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

TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2010

WEDNESDAY, MARCH 17, 2010
2:00 P.M.

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

TO THE HONORABLE ROBERT N. HERKES, CHAIR,
AND TO THE HONORABLE GLENN WAKAI, 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, 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, among other things, creates two new sections within the Motor Vehicle Industry Licensing Act, Chapter 437, Hawaii Revised Statutes ("HRS"), to establish a dispute resolution process for manufacturer-dealer

Testimony on Senate Bill No. 2859 S.D.2
March 17, 2010
Page 2

disputes and to set forth substantive requirements for franchise and ancillary contracts between manufacturers and dealers.

RICO understands that the bill's stakeholders are still in discussions and as such takes no position on the substantive requirements for manufacturer-dealer contracts at this time. RICO does, however, support placing these contractual requirements in a separate section as set forth in the Senate Draft 2. Placing these provisions in a separate section will help differentiate these manufacturer-dealer contract issues and dispute resolution procedures from other types of licensee violations. The Motor Vehicle Industry Licensing Board will still have discretion under §437-28(a)(2), HRS, to take disciplinary action if necessary for any violations of Chapter 437, HRS, including violations based on manufacturer-dealer contracts.

Thank you for this opportunity to testify on Senate Bill No. 2859 S.D.2. 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
CONSUMER PROTECTION AND COMMERCE

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2010

WEDNESDAY, MARCH 17, 2010
2:00 P.M.

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

TO THE HONORABLE ROBERT N. HERKES, CHAIR,
AND TO THE HONORABLE GLENN WAKAI, 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, Relating to the Motor Vehicle Industry Licensing Act. My name is Sheryl Nagata, OAH's Acting Senior Hearings Officer. OAH offers the following comments on the bill.

Senate Bill No. 2859 S.D.2, among other things, creates a new section within the Motor Vehicle Industry Licensing Act, Chapter 437, Hawaii Revised

Testimony on Senate Bill No. 2859 S.D.2

March 17, 2010

Page 2

Statutes ("HRS") which establishes a dispute resolution process for manufacturer-dealer disputes.

While we appreciate the confidence that the supporters of Senate Bill No. 2859 S.D. 2 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 information regarding the complexity and duration of these novel kinds of hearings, it would be difficult for OAH to add to its responsibilities at this time without having a negative impact on OAH's ability to continue processing all of the other cases within OAH's jurisdiction on a timely basis.

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

**PRESENTATION OF THE
MOTOR VEHICLE INDUSTRY LICENSING BOARD**

**TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE**

**TWENTY-FIFTH LEGISLATURE
Regular Session of 2010**

**Wednesday, March 17, 2010
2:00 p.m.**

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

**TO THE HONORABLE ROBERT N. HERKES, 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, Relating to the Motor Vehicle Industry Licensing Act.

Your Committee heard the companion bill House Bill No. 2630 on February 3, 2010 and passed that version out with technical, non-substantive amendments. The H.D.1 also changed the effective date to July 1, 2050 in order to encourage further discussion. House Bill No. 2630, H.D.1, however, did not cross over to the Senate.

The measure before you differs substantively from its House companion, in that Senate Bill No. 2859, S.D.2, among other things, creates two new sections within Chapter 437, Hawaii Revised Statutes ("HRS"). First, section 1 of the bill sets forth a dispute resolution procedure that would address disputes between the motor vehicle dealers and the manufacturers that they represent.

Secondly, a new section regarding requirements for franchise and ancillary contracts between motor vehicle manufacturers and dealers has been created.

While the Board reserves comments on the dispute resolution provision, at this time, it finds that throughout the section, the Office of Administrative Hearings would be granted authority to enforce the provisions of Chapter 437. The Board has serious concerns if any of its enforcement authority for Chapter 437 is transferred to another entity. In addition, the Board notes that the new section regarding requirements for contracts between the industries are provisions for which the Board currently has authority and jurisdiction to suspend, revoke or fine a license, or deny a license or license renewal. As such, the Board would be concerned if its efforts to protect the public would be hampered if this amendment precludes it from taking necessary disciplinary action against a manufacturer or distributor license. Further, the Board suggests that the language on page 8, lines 21 to 22 be revised to comport with the existing provisions for inventory or flooring lines of credit. Specifically, the language "maintains a *reasonable line of credit*" should be replaced with "maintains the line of credit as required by section 437-7(d) (1), HRS". Finally, the Board is concerned that the amendments found in section 2, page 33, lines 19 through 22, may impact existing franchise agreements.

