

SB 2490

SD1, HD1

A BILL FOR AN ACT

RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT.

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

1 SECTION 1. The legislature finds that due to Hawaii's
2 remote location, motor vehicle manufacturers must make certain
3 special considerations when creating programs applicable to
4 franchised motor vehicle dealers located in the State. The
5 legislature further finds that certain amendments to Hawaii's
6 motor vehicle industry licensing laws are necessary to ensure a
7 level playing field amongst the State's motor vehicle dealers.

8 Accordingly, the purpose of this Act is to modernize
9 Hawaii's motor vehicle industry licensing laws by:

- 10 (1) Specifying certain recall reimbursement or repair
11 requirements for manufacturers where a stop-sale order
12 has been issued;
- 13 (2) Authorizing a license holder to engage in business at
14 motor vehicle dealer locations that are affiliated by
15 common ownership under the same license;
- 16 (3) Clarifying when certain manufacturers' or
17 distributors' sales or service performance standards



1 shall be deemed unreasonable, arbitrary, or unfair;
2 and

3 (4) Prohibiting a manufacturer or distributor from
4 requiring a dealer to perform certain construction or
5 renovations to the dealer's facilities; purchase items
6 for a dealership facility in certain circumstances; or
7 provide certain information related to customer
8 information, unless certain conditions are met.

9 SECTION 2. Chapter 437, Hawaii Revised Statutes, is
10 amended by adding a new section to be appropriately designated
11 and to read as follows:

12 "§437- Used vehicle recall; stop-sale orders. (a) A
13 manufacturer shall compensate its new motor vehicle dealers for
14 all labor and parts required by the manufacturer to perform
15 recall repairs. Compensation for recall repairs shall be
16 reasonable. If parts or a remedy are not reasonably available
17 to perform a recall service or repair on a used vehicle held for
18 sale by a dealer authorized to sell and service new vehicles of
19 the same line make within thirty days of the manufacturer
20 issuing the initial notice of recall, and the manufacturer has
21 issued a stop-sale order on the vehicle, the manufacturer shall



1 compensate the dealer at a prorated rate of at least per
2 cent of the value of the vehicle per month, beginning on the
3 date that is thirty days after the date on which the stop-sale
4 order was provided to the dealer until:

5 (1) The date the recall or remedy parts are made
6 available; or

7 (2) The date the dealer sells, trades, or otherwise
8 disposes of the affected used motor vehicle;
9 whichever is earlier.

10 (b) The value of a used vehicle shall be the average
11 trade-in value for used vehicles as indicated in an independent
12 third-party guide for the year, make, and model of the recalled
13 vehicle.

14 (c) This section shall only apply to:

15 (1) Used vehicles subject to a stop-sale order for which
16 repair parts or a remedy remain unavailable for thirty
17 days or longer; and

18 (2) New motor vehicle dealers holding an affected used
19 vehicle for sale that is a line make that the dealer
20 is franchised to sell or on which the dealer is
21 authorized to perform recall repairs.



1 (d) Subject to the audit provisions of section 437-57, it
2 shall be a violation of this section for a manufacturer to
3 reduce the amount of compensation otherwise owed to an
4 individual new motor vehicle dealer, whether through a
5 chargeback, removal of the individual dealer from an incentive
6 program, or reduction in amount owed under an incentive program
7 solely because the new motor vehicle dealer has submitted a
8 claim for reimbursement under this section; provided that this
9 subsection shall not apply to an action by a manufacturer that
10 is applied uniformly among all dealers of the same line make in
11 the State.

12 (e) All reimbursement claims made by new motor vehicle
13 dealers pursuant to this section for recall repairs, or for
14 compensation where no part or repair is reasonably available and
15 the vehicle is subject to a stop-sale order shall be subject to
16 the same limitations and requirements as a warranty
17 reimbursement claim made under section 437-56 or
18 437-28(a)(21)(G). In the alternative, a manufacturer may
19 compensate its franchised dealers under a national recall
20 compensation program; provided that the compensation under the



1 program is equal to or greater than that provided under
2 subsection (a) or the manufacturer and dealer otherwise agree.

