[State,]~~ state to prevent frauds, impositions, and other abuses against its residents~~[,]~~ and to protect and preserve the economy and the transportation system of the State. To further this intent, the legislature finds that all of the provisions of sections 437-1 to 437-41 as amended from time to time are remedial and apply to all franchise agreements existing as of the date of enactment."

SECTION 2. Section 437-1.1, Hawaii Revised Statutes, is amended as follows:

1. By adding a new definition of "relevant market area" to be appropriately inserted and to read:

"Relevant market area" means the following:

Comment [JA1]: Identical to Alliance definition.

(1) In a county with a population of less than five hundred thousand persons according to the most recent data of the United States Census Bureau or the data of

the department of business, economic development, and tourism, the relevant market area shall be the county in which the dealer is located; or

- (2) In a county with a population of more than five hundred thousand persons according to the most recent data of the United States Census Bureau or the data of the department of business, economic development, and tourism, the relevant market area shall be within a radius of six miles from the dealership location."

2. By amending the definitions of "dealer", "franchise", and "new motor vehicle dealer" to read:

"Dealer" includes "auction" as defined in this section or any person or entity not expressly excluded by this chapter who sells three or more vehicles within a calendar year, or who is engaged in the business of selling, soliciting, offering, or attempting to negotiate sales, purchases, or exchanges of motor vehicles or any interest therein, including options to purchase motor vehicles. The term "dealer" excludes a person who sells or purchases motor vehicles in the capacity of:

- (1) A receiver, trustee, personal representative, guardian, or any other person appointed by or acting under a judgment or order of any court;
- (2) A public officer while performing official duties;

- (3) A holder of an auction license issued under this chapter when acting within the scope of the license;
- (4) An insurance company, finance company, bank, or other financial institution [~~selling~~] that sells or [~~offering~~] offers for sale motor vehicles repossessed or foreclosed by it under the terms of a credit sale contract or security agreement;
- (5) A person not engaged in the business of selling or purchasing motor vehicles [~~when acquiring~~] who acquires or [~~disposing~~] disposes of motor vehicles for the person's own personal, family, or business use; provided that the vehicles are acquired or disposed of for the person's use in good faith and not for the purpose of evading any provision of this chapter;
- (6) A consumer consultant who is not engaged in the business of selling, soliciting, offering, or attempting to negotiate sales or exchanges of motor vehicles or any interest therein for any dealer, and who for a fee provides specialized information and expertise in motor vehicle sales transactions to consumers [~~wishing~~] who wishes to purchase or lease motor vehicles [~~The~~]; provided that consumer consultant shall register and pay a fee to the board prior to offering consultant services; or

(7) A Hawaii bank or its affiliate selling or offering for sale motor vehicles surrendered or redelivered to it under the terms of a lease~~[7]~~ or sold by it pursuant to a purchase option contained in a lease.

"Franchise" or "franchise agreement" means any contract or agreement between a dealer and a manufacturer or distributor that authorizes the dealer to engage in the business of selling or purchasing any particular make or makes of new motor vehicles or motor vehicle parts ~~[therefor]~~ manufactured or distributed by ~~[such]~~ manufacturer or distributor~~[7]~~ or that establishes rights or obligations, or both, relating to the dealer's new motor vehicle operation, including agreements relating to dealership facilities, site control, customer satisfaction index requirements, and sales performance.

"New motor vehicle dealer" means a dealer who engages in the business of selling, at wholesale or retail, ~~[or both,]~~ new motor vehicles or new and used motor vehicles."

SECTION 3. Section 437-28, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) In addition to any other actions authorized by law, the board, after notice and hearing as provided in chapter 91, and subject to appeal to the circuit court of the circuit in which the board has jurisdiction under the procedure and rules prescribed by the laws of the State or the applicable rules of

the courts pertaining to appeals to circuit courts, may suspend, revoke, fine, or deny the renewal of any license~~[, or prior]~~. Prior to notice and hearing, the board may deny the issuance of any license for any cause authorized by law, including but not limited to circumstances where the board finds that the applicant or holder, or any officer, director, general manager, trustee, partner, or stockholder owning more than ten per cent interest of the applicant or holder:

- (1) Has intentionally made a false statement of a material fact in the application for a license or in any other statement required by this chapter or has obtained or attempted to obtain a license by fraud or misrepresentation;
- (2) Has failed to comply with, observe, or adhere to any provision of this chapter or any other law relating to the sale, taxing, or licensing of motor vehicles or any rule or order made pursuant to this chapter;
- (3) Has committed a fraudulent act in selling, purchasing, or otherwise dealing in motor vehicles or has misrepresented the terms and conditions of a sale, purchase, or contract for sale or purchase of a motor vehicle or any interest therein including an option to purchase motor vehicles;

- (4) Has engaged in business under a past or present license issued pursuant to this chapter, in a manner as to cause injury to the public or to those with whom one is dealing;
- (5) Has failed to comply with, observe, or adhere to any law in any other respect [~~on account whereof~~] so that the board [~~may deem~~] deems the applicant or holder to be an unfit or improper person to hold a license;
- (6) Has failed to meet or maintain the conditions and requirements necessary to qualify for the issuance of a license;
- (7) Is insolvent [~~or~~], has filed, or is the subject of a petition for bankruptcy, wage earner's plan, or financial reorganization plan[+] or has made or proposes to make an assignment for benefit of creditors;
- (8) In the case of an individual applicant or holder of a license, if the applicant or holder is not at least eighteen years of age[+], or in the case of a partnership applicant or holder of a license, if any general or limited partner [~~thereof~~] is not at least eighteen years of age;
- (9) Has charged more than the legal rate of interest on the sale [~~or~~], purchase, or attempted sale or

purchase, or in arranging the sale or purchase of a motor vehicle or any interest therein including an option to purchase;

- (10) Has violated any ~~[of the laws]~~ law pertaining to false advertising or to credit sales in the offering, soliciting, selling, ~~[or]~~ purchasing, or arranging to sell or purchase a motor vehicle or any interest therein;
- (11) Has wilfully failed or refused to perform any unequivocal and indisputable obligation under any written agreement involving the sale or purchase of a motor vehicle or any interest therein, including an option to purchase;
- (12) Has been denied the issuance of a license under this chapter for substantial culpable cause or ~~[for having]~~ has had a license issued under this chapter suspended, revoked, or the renewal thereof denied for substantial culpable cause;
- (13) Has entered ~~[or]~~ has attempted to enter, or proposes to enter into any contract or agreement contrary to this chapter or any rule adopted thereunder;
- (14) Has been ~~[or]~~ is engaged, or proposes to engage in the business of selling new motor vehicles as a dealer or auction without a proper franchise therefor;

