SB 2859

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DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
REGULATED INDUSTRIES COMPLAINTS OFFICE

TO THE SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2010

TUESDAY, FEBRUARY 23, 2010
10:00 A.M.

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

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND TO THE HONORABLE DAVID Y. IGE, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs' Regulated Industries Complaints Office ("RICO") appreciates the opportunity to submit written testimony on Senate Bill No. 2859 S.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 Section 3 of the bill.

Senate Bill No. 2859 S.D.1 proposes numerous amendments to the Motor Vehicle Industry Licensing Act, Chapter 437, Hawaii Revised Statutes. RICO's comments are limited to Section 3 of the bill that revises Haw. Rev. Stat. §437-28(a)(21). These amendments create substantive requirements for franchise and ancillary contracts between manufacturers and dealers and set forth new procedural requirements for certain manufacturer-dealer disputes. Given the comprehensive and unique nature of these revisions, RICO suggests that franchise issues be placed in a separate section of the law with a reference back to §437-28 for violations of the separate section.

Also, to the extent the bill provides for expedited relief of contractual disputes through a variety of new procedures (see, §437-28(a)(21) subsections E(ii), K(iii), T(ii) and U(iii)), RICO suggests that the bill reference existing dispute resolution mechanisms instead of requiring the creation of new review procedures.

Thank you for this opportunity to submit written testimony on Senate Bill No. 2859 S.D.1.

PRESENTATION OF THE
MOTOR VEHICLE INDUSTRY LICENSING BOARD

TO THE SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH LEGISLATURE
Regular Session of 2010

Tuesday, February 23, 2010
10:00 a.m.

WRITTEN COMMENTS ONLY

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

TO THE HONORABLE ROSALYN H. BAKER, 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 written comments on behalf of the Board, regarding Senate Bill No. 2859, S.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. As such, the Board understands the issues that the franchise motor vehicle dealers are attempting to address through this bill. However, the Board cannot support the bill in its current form.

First, the Board finds that new provisions in this bill do not comport with the purpose of §437-28, which gives the Board the authority and jurisdiction to suspend, revoke or fine a license, or deny a license or a license renewal. Therefore, it is questionable whether the amendments to §437-28 are correctly drafted. Second, the Board believes that it is inappropriate to use the administrative proceedings process to settle private contractual disputes between

two licensees such as that included in this bill.[1] Third, the Board finds that time frames proposed to conduct a hearing or make a determination are unreasonable in light of the time that would be needed to conduct the necessary investigation, fact-finding, and other such administrative proceedings. In addition, the Board is also concerned that the amendments found in Section 1, page 2, lines 8 through 12, may impact existing franchise agreements.

As such, while the Board cannot support the bill in its current state, it intends to continue working with the proponents in order to bridge the differences and work toward a compromise. In light of this, we ask the Committee to insert a defective effective date for this bill.

The Board thanks you for the opportunity to provide testimony on S.B. No. 2859, S.D.1.

[1] Page 18, lines 7 through 12, requires the Board to determine whether it is unfair or prohibited for a manufacturer or distributor to terminate, discontinue, cancel, or fail to renew a franchise agreement; Page 35, lines 6 through 13, requires the Board to decide whether a dealer can be charged back for sales or warranty payments; Page 40, lines 3 through 9, requires the Board to determine whether a manufacturer or distributor has good cause to establish an additional franchise within the dealer's relevant market area for the same brand of vehicles; Page 44, lines 7 through 11, requires the Board to address a protest by a dealer if a manufacturer or distributor denies a dealer's proposed sale, transfer or exchange of the franchise; and Page 46, lines 13 through16, requires the Board to address a protest by a dealer if the manufacturer or distributor refuses to honor a succession.

