HB2433 HD1

Measure Title:	RELATING TO MOTOR VEHICLE INDUSTRY LICENSING ACT.
Report Title:	Motor Vehicle Industry Licensing Act; Dealers; Manufacturers; Distributors
Description:	Allows a licensed motor vehicle dealer to engage in business at multiple locations affiliated by common ownership within the same county. Authorizes revocation, suspension, or denial of a manufacturer's or distributor's license or fines for failure to compensate a dealer for a recalled vehicle. Clarifies the rights and obligations of dealers, manufacturers, and distributors with respect to improvements and upgrades on dealers' facilities, dealers' performance standards, and access to dealers' business information. (HB2433 HD1)
Companion:	
Package:	None
Current Referral:	CPH
Introducer(s):	AQUINO

PRESENTATION OF THE
MOTOR VEHICLE INDUSTRY LICENSING BOARD

TO THE SENATE COMMITTEE ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-NINTH LEGISLATURE
Regular Session of 2018

Wednesday, April 3, 2018
9:35 a.m.

TESTIMONY ON HOUSE BILL NO. 2433, H.D. 1, RELATING TO MOTOR VEHICLE INDUSTRY LICENSING ACT.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is Kedin Kleinhans, and I am the Executive Officer of the Motor Vehicle Industry Licensing Board ("Board") within the Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs. The Board appreciates the intent of this measure, which is a companion to S.B. 2490, and provides the following comments.

H.B. 2433, H.D. 1 allows a licensed motor vehicle dealer ("dealer") to engage in business at multiple locations affiliated by common ownership within the same county. This measure also authorizes revocation, suspension, or denial of a motor vehicle manufacturer's ("manufacturer") or motor vehicle distributor's ("distributor") license or issuance of fines for failure to compensate a dealer for a recalled vehicle. In addition, this measure clarifies the rights and obligations of dealers, manufacturers, and distributors with respect to improvements and upgrades on dealers' facilities, dealers' performance standards, and access to dealers' business information.

Regarding section 1 of the bill, Hawaii Revised Statutes ("HRS") section 437-2(b)(2) on page 1, lines 9-12, the Board recommends adding language to require dealer locations to obtain prior board approval before transferring motor vehicle salespersons ("salespersons"), similar to the existing process provided in subsection (b)(1), lines 5-8. As currently drafted, dealer locations would be able to freely transfer salespersons without a proper evaluation of common ownership. The Board respectfully suggests the following language: ". . . for which the license is issued during the term thereof, provided each motor vehicle dealer location affiliated by common ownership shall obtain prior approval from the board before transferring salespersons between dealer locations." To further define "common ownership," the Board recommends amending "same ownership" on page 1, line 14 to read "same exact ownership," as this will

assist the Board in determining which locations are precisely affiliated by same common ownership.

The Board is aware that a discussion was held between the Hawaii Automobile Dealers' Association ("HADA") and the Alliance of Automobile Manufacturers ("Alliance") pertaining to the used vehicle recall reimbursement rate of 1.75 per cent on page 17, line 8. A rate of one per cent has been agreed upon between HADA and Alliance, and thus, the Board respectfully suggests amending 1.75 per cent to the agreed-upon rate of one per cent.

Regarding section 3 of the measure, the Board supports the amendments to HRS section 437-52 and notes that the amendments from page 22, line 7 to page 28, line 9 will allow dealers to save on additional resources that may lead to additional consumer services, such as car repairs. In addition, the Board supports the addition of HRS section 437-52(15) on page 28, line 10 to page 31, line 14 and agrees this will protect a consumer's non-public information without restricting a manufacturer's ability to satisfy any safety or recall obligation.

The Board prefers the companion measure, S.B. 2490, S.D. 1, H.D. 2, as it addresses concerns pertaining to the process of verifying common ownership. S.B. 2490, S.D. 1, H.D. 2 also incorporates the used vehicle recall reimbursement rate agreed upon by stakeholders.

Thank you for the opportunity to testify on H.B. 2433, H.D. 1.

SanHi
GOVERNMENT STRATEGIES
A LIMITED LIABILITY LAW PARTNERSHIP

DATE: April 2, 2018

TO: Senator Roslyn Baker
Chair, Committee on Commerce, Consumer Protection and Health
Submitted Via Capitol Website

RE: **H.B. 2433, H.D.1 – Relating to Motor Vehicle Industry Licensing Act**
Hearing Date: Tuesday, April 3, 2018, 9.35 AM
Conference Room: 229

Dear Chair Baker and Members of the Committee on Commerce, Consumer Protection and Health:

On behalf of the Alliance of Automobile Manufacturers ("Alliance"), we submit these comments regarding H.B. 2433 H.D. 1 which would amend sections of Hawaii's franchise law referred to as the Motor Vehicle Industry Licensing Law. The Alliance is a trade association of twelve car and light truck manufacturers including BMW Group, Fiat Chrysler Automobiles, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of North America, and Volvo Car USA.