3 (f) Nothing in this section shall require a manufacturer
4 to provide total compensation to a dealer that would exceed the
5 total average trade-in value of the affected used motor vehicle,
6 as originally determined under subsection (b).

7 (g) Any remedy provided to a dealer under this section is
8 exclusive and may not be combined with any other state or
9 federal recall compensation remedy.

10 (h) For purposes of this section, a "stop-sale order"
11 means a notification issued by a manufacturer to its franchised
12 new motor vehicle dealers, stating that certain used vehicles in
13 inventory should not be sold or leased, at either retail or
14 wholesale."

15 SECTION 3. Section 437-2, Hawaii Revised Statutes, is
16 amended by amending subsection (b) to read as follows:

17 "(b) A license issued under this chapter shall authorize
18 the holder to engage in the same business at [~~branch~~]:

19 (1) Branch locations in the same county for which the
20 license is issued during the term thereof; provided



1 that each branch location of a motor vehicle dealer is
2 approved by the board[-]; or

3 (2) Other motor vehicle dealer locations located in the
4 same county and affiliated by common ownership with
5 the location for which the license is issued during
6 the term thereof; provided that each motor vehicle
7 dealer location affiliated by common ownership shall
8 obtain prior approval from the board before
9 transferring salespersons between dealer locations.

10 For purposes of this subsection, "common ownership" shall
11 include entities that have the same exact ownership, whether
12 through individuals, corporations, trusts, or other entities."

13 SECTION 4. Section 437-52, Hawaii Revised Statutes, is
14 amended to read as follows:

15 "[+]§437-52[+] Reciprocal rights and obligations among
16 dealers, manufacturers, and distributors of motor vehicles. (a)

17 A manufacturer or distributor shall not:

18 (1) Require any dealer in the State to enter into any
19 agreement with the manufacturer or distributor or any
20 other party that requires the law of another
21 jurisdiction to apply to any dispute between the



1 dealer and manufacturer or distributor, or requires
2 that the dealer bring an action against the
3 manufacturer or distributor in a venue outside of
4 Hawaii, or requires the dealer to agree to arbitration
5 or waive its rights to bring a cause of action against
6 the manufacturer or distributor, unless done in
7 connection with a settlement agreement to resolve a
8 matter or pending dispute between a manufacturer or
9 distributor, or officer, agent, or other
10 representative thereof, and the dealer; provided[~~—~~
11 ~~however,~~] that such agreement has been entered
12 voluntarily for adequate and valuable consideration;
13 and provided further that the renewal or continuation
14 of a franchise agreement shall not by itself
15 constitute adequate and valuable consideration;

16 (2) Require any dealer in the State to enter into any
17 agreement with the manufacturer or distributor or any
18 other party, to prospectively assent to a release,
19 assignment, novation, waiver, or estoppel, which
20 instrument or document operates, or is intended by the
21 applicant or licensee to operate, to relieve any



1 person from any liability or obligation of this
2 chapter, unless done in connection with a settlement
3 agreement to resolve a matter or pending dispute
4 between a manufacturer or distributor, or officer,
5 agent, or other representative thereof, and the
6 dealer; provided [~~however,~~] that such agreement has
7 been entered voluntarily for adequate and valuable
8 consideration; and provided further that the renewal
9 or continuation of a franchise agreement shall not by
10 itself constitute adequate and valuable consideration;
11 (3) Cancel or fail to renew the franchise agreement of any
12 dealer in the State without providing notice, and
13 without good cause and good faith, as provided in
14 section 437-58;
15 (4) Refuse or fail to offer an incentive program, bonus
16 payment, holdback margin, or any other mechanism that
17 effectively lowers the net cost of a vehicle to any
18 franchised dealer in the State if the incentive,
19 bonus, or holdback is made to one or more same line
20 make dealers in the State;



1 (5) Unreasonably prevent or refuse to approve the
2 relocation of a dealership to another site within the
3 dealer's relevant market area. The dealer shall
4 provide the manufacturer or distributor with notice of
5 the proposed address and a reasonable site plan of the
6 proposed location. The manufacturer or distributor
7 shall approve or deny the request in writing no later
8 than sixty days after receipt of the request. Failure
9 to deny the request within sixty days constitutes
10 approval;