TESTIMONY
In STRONG SUPPORT of SB2859 SD1
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT
Presented to the Committee on Commerce and Consumer Protection
For the public hearing 10 a.m. Tuesday, February 23, 2010
In Conference Room 229

Chair Baker and members of the committee:

Hawaii's new car dealers appreciate the members of the Hawaii State Legislature and this committee for hearing SB2859—a bill to update Hawaii's motor vehicle industry franchise laws necessitated by the extraordinary changes in the motor vehicle industry this past year. Hawaii's franchised new car dealers are in STRONG SUPPORT of the measure.

Background

Motor vehicle industry franchise laws appear in all 50 states. This past year, legislators in New York, Florida, Connecticut, North Carolina and many other states have worked with auto dealers to update their respective state's franchise laws. Hawaii dealers, facing many of the same challenges of other dealers across the country, and agreeing with the earlier Hawaii legislative finding that "the geographical location of Hawaii makes it necessary to ensure the availability of motor vehicles and parts and dependable service," believe that it is indeed 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 this state.

The following testimony relates to changes proposed (the underlined portions of the bill):

Legislative Intent. SECTION 1. Section 437-1 – Legislative findings and declaration—

"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 and ancillary agreements existing as of the date of enactment."

The change is needed to clarify that the franchise protections are intended to be applicable to all franchise agreements existing at the time of the enactment of the legislation.

Examples: The motor vehicle manufacturers have recently sought to circumvent newly enacted franchise laws by arguing that any provision enacted *following* the date of a franchise agreement with a dealer does not apply to the manufacturer's action under that agreement. In Florida, Yahama Motor Company prevailed in a Department of Motor Vehicles case arguing it was not required to pay termination benefits to a dealer under laws enacted in 2007 because the dealer agreement was entered into prior to 2007. Honda Motor Company has recently argued that the new 2009 California franchise law restricting a manufacturer's ability to demand unreasonable renovations to facilities does not apply to dealers in California who are operating under dealer agreements entered into prior to 2009.

Definitions. SECTION 2. Section 437-1.1

Ancillary Agreement

"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.

The addition of this definition is necessary to insure manufacturers cannot avoid the protections of franchise laws by including onerous terms in ancillary agreements instead of in the "dealer agreement" itself. Current franchise protections apply only to the terms of the dealer agreement.

Examples: A number of manufacturers utilize ancillary agreement to require dealers to do things that are not addressed in the standard dealer agreement. Nissan and Mercedes Benz have required dealers to enter into a facility upgrade agreement that includes an agreement by the dealer that the franchise will be terminated if construction timelines are not met. General Motors and Chrysler have ancillary agreements wherein the dealers are required to agree not to add any other linemake to their dealership no matter whether the economy warrants such an addition.

Relevant Market Area

"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,

(3) economic development, and tourism the relevant market area shall be a radius of 10 miles from the dealership location."

This defines the radius around an existing dealership which creates standing for that dealer to protest the addition or relocation of a same-linemake dealer to that relevant market area.

Examples: See below under discussion of protesting new or relocated dealership point.

Section 21

(B) Law and Venue in Hawaii

Notwithstanding the terms of a franchise agreement or any ancillary agreement, ...

(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 the 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;

All manufacturer agreements provide that the law of the state of the manufacturer's domicile (i.e. Michigan, California and New Jersey) apply to any dispute between the dealer and manufacturer. This section clarifies that Hawaii law will apply and all disputes will be heard in a Hawaii court.

This section also clarifies that binding arbitration is prohibited. Many manufacturer agreements require that any dispute be decided through binding arbitration. This prevents a dealership from having its concern heard before the Hawaii Motor Vehicle Industry Licensing Board or a Hawaii court.

(C) Prohibition on Prospective Release

(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 estoppels, 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;

This prevents manufacturers from requiring a dealer to release the manufacturer from liability under the law, including the franchise protections, in the future. This type of provision thwarts the very purpose of the franchise protections.