The Alliance and the Hawaii Automobile Dealers' Association ("HADA") have engaged in numerous discussions about Senate Bill 2490 and House Bill 2433, both of which address the subject. It appears that HADA and the Alliance have reached substantive agreement on the issues. There is some additional work to be accomplished regarding some language, particularly tweaks to the section addressing facilities improvements. We are confident that the remaining language issues will be resolved very quickly.

The provisions in the bills reflect obligations between the dealers and the manufacturers. They do not affect consumers. However, these amendments stabilize the industry in Hawaii and that result will help consumers in many ways.

The H.D. 2 version of Senate Bill 2490, with some modest additional work, primarily in the facilities improvements section, fundamentally reflects the basic agreement of HADA and the Alliance.

The Alliance does have specific comments we are asking HADA to consider as clarification:

On Page 5 at the end of line 20, we believe the following language will add clarity: "due to a federal safety recall for a defect or noncompliance, or a federal emissions recall."

First Hawaiian Center
999 Bishop Street, Ste 1400
Honolulu, HI 96813
T 808-539-0400
F 808-533-4945
Gary Slovin gslovin@awlaw.com
Mihoko Ito mito@awlaw.com
Rick Tsujimura rtsujimura@awlaw.com
C. Mike Kido cmkido@awlaw.com
Tiffany Yajima tyajima@awlaw.com
Matthew Tsujimura mtsujimura@awlaw.com

This portion of the bill is about recalls for used vehicles, and we believe it is advisable for the definition to clearly limit the definition of “stop-sale” to recalls.

On Page 5, after line 20, the Alliance is suggesting language to help address the logistic challenges of dealing with the deluge of recalls the industry has been faced with:

“(i) A manufacturer may direct the manner and method in which a dealer must demonstrate the inventory status of an affected used motor vehicle to determine eligibility under this section, provided that the manner and method may not unduly burdensome and may not require information that is unduly burdensome to provide.”

The section on facility improvements beginning on page 11, line 2 and ending on page 13 line 15.

There are two concepts being addressed in this section. The first is that when a dealer enters into an obligation to improve its facilities based on receiving incentive payments from the manufacturer, those incentive payments must continue for a minimum of ten years. The second is that if a manufacturer offers an additional incentive program during that ten year period the dealer is not obligated to participate but, if the dealer chooses not to participate the dealer will not be eligible for the incentive payments under the second program but will continue to receive the payments under the program it entered into. SB 2490, SD 1, HD 2, includes language addressing both concepts but needs to be tweaked to be clearer.

The section on Data beginning on page 19, line 1 and ending on page 22, line 13.

This section of the bill deals with data regarding customers that is held by the dealer. The Alliance and HADA have made considerable progress on this section through negotiation. We believe that we have conceptual and substantive agreement on the revised language. The Alliance feels the following change will add clarity:

Page 20, line 21 the Alliance suggests that the word “or” be struck and the following new subparagraphs be added:
(e) analytics; or
(f) reasonable marketing purposes.

Thank you for the opportunity to present these comments. The Alliance is committed to continuing to meet with HADA and its members to work out the remaining language.

Brian Kitagawa, President
Dave Rolf, Executive Director

HADA TESTIMONY IN STRONG SUPPORT
of HB2433 with HADA-proposed amendments, shown in yellow highlight
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT
Presented to the Senate Committee on Commerce, Consumer Protection and Health
at the Public Hearing, 9:35 a.m. Tuesday, April 3, 2018
Conference Room 229, Hawaii State Capitol

Chair Baker, Vice Tokuda and members of the committee:

The members of the Hawaii Automobile Dealers Association, Hawaii's franchised new car dealers, appreciate the opportunity to offer **strong support** for this bill which proposes to add certain amendments to Hawaii's motor vehicle industry licensing law.