The Board intends to continue working with the stakeholders of this bill in order to bridge the differences and work toward a compromise.

Testimony on Senate Bill No. 2859, S.D.2
Wednesday, March 17, 2010
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The Board thanks you for the opportunity to provide testimony on Senate
Bill No. 2859, S.D.2.



Stan Masamitsu, President
Dave Rolf, Executive Director

**Testimony in STRONG SUPPORT of SB2859
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 Consumer Protection and Commerce
For the public hearing 2 p.m. Wednesday, March 17, 2010
In Conference Room 325
At the Hawaii State Capitol**

Chair Herkes, Vice Chair Wakai, 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 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.

At the request 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 incorporated language provided by these stakeholders.

Several issues remain to be resolved and negotiations on these continue.

The new formatting request by RICO is helpful and so far has been agreed to by all parties. 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. 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.

--continued next page--

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

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.

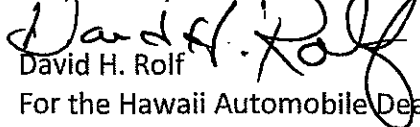
In summary, there is agreement on much of the bill

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, 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.

Respectfully submitted,


David H. Rolf

For the Hawaii Automobile Dealers Association

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 vitally affects the general economy of the State and the public interest and public welfare;
- (2) Manufacturers of motor vehicles whose physical manufacturing facilities are not located within the State, and motor vehicle distributors, are doing business in the 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 motor vehicles and parts and dependable service therefor within the 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, to prevent frauds, impositions, and other abuses against its residents, and to protect and preserve the economy and the transportation system of the State. In order to further this intent, the legislature finds that all 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 two new definitions to be appropriately inserted and to read as follows:

~~"Ancillary agreement" means any written agreement between the dealer and manufacturer or distributor, other than the franchise agreement, which directly relates to the dealer's new motor vehicle operations such as dealership facilities, site control, CSI requirements, sales performance, or similar agreements.~~

"Relevant market area" means the following:

- (1) In a county with a population of less than 500,000 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 500,000 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 a radius of 4-6 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 or offering 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 or disposing 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 to purchase or lease motor vehicles.

The 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, 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 parts therefor manufactured or distributed by such manufacturer or distributor or that establishes rights and/or obligations relating to the dealer's new motor vehicle operation including but not limited to agreements relating to dealership facilities, site control, CSI 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 to notice and hearing 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 the board may deem 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 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; 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 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 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 or attempted or proposed to employ or utilize 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, 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 a salesperson or dealer:
 - (A) Has required a purchaser of motor vehicles 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 operated as a demonstrator, leased, 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, 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, prior to the signing of the contract of sale or lease:

"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 an applicant or holder of a dealer's license:

- (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 an applicant or holder of an auction's license has sold or proposed to sell new motor vehicles without being franchised therefor;
- (20) Being an applicant for a salesperson's license:
- (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; or
- (21) ~~Being~~ Notwithstanding the terms of a franchise agreement or any ancillary agreement, being a manufacturer or distributor[+] that:
- (A) Has ~~coerced~~ attempted to [coerce] require or has [coerced] required any dealer in the 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 attempted to require or 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, 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;~~

(C) ~~Has attempted to require or 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, 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;

~~[-B-]~~ (D) Has attempted to ~~coerce~~ require or has ~~coerced~~ coerced any dealer in the 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 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 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~~
- ~~(ii) 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 and the board of the manufacturer's intent to terminate, discontinue, cancel, or fail to renew a franchise agreement at least ninety-sixty (9060) 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 (15) days before the effective date of termination, discontinuation, cancellation, or non-renewal in the following circumstances:-

~~(1) Without the consent of the manufacturer or distributor, the dealer has transferred an interest in the dealership, there has been a withdrawal from the dealership of an individual proprietor, partner, major shareholder, or the manager of the dealership, or there has been a substantial reduction in interest of a partner or major stockholder,~~

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~~(21) 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;~~

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~~(3) 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;~~