- (15) Has at any time employed ~~[or]~~, ~~[utilized]~~ used, or attempted or proposed to employ or ~~[utilize]~~ use any person not licensed under this chapter who is required to be so licensed;
- (16) Has entered or attempted to enter any one-payment contract~~[r]~~ where the contract is required to be signed by the purchaser prior to removal of the motor vehicle for test driving from the seller's premises;
- (17) ~~[Being]~~ Is a salesperson or dealer~~[+]~~ and:
- (A) Has required a purchaser of a motor ~~[vehicles]~~ vehicle as a condition of sale and delivery ~~[thereof]~~, to purchase special features, appliances, accessories, or equipment not desired or requested by the purchaser; provided that this prohibition shall not apply as to special features, appliances, accessories, or equipment which are ordinarily installed on the vehicle when received or acquired by the dealer;
- (B) Has represented and sold as an unused motor vehicle any motor vehicle which has been leased or operated as a demonstrator~~[r-leasedr]~~ or U-drive motor vehicle;
- (C) Has sold a new motor vehicle without providing or securing for the purchaser the standard factory

new car warranty for the vehicle[7] unless the dealer or salesperson clearly notes in writing on the sales contract that the new motor vehicle is sold without the standard factory warranty;

- (D) Has sold a new motor vehicle covered by a standard factory warranty without informing the purchaser in writing that any repairs or other work necessary on any accessories which were not installed by the manufacturer of the vehicle may not be obtainable in a geographic location other than where the purchase occurred; provided that the notice required by this section shall conform to the plain language requirements of section 487A-1, regardless of the dollar amount of the transaction;
- (E) Has engaged in any improper business conduct, including but not limited to employing, contracting with, or compensating consumer consultants; or
- (F) Has sold or leased a new or used motor vehicle, other than at auction, without written documentation [~~that contains the following provision printed legibly in at least fourteen-point bold typeface print,~~] upon which the

salesperson or dealer shall appropriately indicate the type of sale, [~~and upon~~] which both the customer and salesperson or dealer shall place their initials in the designated spaces[7] prior to the signing of the contract of sale or lease[+] and that contains the following provision printed legibly in at least fourteen point bold typeface:

"This (IS) (IS NOT) a door-to-door sale. There (IS A) (IS NO) 3-DAY RIGHT TO CANCEL on this purchase.

_____ Customer's Initials _____

Salesperson's

_____ or Dealer's Initials";

(18) [~~Being~~] Is an applicant or holder of a dealer's license[+] and:

(A) Has sold or proposed to sell new motor vehicles without providing for the maintenance of a reasonable inventory of parts for new vehicles or without providing and maintaining adequate repair facilities and personnel for new vehicles at either the main licensed premises or at any branch location;

- (B) Has employed or proposed to employ any salesperson who is not duly licensed under this chapter; or
 - (C) Has sold or proposed to sell new motor vehicles without being franchised therefor;
- (19) [~~Being~~] Is an applicant or holder of an auction's license and has sold or proposed to sell new motor vehicles without being franchised therefor; or
- (20) [~~Being~~] Is an applicant for a salesperson's license[+] and:
- (A) Does not intend to be employed as a salesperson for a licensed motor vehicle dealer; or
 - (B) Intends to be employed as a salesperson for more than one dealer[~~+~~];
- (21) [~~Being~~] Notwithstanding the terms of a franchise agreement, is a manufacturer or distributor[+] that:
- (A) Has [~~attempted to coerce or has coerced~~] required any dealer in the [~~State~~] state to enter into any agreement with the manufacturer or distributor or any other party, to perform any act not required by or to refrain from performing any act not contrary to the reasonable requirements of the franchise agreement with the dealer, by threatening to cancel the franchise agreement or by threatening to refuse, at the expiration of

the current franchise agreement, to enter into a new franchise agreement with the dealer;

(B) Has required any dealer in the state to enter into any agreement with the manufacturer or distributor or any other party, that requires the law of another jurisdiction to apply to any dispute between the dealer and manufacturer or distributor or requires that the dealer bring an action against the manufacturer or distributor in a venue outside of Hawaii or requires the dealer to agree to arbitration or waive its rights to bring a cause of action against the manufacturer or distributor;

(C) Has required any dealer in the state to enter into any agreement with the manufacturer or distributor or any other party, to prospectively assent to a release, assignment, novation, waiver, or estoppel, which instrument or document operates, or is intended by the applicant or licensee to operate, to relieve any person from any liability or obligation of this chapter;

~~[(B)]~~ (D) Has ~~[attempted to coerce or has coerced]~~ required any dealer in the ~~[state]~~ state to enter into any agreement with the manufacturer or distributor or

any other party, to perform any act not required by or to refrain from performing any act not contrary to the reasonable requirements of the franchise agreement with the dealer, by awarding or threatening to award a franchise to another person for the sale of the same make of any motor vehicle in the ~~[same sales area of responsibility covered by the existing franchise agreement of the dealer,]~~ dealer's relevant market area;

~~[(C)]~~ (E) Has ~~[attempted to or has]~~ canceled or failed to renew the franchise agreement of any dealer in the [State] state without providing notice, and without good cause and good faith, as defined herein. ~~[Upon such a cancellation or failure to renew the franchise agreement, the party canceling or failing to renew the franchise agreement, at the dealer's option, shall either:~~

~~(i) Compensate the dealer at the fair market going business value for the dealer's capital investment, which shall include but not be limited to the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise, inventory~~

Comment [JA2]: E is identical to Alliance draft and the added subsections are almost identical

~~of parts, and motor vehicles possessed by
the dealer in connection with the franchise,
plus reasonable attorney's fees incurred in
collecting compensation; provided that the
investment shall have been made with
reasonable and prudent judgment for the
purpose of the franchise agreement; or~~

(iii) ~~Compensate the dealer for damages including
attorney's fees as aforesaid, resulting from
the cancellation or failure to renew the
franchise agreement.~~

~~As used in this paragraph, "good faith" means the
duty of each party to any franchise agreement to
fully comply with that agreement, or to act in a
fair and equitable manner towards each other;]~~

A manufacturer or distributor shall give written
notice to the dealer and the board of the
manufacturer's intent to terminate, discontinue,
cancel, or fail to renew a franchise agreement at
least sixty days before the effective date
thereof, and state with specificity the grounds
being relied upon for such discontinuation,
cancellation, termination, or failure to renew,
except that the manufacturer or distributor may

provide such notice fifteen days before the effective date of termination, discontinuation, cancellation, or non-renewal in the following circumstances:

- (i) The dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within thirty days after the filing, there has been a closeout or sale of a substantial part of the dealer's assets related to the business, or there has been a commencement of dissolution or liquidation of the dealer;
- (ii) The dealer has failed to operate in the normal course of business for seven consecutive days or has otherwise abandoned the business;
- (iii) The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the manufacturer or distributor; or
- (iv) The dealer has engaged in conduct that is injurious or detrimental to the dealer's customers or to the public welfare.

(v) There has been a change, without the prior written approval of the manufacturer or distributor, in the location of the dealer's principal place of business under the dealership agreement

Comment [JA3]: Sections (v) and (vi) are added from Alliance draft.

(vi) Misrepresentation or fraud upon the manufacturer by the dealer.

As used in this subparagraph, "good faith" means the duty of each party to any franchise agreement to fully comply with that agreement, and to act in a fair and equitable manner towards each other.