Examples: Many manufacturers include in their dealer agreements and ancillary agreements a provision which asks the dealer to agree that franchise laws will not apply in any dispute under the agreement. General Motors' Participation Agreement entered into with dealers being retained after the GM bankruptcy contains such a provision.

(E) Franchise Termination

" 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."

Requires a manufacturer to give notice and cure period prior to attempting to terminate a dealer. Allows the dealer to protest the termination and maintain the franchise pending the outcome of the protest. Provides criteria to be considered as "good cause" before the dealer is terminated.

"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 ninety (90) days before the effective date thereof, and state with specificity the grounds being relied upon for such discontinuation, cancellation, termination, or failure to renew. 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:
(i) 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;
(ii) A dealer who receives a notice of intent to terminate, discontinue, cancel, or fail to renew may, within the 90-day notice period, file a petition or complaint with the board for a determination of whether such action is unfair or prohibited. The manufacturer or distributor shall have the burden of proof that such action is fair and not prohibited; and
(iii) In an action commenced pursuant to clause (ii) of this subparagraph, good cause shall not exist absent a breach of a material and substantial term of the franchise agreement, 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 (ii), 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

(v) Upon the termination, discontinuation, cancellation or failure to renew the franchise agreement, regardless of which party terminates the agreement, the manufacturer or distributor shall compensate the dealer at the fair market value for all new, unused, and undamaged parts, all special tools or equipment in working condition required by the manufacturer or distributor within the three years prior to the termination, all signage required by the manufacturer or distributor, and 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 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;

Examples: Without these protections, the manufacturer may rely on the terms of their dealer agreement which in most cases does not require the manufacturer provide any cure period and requires only 30 days notice of the termination. Upon the termination, the dealership is shut off unless the dealer goes through the expensive and involved process of seeking an injunction in court.

This section also requires a manufacturer repurchase certain items the dealership was required to purchase such a vehicles, parts and special tools.

Examples: Under most manufacturer dealer agreements there is no or very little obligation to repurchase these items in the case the dealership is terminated. However, once the dealership is terminated they are prohibited from selling the manufacturer's vehicles and performing warranty repairs on the manufacturer's vehicles.

Fair Market Value

" (vi) In addition to the compensation set forth in clause (v), upon the termination, discontinuation, cancellation or failure to renew the franchise agreement by a manufacturer or distributor without good cause, 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 fair market value of the business, 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; This section requires that in addition to the above repurchase obligation that a manufacturer who terminates a dealership without good cause pay the dealer the fair market value of the franchise.

Examples: The need for the payment of the lost investment in the dealership's franchise has been most evident in the recent closure by General Motors of various line makes (Oldsmobile, Saturn, etc.). Although the dealers did not violate their dealer agreements in any way, and made substantial investments in their franchises as required by General Motors, dealers for these line makes were not compensated for the franchise taken from them without any cause.

(H) Prohibition on Unreasonable Incentive Programs

"(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 unless the incentive, bonus, or holdback is reasonably and practically available to all 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;"

Prohibits manufacturers from instituting bonus or incentive programs that unfairly favor one dealer over another.

Examples: Kia and Hyundai have periodically instituted sales incentives which favor large-volume dealers over small-volume dealers where the small-volume dealer is meeting all sales performance requirements of Kia and Hyundai but sells fewer cars solely because of the size market the dealer serves. Audi, BMW and Mercedes Benz pay dealers per car incentives in

return for a facility upgrade which places dealers who cannot economically justify a facility upgrade at a competitive disadvantage. As an example, a dealer who upgraded their facility just 2 years ago may not be able to financially justify incurring additional capital expenditures to meet the manufacturer's latest image requirements but nevertheless does not receive the valuable incentive monies.

(J) Warranty Reimbursement Procedures

(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....

(i)For parts reimbursement, the 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 fifty (50) qualifying customer paid repair orders. For a dealer unable to provide fifty (50) 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;
(ii) 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. 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, 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;
(vi) 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 thirty 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;

This language establishes clear procedures under which dealers may seek reimbursement for warranty work and requires dealers be paid the equivalent of what the dealer charges for similar repairs in the open market.