Background

Motor vehicle industry franchise laws appear in all 50 states. This past year, legislators in Maryland, Florida, New York 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. "

This bill will provide:

- **for seamless transfer of sales persons between dealerships which have common ownership**
- **for auto manufacturer payments to dealers for certain used vehicles when stop-sell/do not drive orders are issued by the manufacturer**
- **a definition of "unreasonable" with regard to manufacturer facility requirements of dealers.**
- **certain considerations when manufacturers establish sales performance criteria**

- **consideration when goods, materials and services are available locally to fulfill a manufacturer's facility brand requirements**
- **certain limitations on a manufacturer's or certain third party's access to a dealers proprietary business information**

Please note that the following dealer-proposed amendment language to the bill language from SB2490 S.D.1 H.D. 2 is requested for inclusion in a HB2433 H.D.1 S.D.1 version. Since significant input from dealers and auto manufacturers has been provided on the Senate version (during its House hearings) we request that the amendments shown in yellow below be made to the Senate version and that the new Senate Bill language, with the amendments, replace the current House Bill language.

Please see the following housekeeping addition to the used vehicle recall; stop-sale orders section. The proposed amendment language (in yellow highlight) is requested to be added for clarity:

"**§437- Used vehicle recall; stop-sale orders.** (a) A manufacturer shall compensate its new motor vehicle dealers for all labor and parts required by the manufacturer to perform recall repairs. Compensation for recall repairs shall be reasonable as described in subsection (e).

RE: Please also amend the SB 2490 S.D.1 H.D. 2 language by deleting the highlighted language in (6) below which may have the affect of denying a dealer "any facility related incentives and benefit" for program agreed upon by dealer and manufacturer, if a manufacturer requires a subsequent program upgrade.

(6) 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 based on reasonable business consideration, including current and reasonably foreseeable projections of economic conditions existing in the automotive industry at the time such action would be required of the dealer, and agrees to make a good faith effort to make available, at the dealer's option, a reasonable quantity and mix of new motor vehicles, which, after a reasonable analysis of market conditions, are projected to meet the sales level necessary to support the increased overhead incurred by the dealer as a result of the required construction, renovation, or alteration; provided[~~, however,~~] that a dealer may be required by a manufacturer or distributor to make reasonable facility improvements and technological upgrades necessary to support the technology of the manufacturer's or distributor's vehicles. If the dealer chooses not to make such facility improvements or technological upgrades, the manufacturer or distributor shall not be obligated to provide the dealer with the vehicles which require the improvements or upgrades[~~;~~]. ~~Where a dealer is required by a manufacturer or distributor to make reasonable facility~~

~~improvements and technological upgrades, and the dealer does not comply, the dealer is not eligible for any related facility-related incentives and benefit.~~ A manufacturer or distributor may not require a dealer to construct, renovate, or make substantial alterations to the dealer's facility if the dealer has completed a construction, renovation, or substantial alteration to the same component of the facility that was required and approved by the manufacturer or distributor within the previous ten years. For purposes of this paragraph, a "substantial alteration" means an alteration that has a major impact on the architectural features, characteristics, appearance, or integrity of a structure or lot. The term "substantial alteration" does not include routine maintenance, such as interior painting reasonably necessary to maintain a dealership facility in attractive condition, or any changes to items protected by federal intellectual property rights. A dealer that has completed facility construction, renovation, or substantial alteration shall be deemed to be in compliance with any facility component of a manufacturer or distributor incentive program for a period of ten years following the completion of the upgrade and shall be deemed to have earned all facility-related incentives and benefits during the ten year period following the upgrade's completion; provided that no changes have been made to the facility since the manufacturer or distributor approval that would render the facility non-compliant, regardless of whether the manufacturer's or distributor's image program has changed. Facility changes that are necessitated due to damage sustained from a natural disaster or as a result of necessary safety upgrades shall not be considered a change to the facility that renders the facility non-compliant; provided that those facility changes substantially restore the facilities to the previous or current compliant state. Eligibility for facility-related incentives under this paragraph shall not apply to lump sum payments so long as the compensation relates to the cost of the facility upgrade and is not paid on a per vehicle basis. Nothing in this paragraph shall be construed to allow a franchised motor vehicle dealer to impair or eliminate a manufacturer's or distributor's intellectual property or trademark rights and trade dress usage guidelines; impair other intellectual property interests owned or controlled by the manufacturer or distributor, including the design and use of signs; or refuse to change the design or branding of any signage or other branded items required by a manufacturer or distributor at any time, if the manufacturer or distributor requires those changes of all of its franchised dealers nationally;

RE: (12) The Alliance of Automobile Manufacturers commented that "any material and adverse action against a dealer" was language that was too broad. HADA dealers agreed to their request to delete that language and apply subsection (12) to termination. Please see the requested amendments to the subsection (in yellow highlight).