In the event that the manufacturer's or distributor's notice of intent to terminate, discontinue, cancel, or fail to renew is based upon the dealer's alleged failure to comply with sales or service performance obligations, the dealer shall first be provided with notice of the alleged sales or service deficiencies and afforded at least one hundred eighty days to correct any alleged failure before the manufacturer or distributor may send its notice of intent to terminate, discontinue, cancel, or fail to renew. Good cause shall not be deemed to

Comment [JA4]: Identical to Alliance draft except for word "substantially" in the last sentence.

exist if a dealer substantially complies with the manufacturer's or distributor's reasonable performance provisions within the one hundred eighty-day cure period, or if the failure to demonstrate substantial compliance was due to factors that were beyond the control of the dealer.

A dealer who receives notice of intent to terminate, discontinue, cancel, or fail to renew may, within the sixty-day notice period, file a petition or complaint with the board for a determination of whether such action is taken in good faith and supported by good cause. A petition or complaint filed under this subsection shall be immediately referred to a hearing officer as a contested case in accordance with Title 8, Chapter 91-9, and shall operate under the Administrative Procedure Act and the administrative rules set forth in Title 16, Chapter 201 et al. The contested case shall not be subject to mediation under Title 8, chapter 91-8.5. The manufacturer or distributor shall have the burden of proof that such action is taken in good faith and supported by good cause.

Comment [JA5]: Substantive language is identical; process is different, but that is best left to work out locally

The hearing officer's final determination shall not be subject to board approval.

In an action commenced pursuant to this subparagraph, good cause shall not exist absent a breach of a material and substantial term of the franchise agreement or the existence of one or more circumstances enumerated in subsection (i) or upon the change in ownership of a manufacturer or distributor or upon the cancellation of a line make.

Comment [JA6]: Identical except for Alliance does not want good cause in the event of cancellation of line make

Upon the filing of an action pursuant to this subparagraph, except in the circumstances enumerated in subsection (i), the franchise agreement shall remain in effect until a final judgment is entered after all appeals are exhausted, and during that time the dealer shall retain all rights and remedies pursuant to the franchise agreement, including the right to sell or transfer the franchise.

Comment [JA7]: Identical

Upon the termination, discontinuation, cancellation or failure to renew the franchise agreement by the manufacturer or distributor, the manufacturer or distributor shall compensate the dealer for all new, unused, and undamaged parts

Comment [JA8]: A few variations, particularly with repayment for capital investment that Alliance does not want, but most are the same, and this draft incorporates a couple suggestions from the latest Alliance draft.

listed in the current parts catalog and still in
the original, resalable merchandising packages
and in unbroken lots; provided that for sheet
metal, a comparable substitute may be used.
Prices shall be those in effect at the time the
manufacturer or distributor receives the parts,
less applicable allowances; the fair market value
of all undamaged, unmodified special tools,
equipment, and signage required by the
manufacturer or distributor and acquired by the
dealer within the three years prior to the
termination; all new, undamaged and unsold
vehicle inventory of the current model year, and
one year prior model acquired from the
manufacturer or distributor or from another same
line make dealer in the ordinary course of
business prior to the effective date of
termination or non-renewal; provided that the
vehicle has less than five hundred miles
registered on the odometer. The purchase price
shall be the dealer's net acquisition cost. The
compensation shall be paid to the dealer no later
than ninety days from the date of the franchise

Comment [JA9]: Added from latest Alliance
draft

Comment [JA10]: Added from latest Alliance
draft

termination, discontinuation, cancellation, or failure to renew.

In addition to the other compensation set forth in this subparagraph, upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith or as a result of the discontinuation of a line make, the manufacturer or distributor shall compensate the dealer at the fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise as of the effective date of the termination or date of notice, whichever is greater. The compensation shall be paid to the dealer no later than ninety days from the date of the franchise termination, discontinuation, cancellation, or failure to renew. For the purposes of this subparagraph, "fair market value" means the value of the business at the time the franchise agreement is terminated, cancelled, or not renewed or the value of the

business twelve months prior, whichever is greater;

[~~(D)~~] (F) Has delayed delivery of or refused to deliver without cause, any new motor vehicle to a dealer, franchised to sell the new motor vehicle, within a reasonable time after receipt of a written order for the vehicle from the dealer. The delivery to another dealer of a motor vehicle of the same model and similarly equipped as the vehicle ordered by a dealer who has not received delivery thereof, but who had placed the written order for the vehicle prior to the order of the dealer receiving the vehicle, shall be prima facie evidence of a delayed delivery of, or refusal to deliver, a new motor vehicle without cause. The nondelivery of a new motor vehicle to a dealer within sixty days after receipt of a written order for the vehicle from a dealer shall also be prima facie evidence of delayed delivery of, or refusal to deliver, a new motor vehicle without cause; provided that the delayed delivery of, or refusal to deliver, a motor vehicle shall be deemed with cause if the manufacturer establishes that the delay or refusal to deliver

is due to a shortage or curtailment of material, labor, transportation, utility service, labor or production difficulty, or other similar cause beyond the reasonable control of the manufacturer;

~~(E)~~ (G) Has discriminated against any of their franchised dealers in the [State] state by directly or indirectly charging the dealer more for a new motor vehicle or services, parts, or accessories or a higher rate of transportation for transporting the vehicle from the manufacturing or assembly plant to the dealer or any portion of the distance, than is charged to any other of their franchised dealers in the [State] state for the same make, model, and year of a new motor vehicle or for the same devices, parts, or accessories for the similar transportation for the vehicle during the same period. A manufacturer or distributor who provides or causes to be provided greater transportation benefits for a new motor vehicle as aforesaid to any of their franchised dealers in the [State] state than is provided to any of their competing franchised dealers in the [State] state for the

same or lesser price or charge than that imposed upon the franchised dealer in the [State] state during the same period is deemed to have so discriminated against the competing franchised dealer in the [~~State-~~] state. Evidence of similar discriminatory practice against franchised dealers in other states shall not constitute a defense to or justification of the commission of the discriminatory act against the franchised dealer in the [~~State-~~] state. The intent and purpose of this subparagraph is to eliminate inequitable pricing policies set by manufacturers or distributors which result in higher prices of new motor vehicles to the consumer in the [~~State-~~] state. This subparagraph shall be liberally interpreted to effect its intent and purpose and in the application thereof, the substance and effect and not the form of the acts and transactions shall be primarily considered in determining whether a discriminatory act has been committed. Nothing contained in this subparagraph shall prohibit establishing delivered prices or destination charges to dealers in the [State] state which

reasonably reflect the seller's total transportation costs incurred in the manufacture or delivery of products to the dealers, including costs that are related to the geographical distances and modes of transportation involved in shipments to this State, or which meet those lower prices established by competitors;

(H) Refuses or fails to offer an incentive program, Comment [JA11]: identical
bonus payment, holdback margin, or any other mechanism that effectively lowers the net cost of a vehicle to any franchised dealer in the State if the incentive, bonus, or holdback is made to one or more same line make dealers in the state;