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~~(4) The dealer has defaulted under a security agreement between the dealer and the manufacturer or distributor or there has been a revocation or discontinuance of a guarantee of the dealer's present or future obligations to the manufacturer or distributor;~~

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~~(52) The dealer has failed to operate in the normal course of business for seven~~

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consecutive days or has otherwise abandoned
the business;

(63) The dealer has pleaded guilty to or has
been convicted of a felony affecting the
relationship between the dealer and the
manufacturer or distributor;

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(74) The dealer has engaged in conduct which
is injurious or detrimental to the dealer's
customers or to the public welfare

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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:

(ii) 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 and/or service performance
obligations, the dealer must first be
provided with notice of the alleged sales
and/or service deficiencies and afforded at
least 180 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 will not exist if a dealer substantially complies with the manufacturer's or distributor's reasonable performance provisions within the 180 day cure period, or if the failure to demonstrate substantial compliance was due to factors which were beyond the control of the dealer;

(iii) A dealer who receives a notice of intent to terminate, discontinue, cancel, or fail to renew may, within the ~~90~~ 60 days of receipt of notice day notice period, file a petition or complaint with the board for a determination of whether such action is unfair or prohibited 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. 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
that such action is fair and not
prohibited taken in good faith and supported
by good cause. The hearing officer's final
determination is not subject to Board
approval; and

(iiiiv) In an action commenced pursuant to clause
(iii) of 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) (1)-(74) hereto or upon the change in
ownership of a manufacturer or distributor
or upon the cancellation of a line make;

(iv) Upon the filing of an action pursuant to
clause (iii), except in the circumstances
enumerated in subsection (i) (1)-(74) hereto,
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, but not limited to, the right to sell or transfer the franchise; and

(vi) Upon the termination, discontinuation, cancellation or failure to renew the franchise agreement, regardless of which party terminates the agreement by the manufacturer or distributor, the manufacturer or distributor shall compensate the dealer at the fair market value for:

1. All new, unused, and undamaged

parts listed in the current parts catalog and still in the original, resalable merchandising packages and in unbroken lots (for sheet metal, a comparable substitute may be used).

Prices will be those in effect at the time the manufacturer or distributor receives the parts, less applicable allowances.

2. The fair market value of all undamaged, unmodified special tools, ex

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~~equipment, in working condition and~~
~~signage required by the manufacturer or~~
~~distributor within the three years~~
~~prior to the termination, all signage~~
~~required by the manufacturer or~~
~~distributor, and~~

3. All new, undamaged and unsold
vehicle inventory of the current model
year, or 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
the vehicle has less than 500 miles
registered on the odometer. The
purchase price is the dealer's net
acquisition cost. ~~all current model~~
~~year new motor vehicles acquired within~~
~~the past 12 months possessed by the~~
~~dealer in connection with the~~
~~franchise., plus reasonable attorney's~~
~~fees incurred in collecting~~
~~compensation.~~ The compensation shall
be paid to the dealer no later than

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90 days from the date of the franchise
termination, discontinuation,
cancellation, or failure to renew.

For the purposes of this clause, "fair market
value" means the dealer's net cost to
acquire the parts, special tools, equipment,
and motor vehicles;

(vii) In addition to the compensation set forth in
clause (vi), 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 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
dealer's capital investment, which shall
include but not be limited to the fair
market value of the as of the effective date

of the termination or date of notice,
whichever is greater. as of the effective
date of the termination or date of notice,
whichever is greater., property, and
improvement owned or leased by the dealer
for the purpose of the franchise. The
compensation shall be paid to the dealer no
later than 90 days from the date of the
franchise termination, discontinuation,
cancellation, or failure to renew.

For the purposes of this clause, "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;

(vii) A dealer shall be immediately entitled to and
a manufacturer or distributor shall within
thirty (30) days compensate the dealer for
the "fair market value" of the franchise
according to the formula set forth in
clauses (v) and (vi) whenever a manufacturer
publicly announces its plans to terminate,
cancel, or discontinue a line make

~~regardless of whether the termination,
cancellation, or nonrenewal is effective
immediately. The manufacturer's or
distributor's compensation pursuant to this
section is in exchange for the dealer's
cessation of the subject line make franchise
operations and the dealer's return of the
franchise to the manufacturer,~~