Examples: Currently, all manufacturers unilaterally designate the reimbursement rate and profit margin a dealer is paid for warranty work. Almost every one of these predetermined rates is well below what the dealer charges on the open market for like work.

(K) Warranty and Sales Incentive Audit Procedures

(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. 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 to 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
(iii) 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 proposed chargeback amount within forty five (45) days of receipt of this notice. 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;

Restricts a manufacturer from auditing and charging back dealers for alleged wrongful claims after a 12 month period and establishes procedures for those audits and chargebacks to include a provision allowing dealers to protest unreasonable chargebacks.

Examples: Currently, all manufacturers reserve for themselves the right to audit and chargeback claims paid to the dealer no matter how much time has passed since payment. In some instances, dealers have had chargeback levied on claims paid as far back as 4 or 5 years prior to the audit which results in an untenable situation for the dealer. In addition, the manufacturers have placed unreasonably restrictive procedures on submitting claims which have resulted in chargebacks for things such as not placing a service technician time stamp in the right location on the repair paperwork or not providing otherwise immaterial detail on a sales incentive claim form.

(O) Relocation of Dealership

(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;

Requires manufacturer to consider relocation request within specified time frame and accept or deny upon reasonable basis.

Examples: All manufacturers reserve to their sole discretion the ability of a dealership to relocate. Without a requirement of reasonableness in reviewing such requests, manufacturers will generally not permit a relocation no matter the economic considerations facing the dealer. With the drastic reduction in sales volume experienced by dealers of all linemakes, many dealerships need the flexibility to move into a more financially viable location.

(P) Dealership Facilities

(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;

Prevents manufacturer from requiring unreasonably large or expensive facility upgrades.

Examples: Over the last several years, manufacturers including General Motors, Nissan, BMW, Mercedes Benz and others have instituted new facility size and image programs to be applied to all dealerships in the United States. In many cases, the manufacturer's size and image requirements are not financially viable for a particular dealership and are based upon unrealistic sales expectations for a small market.

(Q) Exclusive Dealership Facilities

(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 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;

Prohibits a manufacturer from requiring a dealer provide exclusive facilities.

Examples: General Motors, Nissan, BMW, Mercedes Benz and others have attempted to require dealers to commit to providing exclusive facilities which for many dealerships is not economically feasible. Many dealers require more than one franchise within the dealership facility in order to cover overhead.

(R) Site Control

(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;

Prohibits a manufacturer from requiring that a dealer provide the manufacturer with dealership site control, including a first right of refusal on the purchase of the dealership property with a purchase price of less than fair market value.

Examples: Despite Chrysler's repeated claims that its dealers will have to have the Chrysler, Dodge and Jeep franchises in one location to be viable, Chrysler is refusing to provide dealers with the "missing" franchise without the dealer first agreeing to give Chrysler full control of the use of the dealership site.

(S) New Point or Relocation into Another Dealer's RMA

(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, 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. 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 board 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;
(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;

This provision provides existing dealers with the opportunity to protest the addition of a same linemake dealer into a radius of 10 miles around the existing dealership location. The existing dealer will have the right to demonstrate that the addition of the second dealer into the existing dealer's RMA is not warranted. This section provides a procedure for such a protest.

Examples: Honda recently proposed to add a new dealership on Oahu where there exist 4 Honda dealers serving the greater Honolulu area. The existing dealers believe that, particularly under the current economic conditions, the addition of another Honda dealership would have caused severe financial damage to them.

(T) Transfer of Dealership

(T) Unreasonably withholds consent to the sale, 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, 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. 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, 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. 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;

Requires manufacturers to reasonably consider requests to transfer the ownership of a dealership, provides a criteria to be used in considering a transfer request and the procedure for a dealership's challenge of a manufacturer's rejection of a transfer request.