[+F+] (I) Has required a dealer of new motor vehicles in the ~~[State]~~ state as a condition of sale and delivery of new motor vehicles to purchase special features, appliances, accessories, or equipment not desired or requested by the dealer; provided that this prohibition shall not apply to special features, appliances, accessories, or equipment, except heaters, that are regularly installed on that particular model or new motor vehicles as "standard" equipment or to special features, appliances, accessories, or equipment

that are an integral part of the new motor vehicles and cannot be removed therefrom without substantial expense. Nothing in this subparagraph shall make it unlawful for a dealer to sell a vehicle that includes a heater that has been installed as standard equipment;

~~(G)~~ (J) Has failed to adequately and fairly compensate its dealers for labor, parts, and other expenses incurred by the dealer to perform under and comply with manufacturer's warranty agreements. In no event shall any manufacturer or distributor pay its dealers a markup on parts or a labor rate per hour for warranty work that is less than that charged by the dealer to the retail customers of the dealer; provided that such dealer's retail parts markup is not unreasonable when compared with that of same line make authorized franchise dealers of the manufacturer or distributor for identical merchandise or services in the county in which the dealer is engaged in business ~~nor shall the rates be more than the retail rates.~~

(i) For parts reimbursement, the retail markup charged by the dealer shall be established by submitting to the manufacturer or

Comment [JA12]: Identical after changes below

Comment [JA13]: Added from latest Alliance draft

Comment [JA14]: A few minor differences exist, most notably that small volume dealers have a method to set mark up rate whereas the Alliance draft requires 100 RO's in 90 days.

distributor a sufficient quantity of
numerically consecutive repair orders from
the most recent months to provide one
hundred qualifying customer-paid repair
orders. For a dealer unable to provide one
hundred qualifying customer-paid repair
orders out of all numerically consecutive
repair orders within the two-month period
prior to the submission, the dealer shall
submit customer service repair orders of all
types, including customer pay, warranty, and
internal, for that two-month period. The
repair orders shall contain the price and
percentage markup. Dealers shall declare in
their submission the average markup the
dealer is declaring as its new parts
reimbursement rate. The declared parts
reimbursement markup shall take effect
thirty days after initial submission to the
manufacturer or distributor and shall be
presumed to be fair and reasonable.
However, the manufacturer or distributor may
make reasonable requests for additional
information supporting the submission. The

thirty-day timeframe in which the manufacturer or distributor shall make the declared parts reimbursement markup effective shall commence following receipt from the dealer of any reasonably requested supporting information. The dealer shall not request a change in the parts reimbursement markup more than once every twelve months;

(ii) In no event shall any manufacturer or distributor pay its dealers a labor rate per hour for warranty work that is less than that charged by the dealer to the retail customers of the dealer;

Comment [JA15]: No change from current law

(iii) In determining qualifying repair orders for parts, the following work shall not be included: repairs for manufacturer or distributor special events; repairs covered by any insurance or service contract; federal, state, or local government legislated vehicle emission or safety inspections; parts sold at wholesale or repairs performed at wholesale, which shall include any sale or service to a fleet of

Comment [JA16]: Identical

vehicles; engine assemblies and transmission assemblies; routine maintenance not covered under any retail customer warranty, such as fluids, filters, and belts not provided in the course of repairs; nuts, bolts, fasteners, and similar items that do not have an individual part number; tires; and vehicle reconditioning;

- (iv) Dealers shall have at least thirty days after the repair work is completed to submit a claim for approval. All claims made by the dealers for compensation for delivery, preparation, and warranty work shall be [paid within thirty days after approval and shall be approved or disapproved within thirty days after receipt.] approved or disapproved and if approved, paid within forty-five days after receipt by a manufacturer or distributor of a properly completed claim. All sale incentive claims shall be approved or disapproved and if approved, paid within sixty days after receipt by a manufacturer or distributor of a properly completed claim. When any claim

is disapproved, the dealer shall be notified
in writing of the grounds for
disapproval[;]. Failure to disapprove a
claim within the required timeframe
constitutes approval of the claim;

(K) No manufacturer or distributor shall conduct a
warranty or incentive audit on previously paid
claims or chargeback any warranty or incentive
payment previously made more than one year after
the date the manufacturer or distributor made the
payment to the dealer. These provisions do not
apply to fraudulent claims.

A manufacturer or distributor shall not chargeback
a dealer for sales or warranty payments unless
the manufacturer or distributor can satisfy its
burden of proof that the dealer's claim was
fraudulent or that the dealer did not make a good
faith effort to comply with the reasonable
written procedures of the manufacturer or
distributor.

After all internal dispute resolution processes
provided by the manufacturer or distributor have
been concluded, the manufacturer or distributor
shall give notice to the dealer of the final

Comment [JA17]: Only difference is Alliance
desire to leave out incentive audits and not limit
them to one year time frame

proposed chargeback amount. The dealer may file an action with the board protesting proposed chargeback amount within thirty days of receipt of this written notice from the manufacturer or distributor of the proposed chargeback. A protest filed under this subsection shall be immediately referred to a hearing officer as a contested case in accordance with Title 8, chapter 91-9, and shall operate under the Administrative Procedure Act and the administrative rules set forth in Title 16, chapter 201 et al. The contested case shall not be subject to mediation under Title 8, chapter 91-8.5. The hearing officer's determination shall not be subject to Board approval. In the event a protest is filed, the proposed chargeback shall be stayed during the entirety of the action and until a final judgment has been rendered;

~~(H)~~ (L) Has wilfully failed to affix the vehicle bumper impact notice pursuant to section 437-4.5(a), or wilfully misstated any information in the notice. Each failure or misstatement is a separate offense;

~~(I)~~ (M) Has wilfully defaced, or removed the vehicle bumper impact notice required by section 437-4.5(a) prior to delivery of the vehicle to which the notice is required to be affixed to the registered owner or lessee. Each wilful defacement, alteration, or removal is a separate offense; or

~~(J)~~ (N) Has required a dealer to refrain from participation in the management of, investment in, or the acquisition of, any other line of new motor vehicle or related products; provided that the new motor vehicle dealer maintains a reasonable line of credit consistent with the requirements of section 437-7(d)(1) for each make or line of new motor vehicle, remains in compliance with reasonable facilities and other franchise requirements of the manufacturer or distributor, and makes no unauthorized change in the principal management of the dealer~~(-)~~;

~~(O)~~ Unreasonably prevents or refuses to approve the relocation of a dealership to another site within the dealer's relevant market area. The dealer must provide the manufacturer or distributor with notice of the proposed address and a reasonable

Comment [JA18]: Identical

site plan of the proposed location. The manufacturer or distributor shall approve or deny the request in writing no later than sixty days after receipt of the request. Failure to deny the request within sixty days constitutes approval;