~~(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 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 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 than is provided to any of their competing franchised dealers in the State for the same or lesser price or charge than that imposed upon the franchised dealer in the State during the same period is deemed to have so discriminated against the competing franchised dealer in the 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. 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. 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 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(s), bonus payment(s), hold back margin(s), 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. ~~A manufacturer or distributor may offer a bonus, rebate, incentive, or other benefit program to its dealers in this State which is calculated or paid on a per vehicle basis and is related to a dealer's facility or the expansion, improvement, remodeling, alteration, or renovation of a dealer's facility. Any dealer~~

~~who does not comply with the facility criteria or eligibility requirements of such program is entitled to receive a reasonable percentage of the bonus, incentive, rebate, or other benefit offered by the manufacturer or distributor under that program subject to the dealer's compliance with all other reasonable requirements of the franchise;~~

[-(F)] (I) Has required a dealer of new motor vehicles in the 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;

~~[(C)]~~ (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 ~~or labor rate~~ is not unreasonable when compared with that of other same line make dealers for identical merchandise or services in the geographic area in which the dealer is engaged in business ~~[nor shall the rates be more than the retail rates.]~~;

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(i) For parts reimbursement, the retail mark up charged by the dealer will be established by submitting to the manufacturer or distributor a sufficient quantity of numerically consecutive repair orders from the most recent months to provide one hundred (100) qualifying customer paid

repair orders. For a dealer unable to
provide one hundred (100) qualifying
customer paid repair orders out of all
numerically consecutive repair orders within
the two (2) month period prior to the
submission, the dealer will submit customer
service repair orders of all types including
customer pay, warranty and internal for that
two (2) month period. The repair orders
must contain the price and percentage mark
up. Dealers also must declare in their
submission the average mark up the dealer is
declaring as its new parts reimbursement
rate. The declared parts reimbursement mark
up shall go into effect thirty (30) 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 (30) day timeframe in which the
manufacturer or distributor has to 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 mark up more often than once
every twelve (12) months.;

(4i) 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. To establish the
labor rate, the dealer shall submit to the
manufacturer or distributor all qualifying
nonwarranty customer paid service repair
orders covering repairs made during any one
full month out of the three months 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. All customer paid
repair orders submitted pursuant to the
foregoing must accurately reflect the labor
performed, the time spent, the parts used in
the repair, and the amounts charged for such

~~labor and parts. The declared labor rate shall go into effect thirty (30) days after 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 (30) day timeframe in which the manufacturer or distributor has to make the declared labor rate effective shall commence following receipt from the dealer of any reasonably requested supporting information. The dealer shall not request a change in the labor rate more often than once every twelve (12) months;~~

~~(iii) In determining qualifying repair orders for parts and labor, 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 specials or promotional discounts for retail customer repairs; parts~~

sold at wholesale or repairs performed at
wholesale, which shall include any sale or
service to a fleet of 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) The manufacturer or distributor may rebut the
presumption that the declared parts mark up
or labor rate is appropriate by showing that
the dealer did not follow the requirements
set forth in this section. The manufacturer
or distributor shall not require the dealer
to submit any documentation or methodology
other than the repair orders listed above
and the declared rate in order to establish
the reimbursement rate;~~

~~(v) A manufacturer or distributor may not
otherwise recover its costs from dealers
within this State, including an increase in~~

~~the wholesale price of a vehicle or
surcharge imposed on a dealer solely
intended to recover the cost of reimbursing
a dealer for parts and labor pursuant to
this subparagraph, provided a manufacturer
or distributor shall not be prohibited from
increasing prices for vehicles or parts in
the normal course of business;~~

(viii) Dealers have, at a minimum, 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 (45) days after receipt by a
manufacturer or distributor of a properly
completed claim. All sales incentive claims
shall be approved or disapproved and if
approved, paid, within sixty (60) 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, or, in the case of an incentive program, one year after the later of the date of payment or the end of the program. These provisions do not apply to fraudulent claims. No manufacturer or distributor shall conduct more than one warranty or incentive audit every 12 months unless the dealer has committed fraud in submission of claims within that twelve (12) month period. No manufacturer or distributor shall impose any warranty or incentive chargeback pursuant to the results of an audit unless the manufacturer, distributor or a representative has met with the dealer or its representative in person, or by telephone, and