11 (6) Require a dealer to construct, renovate, or make
12 substantial alterations to the dealer's facilities
13 unless the manufacturer or distributor can demonstrate
14 that such construction, renovation, or alteration
15 requirements are reasonable and justifiable based on
16 reasonable business consideration, including current
17 and reasonably foreseeable projections of economic
18 conditions existing in the automotive industry at the
19 time such action would be required of the dealer, and
20 agrees to make a good faith effort to make available,
21 at the dealer's option, a reasonable quantity and mix



1 of new motor vehicles, which, after a reasonable
2 analysis of market conditions, are projected to meet
3 the sales level necessary to support the increased
4 overhead incurred by the dealer as a result of the
5 required construction, renovation, or alteration;
6 provided[~~, however,~~] that a dealer may be required by
7 a manufacturer or distributor to make reasonable
8 facility improvements and technological upgrades
9 necessary to support the technology of the
10 manufacturer's or distributor's vehicles. If the
11 dealer chooses not to make such facility improvements
12 or technological upgrades, the manufacturer or
13 distributor shall not be obligated to provide the
14 dealer with the vehicles which require the
15 improvements or upgrades[+]. Where a dealer is
16 required by a manufacturer or distributor to make
17 reasonable facility improvements and technological
18 upgrades, and the dealer does not comply, the dealer
19 is not eligible for any related facility-related
20 incentives and benefit. A manufacturer or distributor
21 may not require a dealer to construct, renovate, or



1 make substantial alterations to the dealer's facility
2 if the dealer has completed a construction,
3 renovation, or substantial alteration to the same
4 component of the facility that was required and
5 approved by the manufacturer or distributor within the
6 previous ten years. For purposes of this paragraph, a
7 "substantial alteration" means an alteration that has
8 a major impact on the architectural features,
9 characteristics, appearance, or integrity of a
10 structure or lot. The term "substantial alteration"
11 does not include routine maintenance, such as interior
12 painting reasonably necessary to maintain a dealership
13 facility in attractive condition, or any changes to
14 items protected by federal intellectual property
15 rights. A dealer that has completed facility
16 construction, renovation, or substantial alteration
17 shall be deemed to be in compliance with any facility
18 component of a manufacturer or distributor incentive
19 program for a period of ten years following the
20 completion of the upgrade and shall be deemed to have
21 earned all facility-related incentives and benefits



1 during the ten year period following the upgrade's
2 completion; provided that no changes have been made to
3 the facility since the manufacturer or distributor
4 approval that would render the facility non-compliant,
5 regardless of whether the manufacturer's or
6 distributor's image program has changed. Facility
7 changes that are necessitated due to damage sustained
8 from a natural disaster or as a result of necessary
9 safety upgrades shall not be considered a change to
10 the facility that renders the facility non-compliant;
11 provided that those facility changes substantially
12 restore the facilities to the previous or current
13 compliant state. Eligibility for facility-related
14 incentives under this paragraph shall not apply to
15 lump sum payments so long as the compensation relates
16 to the cost of the facility upgrade and is not paid on
17 a per vehicle basis. Nothing in this paragraph shall
18 be construed to allow a franchised motor vehicle
19 dealer to impair or eliminate a manufacturer's or
20 distributor's intellectual property or trademark
21 rights and trade dress usage guidelines; impair other



- 1 intellectual property interests owned or controlled by
2 the manufacturer or distributor, including the design
3 and use of signs; or refuse to change the design or
4 branding of any signage or other branded items
5 required by a manufacturer or distributor at any time,
6 if the manufacturer or distributor requires those
7 changes of all of its franchised dealers nationally;
- 8 (7) Require the dealer to establish or maintain an
9 exclusive showroom or facility unless justified by
10 current and reasonably expected future economic
11 conditions existing in the dealer's market and the
12 automobile industry at the time the request for an
13 exclusive showroom or facility is made; provided that
14 the foregoing shall not restrict the terms and
15 conditions of any agreement for which the dealer has
16 voluntarily accepted separate and valuable
17 consideration;
- 18 (8) Condition the award of an additional franchise on the
19 dealer entering a site control agreement or the dealer
20 waiving its rights to protest the manufacturer's or
21 distributor's award of an additional franchise within