(P) Requires a dealer to construct, renovate, or make substantial alterations to the dealer's facilities unless the manufacturer or distributor can demonstrate that such construction, renovation, or alteration requirements are reasonable and justifiable based on reasonable business consideration including current and reasonably foreseeable projections of economic conditions existing in the automotive industry at the time such action would be required of the dealer and agrees to make a good faith effort to make available, at the dealer's option, a reasonable quantity and mix of new motor vehicles, which after a reasonable analysis of market conditions, are projected to meet the sales level necessary to support the increased overhead incurred by the dealer as a result of

Comment [JA19]: Identical after addition from Alliance draft below

Comment [JA20]: Added from Alliance latest draft

the required construction, renovation, or alteration;

(Q) Requires the dealer to establish or maintain an exclusive showroom or facility unless justified by current and reasonably expected future economic conditions existing in the dealer's market and the automobile industry at the time the request for an exclusive showroom or facility is made, provided that the foregoing shall not restrict the terms and conditions of any agreement for which the dealer has voluntarily accepted separate and valuable consideration;

Comment [JA21]: Slight difference; Alliance wants the shift the burden to the dealer to show the request is unreasonable, whereas this draft requires manufacturer/distributor to show why the requirement is justified; but inserted Alliance language in last sentence

Comment [JA22]: Inserted from Alliance draft to remedy concern over facility assistance payments

(R) Conditions the award of an additional franchise on the dealer entering a site control agreement or the dealer waiving its rights pursuant to paragraph (21) to protest the manufacturer's or distributor's award of an additional franchise within the dealer's relevant market area, provided that the foregoing shall not restrict the terms and conditions of any agreement for which the dealer has voluntarily accepted separate and valuable consideration;

Comment [JA23]: Identical after addition of separate and valuable consideration language

Comment [JA24]: Inserted from Alliance draft

(S) Establishes or relocates a franchise within the relevant market area of an existing franchise

Comment [JA25]: Identical

dealer unless the manufacturer or distributor provides notice to the board and all affected dealers. For the purposes of this subparagraph, "affected dealer" means a dealer that operates a same line make franchise in a relevant market area wherein the manufacturer or distributor is proposing to add or relocate a franchise. The manufacturer's or distributor's notice shall state the location of the proposed dealership and the date on or after which the franchise intends to be engaged in business:

(ii) An affected dealer may file a protest with the board within thirty days of receipt of the manufacturer's or distributor's notice for determination of whether the manufacturer or distributor has good cause to establish or relocate an additional franchise within the dealer's relevant market area. A protest filed under this subsection shall be immediately referred to a hearing officer as a contested case in accordance with Title 8, chapter 91-9, and shall operate under the Administrative Procedure Act and the administrative rules

Comment [JA26]: Identical except for procedural language ie Board/Hearings officer etc...

set forth in Title 16, chapter 201 et al.
The contested case shall not be subject to
mediation under Title 9, chapter 91-8.5.
When such a protest is filed, the
manufacturer or distributor shall not
establish or relocate the proposed franchise
until a hearing has been held and a
determination made whether good cause exists
for the proposed addition or relocation.
The hearing officer shall make its
determination no later than one hundred
eighty days from receipt of notice of the
protest except for good cause. The
manufacturer or distributor shall have the
burden of proof to demonstrate good cause
exists for the addition or relocation of an
additional franchise within the affected
dealer's relevant market area. The hearing
officer's determination shall not be subject
to board approval;

(ii) In determining whether the manufacturer or
distributor has good cause to add or
relocate the franchise into an affected
dealer's relevant market area the board

Comment [JA27]: Identical

shall consider and make findings upon
evidence including the permanency and size
of investment made and the reasonable
obligations incurred by the existing new
motor vehicle dealers in the relevant market
area; the growth or decline in population
and new car registrations in the relevant
market area; the effect on the consuming
public in the relevant market area; whether
it is injurious or beneficial to the public
welfare for a new dealer to be established;
whether the new motor vehicle dealers of the
same line make in that area are providing
adequate competition and convenient customer
care for the motor vehicles of the same line
make including the adequacy of motor vehicle
sales and service facilities, equipment,
supply of motor vehicle parts, and qualified
service personnel; whether the establishment
or relocation of the proposed dealership
appears to be warranted and justified based
on economic and marketing conditions
pertinent to dealers competing in the
community or territory, including

anticipating future changes; the effect on
the relocating dealer of a denial of its
relocation into the relevant market area;
and the reasonably expected market
penetration of the line make motor vehicle
for the community or territory involved,
after consideration of all factors which may
affect such penetration, including
demographic factors such as age, income,
education, size class preference, product
popularity, retail lease transactions, or
other factors affecting sales to consumers
of the community or territory; and

(iii) This subparagraph shall not apply to the
relocation of an existing dealer within two
miles of the dealer's existing dealership
location; the appointment of a successor
dealer at the same location as its
predecessor or within a two-mile radius from
any boundary of the predecessor's former
location within one year from the date on
which the predecessor ceased operations or
was terminated, whichever occurred later; or
the relocation of a dealer to a site that is

farther away from the protesting affected
dealer than the existing location;

(T) Unreasonably withholds consent to the sale,
assignment, or transfer of the franchise to a
qualified buyer capable of being licensed as a
dealer:

(i) The dealer shall notify the manufacturer or
distributor, in writing, of its desire to
sell, assign, or transfer its franchise and
identify the proposed transferee's name,
address, financial qualifications, and
business experience. Along with such
notice, the dealer shall also provide the
manufacturer or distributor with completed
application forms and related information
generally used by the manufacturer or
distributor to conduct its review of such a
proposal, and a copy of all agreements
regarding the proposed sale, assignment, or
transfer. The manufacturer or distributor
shall, within thirty days of receipt of the
application and all supporting documentation
as specified therein, review the application
and identify in writing the additional

Comment [JA28]: Identical to Alliance language

information, data, or documents, if any,
needed by the manufacturer or distributor to
complete its review. If the manufacturer or
distributor does not reject the application
within sixty days of receipt of the
completed application and all supporting
documentation or within sixty days of
receipt of any additional information, data,
or documents timely requested by the
manufacturer or distributor, the application
shall be considered approved, unless the
sixty-day deadline is extended by mutual
agreement of the manufacturer or distributor
and the dealer;

(ii) In the event that a manufacturer or
distributor denies a dealer's proposed sale,
assignment, or transfer of the franchise,
the dealer may file a complaint or protest
with the board within sixty days of the
notice of denial. A protest filed under
this subsection shall be immediately
referred to a hearing officer as a contested
case in accordance with Title 8, Chapter 91-
9, and shall operate under the

Comment [JA29]: Identical to Alliance language
except for procedure with Board/Hearings Officer

Administrative Procedure Act and the administrative rules set forth in Title 16, Chapter 201 et al. However, the contested case is not subject to mediation under Title 8, chapter 91-8.5. The manufacturer or distributor shall have the burden of proof to demonstrate at a hearing pursuant to a timely filed complaint, that the proposed transferee is not of good moral character or does not meet the written, reasonable, and uniformly applied business standards or qualifications of the manufacturer relating to the financial qualifications of the transferee and business experience of the transferee or the transferee's executive management. The hearing pursuant to a timely filed complaint under this section shall take place within ninety days from the date the complaint is filed. The hearing officer's final determination shall not be subject to board approval;