Examples: All manufacturers retain sole discretion in approving ownership transfers of dealerships. Despite meeting generally accepted criteria, manufacturers will from time to time refuse to approve the sale of a dealership which prevents the owner from obtaining a return on his or her investment.

(U) Dealership Succession

(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. 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; 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;

Requires manufacturers to accept a dealer's choice of family member to succeed the dealer as long as the successor meets minimum criteria or presents a qualified manager for the dealership and provides a procedure for the dealership to challenge a rejection of the proposed successor.
Examples: Despite dealerships traditionally being family-owned, in some cases for several generations, there are numerous examples of manufacturers rejecting a dealer's choice, sometimes following the dealer's death, for the family member to be the dealer-principal of the dealership. As long as the proposed successor meets minimum criteria or presents a qualified dealership manager, the manufacturer should not be permitted to prevent the dealership from passing to the next generation within a family.

(V) Manufacturer Required Training

(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;

Prohibits the manufacturer from requiring the dealership to send personnel to training that is not specific and necessary to a new product.

Examples: Manufacturers periodically create "sales motivational" training and demand that dealers send their sales or service personnel to the training. The training is often on the mainland which creates a tremendous inconvenience and expense for Hawaii dealers.

(W) Advertising and Displays

(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;

Prohibits manufacturers from requiring dealers to contribute toward advertising or to accept promotional/display material without the dealer's consent.

Examples: Manufacturers regularly attempt to force dealers to contribute to an advertising fund or to accept promotional or display material shipped to the dealership. As independent businesses, dealerships must have the ability to refuse to participate in any given advertising campaign or refuse to accept promotional material the dealer deems a poor investment.

(X) Customer Satisfaction Performance Requirements

(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 to such dealer;

Requires that a manufacturer's use of CSI performance requirements be reasonable.

Examples: In small markets, a dealership will have only a few CSI survey returned by customers which does not provide an adequate sampling. Nevertheless, manufacturers have customarily enforced their CSI performance criteria despite unreliable samples.

(Y) Sales Performance Requirements

(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

Requires that a manufacturer's use of sales performance requirements be reasonable.

Examples: Manufacturers generally apply a fixed formula to judge their dealer's sales performance. However, every market is unique and manufacturers don't always make adjustments for the unique aspects of a dealer's market in gauging the dealership's sales performance.

(Z) Vehicle Allocation

(Z) Implements or establishes a system of motor vehicle allocation or distribution to one or more of its dealers which is unfair, inequitable, 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, 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 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)."

Requires that a manufacturer provide a reasonable quantity and mix of vehicles to its dealers and prohibits forcing dealers to accept vehicles not ordered.

Examples: Manufacturers have total control over which dealers receive which vehicles. It is critical that the manufacturers be prevented from discriminating amongst its dealers in allocated new vehicles. In contrast, prior to its bankruptcy proceedings, Chrysler was demanding that dealers accept vehicles that the dealers had no need for.

Finally, HADA continues to meet with stakeholders on this issue to address their comments.

We have met with the Motor Vehicle Industry Licensing Board on February 16, 2010 to review their comments and have agreed to insert clarifying language in the bill to insure that the five references to the "board" are understood to be references to the current petition procedures-- pursuant to HRS Chapter 91, and Title 16 Chapter 201 of the Hawaii Administrative Rules.

Also, at the time of the filing of this testimony, we are in discussions with the Automobile Manufacturers Alliance, representatives from General Motors, and a representatives from Honda Motor Company to review and address their input.

In summary, a healthy dealer is more apt to be able to help consumers.

HADA dealers thank you for your consideration of this measure to insure a healthy transportation sector for Hawaii –one which includes a healthy auto industry capable of being responsive to the needs of Hawaii consumers. We respectfully ask that you pass SB2859 SD1.