- 1 the dealer's relevant market area; provided that the
2 foregoing shall not restrict the terms and conditions
3 of any agreement for which the dealer has voluntarily
4 accepted separate and valuable consideration;
- 5 (9) Require a dealer or the dealer's employees to attend a
6 training program that does not relate directly to the
7 sales or service of a new motor vehicle in the line
8 make of that sold or serviced, or both, by the dealer;
- 9 (10) Require a dealer to pay all or part of the cost of an
10 advertising campaign or contest, or purchase any
11 promotional materials, showroom, or other display
12 decorations or materials at the expense of the dealer
13 without the consent of the dealer, which consent shall
14 not be unreasonably withheld;
- 15 (11) Implement or establish a customer satisfaction index
16 or other system measuring a customer's degree of
17 satisfaction with a dealer as a sale or service
18 provider unless any such system is designed and
19 implemented in such a way that is fair and equitable
20 to both the manufacturer and the dealer. In any
21 dispute between a manufacturer, distributor, and a



1 dealer, the party claiming the benefit of the system
2 as justification for acts in relation to the franchise
3 shall have the burden of demonstrating the fairness
4 and equity of the system both in design and
5 implementation in relation to the pending dispute.

6 Upon request of any dealer, a manufacturer or
7 distributor shall disclose in writing to such dealer a
8 description of how that system is designed and applied
9 to such dealer;

10 (12) Implement or establish an unreasonable, arbitrary, or
11 unfair sales or [~~ether~~] service performance standard
12 in determining a dealer's compliance with a franchise
13 agreement [~~+~~~~or~~] that results in any material and
14 adverse action against a dealer. If the sales or
15 service performance standard is to be used as the
16 basis for any material and adverse action against a
17 dealer, then the performance standard shall be deemed
18 unreasonable, arbitrary, or unfair if the standard
19 does not include material and relevant local market
20 factors, including the geography of the dealer's
21 assigned territory as set forth in the franchise



1 agreement, market demographics, change in population,
2 product popularity, number of competitor dealers, and
3 consumer travel patterns;

4 (13) Implement or establish a system of motor vehicle
5 allocation or distribution to one or more of its
6 dealers that is unfair, inequitable, or unreasonably
7 discriminatory. As used in this paragraph, "unfair"
8 includes without limitation, requiring a dealer to
9 accept new vehicles not ordered by the dealer or the
10 refusal or failure to offer to any dealer all models
11 offered to its other same line make dealers in the
12 State. The failure to deliver any motor vehicle shall
13 not be considered a violation of this section if such
14 failure is due to an act of God, work stoppage, or
15 delay caused by a strike or labor difficulty, shortage
16 of products or materials, freight delays, embargo, or
17 other causes of which the motor vehicle franchisor
18 shall have no control. Notwithstanding the foregoing,
19 a dealer may be required by a manufacturer or
20 distributor to make reasonable facility improvements
21 and technological upgrades necessary to support the



1 technology of the manufacturer's or distributor's
2 vehicles. If the dealer chooses not to make such
3 facility improvements or technological upgrades, the
4 manufacturer or distributor shall not be obligated to
5 provide the dealer with the vehicles which require the
6 improvements or upgrades [-];

7 (14) Require a dealer that is constructing, renovating, or
8 substantially altering its dealership facility to
9 purchase goods, building materials, or services for
10 the dealership facility, including but not limited to
11 office furniture, design features, flooring, and wall
12 coverings, from a vendor chosen by the manufacturer or
13 distributor if: goods, building materials, or
14 services of a substantially similar appearance,
15 function, design, and quality are available from other
16 sources; and the franchised motor vehicle dealer has
17 received the manufacturer's or distributor's approval;
18 provided that this approval shall not be unreasonably
19 withheld or unreasonably delayed. In the event that a
20 manufacturer or distributor does not approve the
21 dealer's use of substantially similar goods, building



1 materials, or services, the manufacturer or
2 distributor shall provide the dealer, in writing at
3 the time of disapproval, a detailed list of reasons
4 why the proposed substantially similar items are not
5 acceptable. Nothing in this paragraph shall be
6 construed to allow a franchised motor vehicle dealer
7 to impair or eliminate a manufacturer's or
8 distributor's intellectual property or trademark
9 rights and trade dress usage guidelines or impair
10 other intellectual property interests owned or
11 controlled by the manufacturer or distributor,
12 including the design and use of signs.