(U) Refuses or fails to give effect, unless it has good cause, to the dealer's designated successor, whether designated by will, other estate planning

Comment [JA30]: Identical to Alliance draft

document, or written notice to the manufacturer or distributor either while the dealer was living or within ninety days of the dealer's death or incapacity:

(i) In determining whether good cause exists for the manufacturer's or distributor's refusal to honor the succession, the manufacturer shall have the burden to prove that the successor is not of good moral character, is not willing to be bound by the terms of the franchise agreement and is either not qualified to operate the dealership or fails to demonstrate that the dealership will be operated by a qualified executive manager;

~~(ii)~~ The designated successor must furnish written notice to the manufacturer including all necessary application forms and related information customarily required by the manufacturer of the successor's intention to succeed to the ownership of the new motor vehicle dealership within 60 days prior to the designee's actual proposed succession to dealership ownership for the manufacturer to determine whether the proposed successor

Comment [JA31]: Added from Alliance draft

meets the normal, reasonable and uniformly applied standards for the grant of an application as a new motor vehicle dealer; and

(iii) The manufacturer or distributor shall notify the proposed successor of its belief that good cause exists to refuse to honor the succession within sixty days after receipt of the notice of the proposed successor's intent to succeed the franchise, and the manufacturer or distributor shall detail its reasons why it believes good cause exists to deny the succession;

(iv) A proposed successor may file a protest with the board within sixty days after receipt of the manufacturer's or distributor's notice of refusal to honor the succession. A protest filed under this subsection shall be immediately referred to a hearing officer as a contested case in accordance with Title 8, chapter 91-9, and shall operate under the Administrative Procedure Act and the administrative rules set forth in Title 16,

chapter 201 et al. The contested case shall not be subject to mediation under Title 8, chapter 91-8.5. The hearing pursuant to a timely filed complaint under this clause shall be conducted within ninety days from the date the complaint was filed. The hearing officer's final determination shall not be subject to board approval; and

(v) The franchise shall continue, and the manufacturer or distributor is prohibited from any action to the contrary, until a final judgment has been rendered on the proposed succession;

(IV) Requires a dealer or the dealer's employees to attend a training program that does not relate directly to the sales or service of a new motor vehicle in the line make of that sold or serviced, or both, by the dealer;

Comment [JA32]: Identical to Alliance language

(W) Requires a dealer to pay all or part of the cost of an advertising campaign or contest, or purchase any promotional materials, showroom or other display decorations or materials at the expense of the dealer without the consent of the

Comment [JA33]: Identical to Alliance language

dealer, which consent shall not be unreasonably withheld;

(X) Implements or establishes a customer satisfaction index or other system measuring a customer's degree of satisfaction with a dealer as a sale or service provider unless any such system is designed and implemented in such a way that is fair and equitable to both the manufacturer and the dealer. In any dispute between a manufacturer, distributor, and a dealer, the party claiming the benefit of the system as justification for acts in relation to the franchise shall have the burden of demonstrating the fairness and equity of the system both in design and implementation in relation to the pending dispute. Upon request of any dealer, a manufacturer or distributor shall disclose in writing to such dealer a description of how that system is designed and applied to such dealer;

Comment [JA34]: Identical to Alliance language

(Y) Implements or establishes an unreasonable, arbitrary, or unfair sales or other performance standard in determining a dealer's compliance with a franchise agreement; or

Comment [JA35]: Identical to Alliance language

(Z) Implements or establishes a system of motor vehicle allocation or distribution to one or more of its dealers that is unfair, inequitable, or unreasonably discriminatory. As used in this subparagraph, "unfair" includes without limitation, requiring a dealer to accept new vehicles not ordered by the dealer or the refusal or failure to offer to any dealer all models offered to its other same line make dealers in the state. However, the failure to deliver any motor vehicle shall not be considered a violation of this section if such failure is due to an act of God, work stoppage, or delay due to a strike or labor difficulty, shortage of products or materials, freight delays, embargo or other causes of which such motor vehicle franchisor shall have no control."

Comment [JA36]: Identical to Alliance language after insert below

Comment [JA37]: Inserted from Alliance draft to make language match

SECTION 4. Section 437-28.5, Hawaii Revised Statutes, is amended to read as follows:

"[f]§437-28.5[+] **Procedures, protections, rights, and remedies made available to licensees.** (a) The same procedures, protections, rights, and remedies provided to a dealer under section 437-28(a)(21) and section 437-3.6 shall apply to a distributor that is not a manufacturer; provided that for a

distributor that is not a manufacturer, the measure of compensation under section 437-28(a)(21)(C) upon cancellation or failure to renew a franchise agreement, without good cause and good faith, shall include compensation related to [~~that~~] distributor's dealer operations and franchise agreements with other dealers.

(b) Notwithstanding the terms, provisions, or conditions of any dealer or distributor agreement or franchise or the terms or provisions of any waiver[~~r~~] and notwithstanding any other legal or administrative remedies available, any person who is licensed under this chapter and whose business or property is injured by a violation of section 437-28(a)(21), may bring a civil action in a court of competent jurisdiction in the [~~State~~] state to enjoin further violations and to recover any damages together with the costs of the suit. Laws of the State of Hawaii shall apply to any action initiated under this section.

(c) Any person that brings or defends against a civil action under subsection (b) [~~shall~~] may be entitled to recover reasonable attorneys' fees as a part of any damages or injunction; provided that the person substantially prevails in establishing or defending against a violation of section 437-28(a)(21)."

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

Report Title:

Motor Vehicle Industry Licensing Act

Description:

Increases the grounds for license revocations.

. (SB2859 HD1)

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MEMORANDUM

TO: Representative Jon Riki Karamatsu
Chair, Committee on Judiciary
VIA EMAIL: JUDtestimony@Capitol.hawaii.gov

FROM: Gary M. Slovin

DATE: March 24, 2010

RE: **S.B. 2859, SD2, HD1 – Relating to the Motor Vehicle Industry Licensing Act**
Hearing: Thursday, March 25, 2010 at 2:45 p.m., Room 325

Dear Chair Karamatsu and Members of the Committee:

The Alliance of Automobile Manufacturers (“Alliance”) is a trade association representing eleven car and light truck manufacturers, including: BMW, Chrysler, Ford, GM, Jaguar Land Rover, Mazda, Mercedes-Benz, Mitsubishi, Porsche, Toyota, and Volkswagen.

The Alliance has been working closely with the Hawaii Automobile Dealers Association (“HADA”) during the course of the Session in an effort to address issues raised by the extensive amendments proposed by S.B. 2859 to Hawaii’s Franchise Law. The Alliance has also been working closely with one of its member companies, General Motors. General Motor has in separate testimony provided extensive comments on the H.D. 1 which was offered to the Committee on Consumer Protection by HADA. Comments by GM do reflect concerns that the Alliance has with the H.D. 1.