Respectfully submitted,

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TESTIMONY

In STRONG SUPPORT OF SB2859 SD1

RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT

Presented to the Committee on Commerce and Consumer Protection

For the public hearing 10 a.m. Tuesday, February 23, 2010
In Conference Room 229

Chair Baker and members of the committee:

I remember being president of the Hawaii Auto Dealers Association the last time you folks considered and gave us more protection from our franchisor manufacturers. Back then I thought it was a good idea, but I didn't really see a burning need. Boy have my eyes been opened this last year with the closures of dealerships on Maui and the Big Island. Back then the manufacturers were just trying to nick us a little – now they've got chainsaws and they're trying to hack off our limbs. What SB2589 SD1 asks for are protections from several types of unwarranted acts by the franchisor and definition that any disputes should be settled either by the courts or heard before the HI Motor Vehicle Licensing Board. It also requires them to repurchase inventories from terminated dealers – this is a definite must.

I hope you'll agree that a strong retail dealer network is a benefit to the State and to consumers. That being the case, I urge you to pass SB2859 SD1.

Cordially,

Charles G. King
President

HONDA Dodge Chrysler Plymouth Jeep FIVE STAR

HILO-KONA mazda SUBARU

TESTIMONY
In STRONG SUPPORT of SB2859 SD1
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT
Presented to the Committee on Commerce and Consumer Protection
For the public hearing 10 a.m. Tuesday, February 23, 2010
In Conference Room 229

Chair Baker and members of the committee:

Hawaii's new car dealers appreciate the members of the Hawaii State Legislature and this committee for hearing SB2859—a bill to update Hawaii's motor vehicle industry franchise laws necessitated by the extraordinary changes in the motor vehicle industry this past year. Hawaii's franchised new car dealers are in STRONG SUPPORT of the measure.

Background

The new car automotive franchise system has gone through massive changes within the last 2 years that has allowed very negative and drastic actions by the manufactures to disregard the rights of auto dealers and the people who work with us.

Motor vehicle industry franchise laws appear in all 50 states. This past year, legislators in New York, Florida, Connecticut, North Carolina and many other states have worked with auto dealers to update their respective state's franchise laws. Hawaii dealers, facing many of the same challenges of other dealers across the country, and agreeing with the earlier Hawaii legislative finding that "the geographical location of Hawaii makes it necessary to ensure the availability of motor vehicles and parts and dependable service," believe that it is indeed 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 this state.

I humbly ask for your support at a time that is critical to helping us keep our businesses and our people employed viable for years to come. **We respectfully ask that you pass SB2859 SD1.**

Respectfully submitted,

Wayne K. De Luz
President
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& Big Island Harley-Davidson

February 22, 2010

Testimony in STRONG SUPPORT of SB2859 SD1 RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT

Presented to the Committee on Commerce and Consumer Protection

For the public hearing 10 a.m. Tuesday, Feb. 23, 2010 in Conference Room 229

Dear Chair Baker and members of the committee:

Aloha Auto Group has been in business since April 1997 as a Kia franchised dealer on the islands. We have locations on Oahu, Maui and the Island of Hawaii.

I am in Strong Support of SB2859 SD1—relating to the Motor Vehicle Industry Licensing Act which needs to be passed. My reasoning is manufacturers have Business and Operating Plans (BOP). As our business grew so did our BOP. However, with business declining during our economic downturn, our manufacturers' BOP remained at a high level and the manufacturers did not take into consideration the downturn that existed in Hawaii.

As an example, in 2007 we sold 1125 new units, in 2008 - 702 new units, and in 2009 - 621 new units. As you see, a decrease each year. Nonetheless, our BOP was kept at a level of approximately 1000 units annually. It was not until around 4th quarter 2009 that the manufacturer reduced our BOP to the current rate of sales.

Over the last two years this has cost my company hundreds of thousands of dollars. Had the manufacturer adjusted the BOP much earlier, I may not have had to resort to layoffs.

Respectfully submitted,

William (Bill) van den Hurk
President