(12) Implement or establish an unreasonable, arbitrary, or unfair sales or [~~other~~] service performance standard in determining a dealer's compliance with a franchise agreement[~~; or~~] ~~that results in any material and adverse action against a dealer~~. If the sales or service performance standard is to be used as the basis for ~~any material and adverse action~~ a termination of ~~against~~ a dealer, then the performance standard shall be deemed unreasonable, arbitrary, or unfair if the standard does not include material and relevant local market factors, including, but not limited to, the geography of the dealer's assigned

territory as set forth in the franchise agreement, market demographics, change in population, product popularity, number of competitor dealers, and consumer travel patterns;

Additional Background Information

Re: Payment to dealers for used vehicles grounded by the manufacturer because of a safety recall when the repair part is not made available.

Auto manufacturers currently are required, under federal law, to pay a dealer 1% of the retail value per month for any new motor vehicle delivered to the dealer, which has been grounded by the manufacturer by an order to stop sell / do-not-drive, if the manufacturer is unable to supply the repair part to allow the vehicle to be repaired and sold.

Stop sell / do-not-drive orders by manufacturers have occurred more frequently in the **used** vehicle category in the past few years.

After discussions with the representatives of auto manufacturers HADA dealers support a value of one per cent per month for used vehicles also.

A National Automobile Dealers Association study found that the value of a vehicle trade-in under a stop sell /do-not-drive order would decline by an average of $1,210 and by as much as $5,713 if auto dealers were prohibited from sell or wholesaling any used vehicle while awaiting a part.

Because trade-in allowances are typically used to fund a down payment for a new-or used car purchase, dealers must balance the projected wholesale value of the trade-in car against the costs of holding the vehicle until resale. A dealer would need to assess and reflect the additional risks and costs mandated by the stop sell/ do-not-drive order with the adverse consequences affecting consumers who want to buy a newer, safer vehicle.

For this reason, dealers are requesting the addition of the amendment addressing not only used cars in inventory at the time of the stop sell order, but also those cars which are taken into inventory as a result of a consumer trade-in.

Re: 100% common ownership

Dealers who have 100% same common ownership for their dealerships, but which are licensed separately are prohibited by current law from transferring sales persons between their dealerships in the same seamless fashion as dealers who own a main licensed dealership with licensed branches. The addition of the language in this bill will remedy this.

Re: Providing a definition of "unreasonable" with regard to manufacturer facility

requirements

A Hawaii franchised new car dealer, within the past few years, completed construction of a significant multi-million-dollar new auto dealership facility which met the auto manufacturer's requirements. However, after less than two years had passed, the auto manufacturer required significant changes requiring the removal and replacement of a wall and adjacent offices. The new language proposes a definition of unreasonable with regard to subsequent facility requirements issued after a dealer has completed agreed upon facility construction, renovation, or substantial alteration.

Re: Taking into consideration Hawaii factors when establishing sales performance standards.

The bill's language requires that unique factors found in the Hawaii marketplace be taken into consideration when establishing sales performance requirements for Hawaii dealerships. The proposed language is similar to that found in New York State's motor vehicle franchise law, and has been recently vetted in the courts in that state.

Re: Use of construction and renovation goods or materials or services that are substantially similar in appearance, function, design and quality.

Manufacturer requirements for a dealer to purchase specialized goods, building materials, or services from a specific manufacturer, distributor, or service provider may incur substantial additional unnecessary costs for a dealer if those goods and services of substantially similar appearance, function, design and quality are available from a local Hawaii source.

Re: Limiting manufacturer access to a dealer's proprietary business information

This language seeks to prevent manufacturers or certain third parties from taking any action by contract, technical means or otherwise that would prohibit or limit a dealers ability to protect, story, copy, share, or use any protected dealer data.

Dealers are held responsible for the protection of this data. This bill's language provides prohibitions against unreasonable restrictions on the scope and nature of the data which a dealer shares.

In Summary

Commerce plays such a vital role in the health of our economy that is necessary to insure that it is smooth-flowing and unhampered. For the foregoing reasons outlined, the members of the Hawaii Automobile Dealers Association request that the members of the Senate Committee on Commerce, Consumer Protection and Health give highest

consideration to passing HB2433 H.D.1 with the removal of the current bill language and the insertion of the amended language from SB 2490 S.D1, HD2 with the additional note that the fruitful HADA discussions conducted with representatives of the auto manufacturers this past week, may possibly produce additional HADA-proposed amended language as the auto manufacturer input is received and reviewed.

Respectfully submitted,

David H. Rolf

For the Members of the Hawaii Automobile Dealers Association