The auto dealers have prepared an additional draft which has been forwarded to the Alliance for its review and we are expecting comments on that new draft within the next couple of days. Hopefully that draft will bring us very close to an agreement that we can present to the committee. The Alliance is committed to working with the Legislature, the dealers, the Motor Vehicle Licensing Board and the Regulated Industries Complaints Office to reach an agreement before the end of Session.

With regard to the H.D.1, there are a few critical issues that will need to be

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addressed and, as noted, hopefully many of these have been addressed in the new version of the bill which we have just received from HADA. These issues include the retroactive application of new provisions, the inclusion of nonfranchise agreements under the Franchise Law, differences regarding various notice periods, standards for reimbursement of dealers by manufacturers for work done under warranty, and limitations with regard to charge backs by manufacturers.

As we have noted earlier, the Alliance has been able to reach agreement with dealer associations in many other states on issues similar to those that are raised in this legislation, and we are hopeful that we will be able to accomplish the same in Hawaii. However, there do remain significant issues that do need to be resolved.

Lastly, the parties are in agreement that a separate and unique dispute resolution process is called for. The parties have met with the Department of Commerce and Consumer Affairs which has been extremely cooperative in working with the parties to come up with a process that will work for the unique nature of the relationship between automobile manufacturers and automobile dealers. This process is modeled after a pilot resolution process established for condominiums under Chapters 514A and 514B and we believe that it will be a means of dealing with the few disputes that historically have arisen in Hawaii in an expeditious and fair manner.

Thank you very much for the opportunity to provide comments on this legislation.

**HOUSE COMMITTEE ON
JUDICIARY**

March 25, 2010

Senate Bill 2859, SD 2, HD 1 Relating to the Motor Vehicle Industry Licensing Act

Chair Karamatsu and members of the House Committee on Judiciary, I am Rick Tsujimura, representing General Motors, LLC (GM). GM offers the following comments to SB 2859, SD 2, HD 1 Relating to the Motor Vehicle Industry Licensing Act.

General Motors is requesting amendments to the House Draft 1 (HD 1) version of SB 2859. Some of the amendments address conflicts and inconsistencies in the HD 1, while some deal with clarifications of timing, procedures and process. Other issues are more general dealing with policy issues and fairness. We ask the committee's favor in reviewing and considering the following amendments.

1. The proposed changes to the definition of "franchise" are overly broad resulting in the application of franchise law to agreements never intended to fall into this category. An example might be an incentive program that has structured payouts based on the dealer's sales performance or customer satisfaction scores. These programs are not franchise agreements and have nothing to do with a franchise agreement. Amend the definition of Franchise Agreement, page 5, lines 13-16, by deleting the words "dealer's new motor vehicle operation, including agreements relating to dealership facilities, site control, customer satisfaction index requirements, and sales performance." And replace with "operation of the franchise."
2. Delete the phrase "Notwithstanding the terms of a franchise agreement, is" on page 13, lines 10-11; and the deletion of the amendment on line 12 and the reinsertion of the original language.
3. The language on pages 18-20 are inconsistent. On page 18, line 20 and page 19, lines 5-6, the section references a 180 day notice period. On page 19 it refers to a 60 day notice period. We suggest that the section be amended to reflect a 60 day notice period to be consistent. We also suggest deleting all of the hearing provisions and using one dispute resolution section as contained in section 1 of the SD 2.
4. On page 21, line 20, strike the word "or". This is an extraneous occurrence of the word and if left in place it results in an interpretation that was not contemplated or intended.
5. The definition of "fair market value" on page 22, line 17 to page 23, line 5, conflicts with the definition on page 23, lines 5-11. The language in the section is internally confusing and conflicting. In the initial portion of the section, it states: "...[T]he manufacturer or distributor shall compensate the dealer at the fair market value for the dealer's capital investment, which shall include but not be limited to the going business value of the business, goodwill, property and improvement owned or leased by the dealer for the purpose of the franchise as of the effective date of termination or date of notice,

whichever is greater.” Immediately following that section, it states: “for the purposes of this subparagraph, ‘fair market value’ means the value of the business at the time the franchise agreement is terminated, cancelled, or not renewed or the value of the business 12 months prior, whichever is greater.” Clearly the two provisions conflict. Moreover a dealer’s capital investment as we all know is depreciated overtime so the value should at a minimum reflect that depreciated cost not only in the facilities but in the equipment. Second, there may be no value to leased property if the lessor of the property intends to reclaim the property and the rights cannot be attorned to the manufacturer. Third, the dealer should not be allowed to pick the date for the value, rather a firm fixed date which is objective is preferred.

6. Language dictating that manufacturers reimburse dealers for warranty parts including a mark-up rate as declared by the dealer includes a requirement that the declared parts mark-up “shall take effect 30 days after initial submission and shall be presumed to be fair and reasonable.” The effect of this language is that the manufacturer or distributor is left with no meaningful opportunity to substantiate the dealer’s declared mark-up. This is unfair and discriminatory. It is already concerning that the state is dictating what a manufacturer must pay to a dealer, instead of leaving such a decision to a negotiated outcome. This language goes further to strip the manufacturer or distributor of any opportunity to disprove that the declared mark up is not accurate, fair, or reasonable. On page 29, lines 17-19, strike “initial submission to the manufacturer or distributor and shall be presumed to be fair and reasonable.” and replace with “final approval by the manufacturer or distributor, and not longer than 90 days after the submission of all necessary and required documentation needed for the manufacturer to substantiate the declaration.” On page 29, line 20, strike “However”. On page 30, strike lines 1-6 beginning with “thirty-day” through “supporting information”.
7. HADA has expressly rejected the notion that the manufacturers who pay for warranty work could question the labor rate used on that warranty job. The Alliance language is similar to that included in the HADA proposal for “parts markup” and which is present in the HD 1. We request that similar language be included in this section. GM believes it is fair to verify that the labor rate paid for warranty work be justified and reasonable as demonstrated by substantiated repair orders demonstrating that the dealer is actually charging and obtaining the declared rate from non-warranty customers. If there is no check and balance dealers would be able to hold manufacturers hostage for warranty work. Warranty work does not require dealer marketing and is a “monopoly” for dealers. We believe it is reasonable to include language originally proposed by the Alliance for insertion here. On page 30, strike line 10 -14 after “(ii)” and insert “If the manufacturer or distributor and dealer do not otherwise agree to an hourly retail labor rate, the dealer may choose to establish the labor rate by submitting to the manufacturer or distributor all qualifying bona fide non-warranty customer paid service repair orders covering repairs made during the month prior to submission of the labor rate and dividing the amount of the dealer’s total labor sales by the number of total labor hours that generated those sales. The declared labor rate shall go into effect thirty (30) days after final approval by the manufacturer or distributor, and not longer than 90 days after the submission of all necessary and required documentation needed for the manufacturer to substantiate the declaration.”