~~explained the basis for each proposed chargeback in detail and given the dealer or its representative a reasonable opportunity to respond during the meeting or within thirty (30) days thereafter. The manufacturer shall also provide the dealer with a written statement detailing the basis or methodology upon which the dealer was selected for review.~~

~~(i) 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 comply with the reasonable written procedures of the manufacturer or distributor.~~

~~(ii) A manufacturer or distributor shall not utilize the method of extrapolation in levying a chargeback against a dealer, and~~

(i) 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 proposed chargeback amount. The dealer may file an action with the board protesting the-a proposed chargeback amount within forty fivethirty (4530) 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. However, the contested case is not subject to mediation under Title 8, chapter 91-8.5. The hearing officer's determination is not 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; ~~[ex~~

~~[-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 § 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 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 60 days constitutes approval. It shall not be considered an unreasonable denial of a relocation request if the relocation fails to meet the manufacturer or distributor's reasonable and uniformly applied minimum standards for a relocation;

(P) Requires or attempts to require 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 in light of 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 the required construction, renovation, or alteration;

(Q) Requires ~~or attempts to require~~ the dealer to establish or maintain an exclusive showroom or facility unless the manufacturer or distributor can establish that the dealer's current facility is inadequate to meet the reasonably expected sales and/or service demand in the dealer's market, based on the 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;

(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;

- (S) Establishes or relocates a franchise within the relevant market area of an existing franchise dealer unless the manufacturer or distributor provides notice to the board and all affected dealers. For the purposes of this subparagraph, an "affected dealer" is 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 or which makes twenty percent (20%) of its retail sales of new motor vehicles, within the 12 month period prior to the notice, to persons whose registered household addresses were located within a radius of 10 miles of the location of the proposed additional or relocated franchise. The manufacturer's or distributor's notice must state the location of the proposed dealership, and the

date on or after which the franchise intends to be engaged in business, the names and addresses of the dealer operator and the principal investors in the proposed additional or relocated franchise, and the identity of all same line make franchise dealers in the relevant market area where the proposed addition or relocation would be located:

- (i) An affected dealer may file a protest with the board within thirty (30) 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 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.

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 must make its determination no later than 180 days from receipt of notice of the protest except for good cause. The manufacturer or distributor has 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 is not 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 shall consider and make findings upon evidence including but not limited to: 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; ~~any attempts by the manufacturer or distributor to coerce the existing dealer or dealers into~~

consenting to additional or relocated franchises of the same line make in the relevant market area, 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 said penetration, including, but not limited to, 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

- (iv) This subparagraph shall not apply to the relocation of an existing dealer within two (2) miles of the dealer's existing dealership location; the appointment of a successor dealer at the same location as its predecessor or within a 2-mile radius from any boundary of the predecessor's former location within 1 year from the date on

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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;

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(T) Unreasonably withholds consent to the sale,
assignment, or transfer ~~or exchange~~ 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, ~~or dispose~~ of its
franchise and identify the proposed
transferee's name, address, financial
qualifications, and ~~general business~~
~~experience in the past five years.~~ Along
with such notice, the dealer shall also
provide the manufacturer or distributor with
completed application forms and related
information generally utilized 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

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or distributor shall, within 30 days of receipt of the application and all supporting documentation as specified therein, review it and identify in writing the additional 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 60 days of receipt of the completed application and all supporting documentation or within 60 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 60 day deadline is extended by mutual agreement of the manufacturer or distributor and the dealer.

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~~A manufacturer or distributor must approve or disapprove the transaction within 60 days following receipt of the dealer's notice. Failure of the manufacturer or distributor to disapprove the transaction within the 60~~

day period constitutes approval of the
transfer;

(ii) In the event that a manufacturer or
distributor denies a dealer's proposed sale,
assignment, or transfer, or exchange of the
franchise, the dealer may file a complaint
or protest with the board within 60 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
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 has 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 general business experience of the transferee or the transferee's executive management. ~~The manufacturer or distributor must respond to the dealer's complaint within thirty (30) days from the date it was filed. Failure to respond within thirty (30) days constitutes approval of the transfer.~~ The hearing pursuant to a timely filed complaint under this section must take place within ninety (90) days from the date the complaint is filed. The hearing officer's final determination is not 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 document, or written notice to the manufacturer or distributor either while the dealer was living or within ninety (90) 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

has the burden to prove that the successor is not of good moral character, not willing to be bound by the terms of the franchise agreement and either not qualified to operate the dealership or fails to demonstrate that the dealership will be operated by a qualified executive manager;