13 (b) Notwithstanding the provisions of any franchise
14 agreement, a manufacturer or distributor shall not require a
15 dealer to provide its customer and prospective customer
16 information, customer lists, service files, transaction data or
17 other proprietary business information ("consumer and
18 proprietary data"), or access the dealer's data management
19 system to obtain consumer and proprietary data, unless written
20 consent is provided by the dealer. Consumer and proprietary data
21 does not include the same or similar data which is obtained by a



1 manufacturer from any other source. "Data management system"
2 means a computer hardware or software system that is owned,
3 leased or licensed by a dealer, including a system of web-based
4 applications, and is located at the dealership or hosted
5 remotely, which stores and provides access to consumer and
6 proprietary data collected and which is stored by the dealer or
7 on behalf of a dealer.

8 (c) Notwithstanding the provisions of any franchise
9 agreement, a manufacturer or distributor:

- 10 (1) Shall allow a dealer to furnish consumer and
11 proprietary data in a widely-accepted file format,
12 such as comma-separated values, and through a third-
13 party vendor selected by the dealer;
- 14 (2) May not require a dealer to grant the manufacturer or
15 distributor access to the dealer's data management
16 system to obtain consumer and proprietary data;
- 17 (3) May access or obtain consumer data directly from a
18 dealer's data management system only with the express
19 written consent of the dealer;



- 1 (4) May not take any adverse action against a dealer for
2 refusing to grant access to the dealer's data
3 management system;
- 4 (5) May require that a dealer of the manufacturer or
5 distributor provide consumer data and proprietary data
6 that pertains to any of the following:
 - 7 (A) Claims for warranty parts or repairs;
 - 8 (B) Data pertaining to the sale and delivery of a new
9 or certified pre-owned vehicle of any line make
10 of the manufacturer or distributor;
 - 11 (C) Safety or recall obligations; or
 - 12 (D) Validation and payment of customer or dealer
13 incentives;
- 14 (6) May not require a dealer to grant access to the
15 dealer's data management system through the franchise
16 agreement or as a condition of renewal or continuation
17 of the franchise agreement;
- 18 (7) May not release or cause to be released nonpublic
19 personal information about a dealer's customers, as
20 defined in title 15 United States Code section
21 6809(4), to:



- 1 (A) Another dealer unless the franchise has been
- 2 terminated, the customer has relocated out of the
- 3 State or to a different island in the State, or
- 4 the dealer whose information is being released
- 5 has provided written consent; or
- 6 (B) Any other third party unless the manufacturer or
- 7 distributor provides the dealer with advanced
- 8 written notice that the manufacturer or
- 9 distributor intends to distribute the information
- 10 to the third party; and
- 11 (8) Shall indemnify the dealer for any third-party claims
- 12 asserted against or damages incurred by the dealer to
- 13 the extent the claims or damages are caused by the
- 14 access to and unlawful disclosure of consumer and
- 15 proprietary data resulting from a breach caused by the
- 16 manufacturer or distributor or a third party to which
- 17 the manufacturer or distributor has provided the
- 18 consumer and proprietary data in violation of this
- 19 section, the written consent granted by the dealer, or
- 20 other applicable State or federal law.



1 (d) Written consent under subsection (c)(3) of this
2 section:

3 (1) Shall be separate from the dealer franchise agreement;

4 (2) Shall be executed by the dealer; and

5 (3) May be withdrawn by the dealer upon thirty days

6 written notice to the manufacturer or distributor."