8. On page 32, lines 17-22, the language only permits a manufacturer to recover money from a dealer for ineligible claims if the manufacturer can prove fraud or bad faith. It does not allow a manufacturer to recover such monies where the dealer failed to meet the terms and conditions of the program as stated and known by the dealer in advance of submitting the claim. On page 32, line 22, strike "make a good faith effort to".
9. HADA has rejected all requests for a provision to allow dealers and manufacturers to reach agreements which differ from the terms specified in this bill. The ability of companies and individuals to contract is a fundamental part of the free market system. No one is obligated to enter into voluntary agreements and if the parties can reach an agreement such agreements should be allowed unless they violate some fundamental public policy. There is no such fundamental public policy here. If businesses can reach a mutually satisfactory agreement then they should be allowed to do so. Consequently we propose that the following language be inserted as a new section: "Notwithstanding the provisions of this chapter, nothing shall prohibit a dealer and a distributor, or a dealer and a manufacturer to enter into voluntary agreements supported by separate consideration, which modify the provisions of this chapter or the franchise agreement."
10. HADA proposes on pages 32-33 that the protest of a manufacturer chargeback for warranty or incentive service happens after all internal dispute resolution processes are complete. GM believes that the 30 day period should begin at the time the dispute is started not at the end of the process.
11. GM is also requesting an amendment on pages 35-36, which would allow manufacturers to require dealers to install technological upgrades for the sale of vehicles. As you know GM is expecting the production of its new VOLT and it will be a requirement that dealers have their facilities upgraded to handle the sales and servicing of the vehicle. Other possible fuels are also being explored and GM must be able to either require dealers to make technological improvements to their facilities or forego the receipt of such vehicles. GM is requesting that section P be revised to include the following: "A dealer may be required by a manufacturer to make reasonable facility improvements and technological upgrades necessary to support the technology of the manufacturer's vehicles. If the dealer chooses not to make such facility improvements or technological upgrades, the manufacturer shall not be obligated to provide the dealer with the vehicles which require said improvements and upgrades."
12. Finally, there are several references in the HADA HD 1 that speaks to the dispute resolution process and the time frames. In meetings with the DCCA and the hearings office, we agreed that we would follow the dispute resolution process outlined in the condominium dispute resolution proposals passed by this legislature for a trial period. GM agreed to those provisions and drafted section 1 as it appears in the original SD 2. We support those provisions with the additional change of reducing the number of hearings to 10 and making this process a trial process for the next 2 years.

Thank you for the opportunity to present this testimony.

**PRESENTATION OF THE
MOTOR VEHICLE INDUSTRY LICENSING BOARD
TO THE HOUSE COMMITTEE ON JUDICIARY**

TWENTY-FIFTH LEGISLATURE
Regular Session of 2010

Thursday, March 25, 2010
2:45 p.m.

**TESTIMONY ON SENATE BILL NO. 2859, S.D.2, H.D.1, RELATING TO THE
MOTOR VEHICLE INDUSTRY LICENSING ACT.**

TO THE HONORABLE JON RIKI KARAMATSU, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Werner Umbhau and I am the Chairperson and a public member of the Motor Vehicle Industry Licensing Board ("Board"). Thank you for the opportunity to submit testimony on behalf of the Board regarding Senate Bill No. 2859, S.D.2, H.D.1, Relating to the Motor Vehicle Industry Licensing Act.

For the Committee's information, the Board has met with the proponents of this bill and therefore the Board understands the issues that the franchise motor vehicle dealers are attempting to address. However, the Board has serious concerns with this bill and, as such, cannot support it in its current form.

This measure proposes substantive amendments to the Motor Vehicle Industry Licensing Act, Chapter 437, Hawaii Revised Statutes, as pertains to franchise agreements between motor vehicle dealers and the motor vehicle manufacturers that they represent. In addition, the amendments delineate new dispute resolution provisions for scenarios described below to which dealers can avail themselves.

The Board has the following numerous concerns with this Bill:

First, in Section 3 of the bill, the amendments found on Page 6, lines 1 through 13, appear to do away with the Board's authority to suspend, revoke, fine or deny any license issued under Chapter 437, HRS. Whereas under the current law, the Board has jurisdiction to discipline current licensees *and* take appropriate action on applications for license under subsections (1) to (21), the proposed amendments appear to limit the Board's authority to applications *only*. This is the result of an insertion of a period after the word license that is found on page 6, line 7 and the creation of the new sentence that begins on line 8. Enactment of a law that would result in eliminating the Board's authority to discipline licenses issued under Chapter 437, HRS, would clearly be detrimental to the consuming public.

Second, this measure sets up new dispute resolution provisions for disputes between motor vehicle dealers and the motor vehicle manufacturers they represent that would be determined by a hearings officer or the Board.¹ While these provisions are intended to resolve private contractual disputes

¹ Page 19, lines 10 through 18, requires the Board to immediately refer to a hearings officer, a petition or complaint filed by a dealer to determine whether a manufacturer or distributor's action to terminate, discontinue, cancel, or fail to renew a franchise agreement was done in good faith and supported by good cause; Page 33, lines 7 through 13, requires the Board to immediately refer to a hearings officer a dealer's protest on whether a dealer can be charged back for sales or warranty payments; Page 37, lines 16 through 22 and Page 38, lines 1 through 3 requires the Board to immediately refer to a hearings officer, a dealer's protest of a manufacturer or distributor's establishment of an additional franchise within the dealer's relevant market area for the same brand of vehicles. Despite the referral of the protest and the requirement for the hearings officer to make a determination, Page 39, lines 5 through 9 requires the **Board to consider and make findings upon the evidence**. Page 43, lines 8 through 15, requires the Board to immediately refer to a hearings officer, a dealer's protest regarding a manufacturer or distributor's denial of a dealer's proposed sale, transfer or exchange of the franchise; and Page 46, lines 1 through 6, requires the Board to immediately refer to a hearings officer, a protest by the dealer if the manufacturer or distributor refuses to honor a succession.

between the parties, they have been inserted in §437-28(21), HRS, which is the section that grants the Board disciplinary authority over licensees. As such, these new provisions do not comport with the intent and purpose of §437-28, HRS, and if allowed to remain in this section, would result in confusion as to which process (disciplinary or dispute resolution) should be utilized to address the matter. Indeed, if the Committee intends for the parties to benefit from a dispute resolution process under an administrative-type remedy, the provision should not be placed within the section of the law that delineates the basis for which the Board may take disciplinary sanctions against licensees.

Third, the Board is concerned that the amendments found in Section 1 of the bill, page 2, lines 10 through 13, may impact existing franchise agreements.

Finally, we find that there are several incorrect law references or citations, drafting errors and typographical errors, located throughout the bill, with some located on page 19, lines 19 and 22; page 20, lines 1 and 2, lines 11 and 17; page 31, lines 16 through 18; page 32, line 7; page 33, lines 14 and 15, lines 19 and 20; page 38, line 9, line 13; page 46, lines 7 and 8, lines 12 and 13.

Therefore, while the Board cannot support the bill in its current state, it intends to continue working with all of the stakeholders of this bill in order to bridge differences and work toward a compromise.

The Board thanks you for the opportunity to provide testimony on Senate Bill No. 2859, S.D.2, H.D.1.