(ii) The manufacturer or distributor must notify the proposed successor of its belief that good cause exists to refuse to honor the succession within sixty (60) days after receipt of the notice of the proposed successor's intent to succeed the franchise, and the manufacturer or distributor must detail why it believes good cause exists to deny the succession;

(iii) A proposed successor may file a protest with the board within sixty (60) 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. However, the contested case is not subject to mediation under Title 8, chapter 91-8.5. The hearing pursuant to a timely filed complaint under this clause must be conducted within ninety (90) days from the date the complaint was filed. The hearing officer's final determination is not subject to Board approval; and

(iv) 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;

(V) ~~Requires or attempts to require~~ a dealer or the dealer's employees to attend a training program(s) that does not relate directly to the sales or service of a new motor vehicle in the line make of that sold and/or serviced by the dealer;

(W) ~~Requires or attempts to require~~ 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 dealer, which consent shall not be unreasonably withheld;

- (X) Implements or establishes a CSI (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 ~~all relevant information pertaining to such dealer used in the application of that system applied to such dealer;~~

(Y) Implements or establishes an unreasonable, arbitrary or unfair sales or other performance standard in determining a dealer's compliance with a franchise agreement. ~~Before applying any sales, service or other performance standard to a dealer, a manufacturer or distributor shall communicate the performance standard in writing in a clear and concise manner; or~~

(Z) Implements or establishes a system of motor vehicle allocation or distribution to one or more of its dealers which is unfair, inequitable, or unreasonably discriminatory, ~~or not supportable by reason and good cause after considering the equities of the affected dealer or dealers. 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 an equitable supply of new vehicles under its franchise, by model, mix, or colors as the manufacturer offers or allocates all models offered to its other same line make dealers in the state, or the refusal or failure to ship monthly to any dealer, if ordered by the dealer,~~

~~the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise. A manufacturer and distributor shall maintain for 3 years records that describe its methods or formula of allocation and distribution of its motor vehicles and records of its actual allocation and distribution of motor vehicles to its dealers in this State. Upon the written request of any dealer, the manufacturer or distributor shall disclose to the dealer in writing the basis upon which new motor vehicles are allocated, scheduled, and delivered to the dealers of the same line make by make, model, color, and accessories."~~

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

"[+]§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, 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 to enjoin further violations and to recover any damages together with the costs of the suit. The law 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.

INTRODUCED BY: _____

Report Title:

Motor Vehicle Industry Licensing Act

Description:

Increases the grounds for license revocations.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

**HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE**

March 17, 2010

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

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

While the parties have been meeting and working on competing drafts of the proposed bill, and although some agreements have been reached, much more remains before an agreed upon draft can be presented to the legislature. As we noted when this issue was first considered by this committee, the dealer-manufacturer relationship is comprised of complex and differing views. While we have made substantial progress, more needs to be done. We continue to work with the department, board, Alliance and HADA to seek some conclusions. We are in receipt of draft proposed bills from the Alliance and HADA. We are in support of the Alliance proposal and oppose the HADA version. We support the dispute resolution in the SD 2 and oppose the sections in the HADA version. We therefore suggest that this committee pass this bill on to the House Committee on Judiciary to continue the talks between the parties.

Thank you for the opportunity to present this testimony.

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MEMORANDUM

TO: Representative Robert Herkes
Chair, Committee on Consumer Protection & Commerce
VIA EMAIL: CPCtestimony@Capitol.hawaii.gov

FROM: Gary M. Slovin

DATE: March 16, 2010

RE: S.B. 2859, SD2 – Relating to the Motor Vehicle Industry Licensing Act
Hearing: March 17, 2010 at 2:00 p.m.

Dear Chair Herkes 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.

Senate Bill 2859 proposed numerous changes to the Motor Vehicle Industry Licensing Act.

The Alliance and the Hawaii Automobile Dealers Association have met to discuss the issues presented by the bill and have recently exchanged drafts setting out their respective positions on the issues. Much progress toward a compromise bill has been made. We expect to discuss the remaining issues in the next few days.

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