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

9 SECTION 6. This Act shall take effect on July 1, 2050.



Report Title:

Motor Vehicle Industry Licensing Act; Motor Vehicle Dealers;
Manufacturers; Distributors

Description:

Specifies certain recall reimbursement or repair requirements for manufacturers where a stop-sale order has been issued. Authorizes a license holder to engage in business at motor vehicle dealer locations that are affiliated by common ownership under the same license. Clarifies when certain manufacturers' or distributors' sales or service performance standards shall be deemed unreasonable, arbitrary, or unfair. Prohibits a manufacturer or distributor from requiring a dealer to perform certain construction or renovations to the dealer's facilities; purchase items for a dealership facility in certain circumstances; or provide certain customer and proprietary data; unless certain conditions are met. (SB2490 HD1)

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



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

TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE

TWENTY-NINTH LEGISLATURE
Regular Session of 2018

Tuesday, March 20, 2018
2:00 p.m.

**TESTIMONY ON SENATE BILL NO. 2490, S.D. 1, H.D. 1, RELATING TO THE
MOTOR VEHICLE INDUSTRY LICENSING ACT.**

TO THE HONORABLE ROY M. TAKUMI, 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. Thank you for the opportunity to testify on S.B. 2490, S.D. 1, H.D. 1, Relating to the Motor Vehicle Industry Licensing Act. The Board supports S.B. 2490, S.D. 1, H.D. 1, which is a companion to H.B. 2433, and provides the following comments.

S.B. 2490, S.D. 1, H.D. 1 specifies certain recall reimbursement or repair requirements for motor vehicle manufacturers ("manufacturer") where a stop-sale order has been issued, authorizes a license holder to engage in business at motor vehicle dealer ("dealer") locations that are affiliated by common ownership under the same license, and clarifies when certain manufacturers' or motor vehicle distributors' ("distributor") sales or service performance standards are deemed unreasonable, arbitrary, or unfair. In addition, this measure prohibits a manufacturer or distributor from requiring a dealer to: perform certain construction or renovations to the dealer's facilities; purchase items for a dealership facility in certain circumstances; or provide certain information related to customer information, unless certain conditions are met.

Regarding section 2 of the bill, the Board agrees that stop-sell orders on used motor vehicles need some form of compensation. The Board is aware of ongoing discussion between the Hawaii Automobile Dealers' Association ("HADA") and the

Alliance of Automobile Manufacturers in determining a proposed reimbursement rate. Thus, the Board defers the reimbursement rate to an agreement between HADA and the interested manufacturer stakeholders.

Regarding section 3 of the bill, the Board supports the amendments to Hawaii Revised Statutes (“HRS”) section 437-2 subsection (b) and agrees with the language on page 6, lines 3-12, as it will assist the Board in determining which locations are precisely affiliated by same common ownership.

Regarding section 4 of the bill, the Board supports the intent of the amendments to HRS 437-52 and notes that the amendments from page 10, line 15 to page 18, line 12 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 intent of proposed subsections (b) through (d) on page 18, line 13 to page 22, line 6, as the subsections protect a consumer’s non-public information without restricting a manufacturer’s ability to satisfy any safety or recall obligation.

Thank you for the opportunity to testify on S.B. 2490, S.D. 1, H.D. 1.



SanHi

GOVERNMENT STRATEGIES
A LIMITED LIABILITY LAW PARTNERSHIP

DATE: March 19, 2018

TO: Representative Roy Takumi
Chair, Committee on Consumer Protection & Commerce
Submitted Via Capitol Website

RE: **S.B. 2490, S.D. 1, H.D. 1 – Relating to Motor Vehicle Industry Licensing Act**
Hearing Date: Tuesday, March 20, 2018, 2:00 p.m.
Conference Room: 329

Dear Chair Takumi and Members of the Committee on Consumer Protection & Commerce:

On behalf of the Alliance of Automobile Manufacturers (“Alliance”), we submit these comments regarding S.B. 2490, S.D. 1, 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 several discussions about Senate Bill 2490 and House Bill 2433 which also addresses the subject. Included in these efforts are telephone conferences in which HADA and the Alliance went over all the sections of the bills. During those discussions it appears that we reached conceptual agreement on most of the issues, with some specific unresolved concerns. The Alliance appreciates the candid discussions that were held with HADA. We are hopeful that the parties, through additional discussions, can reach agreement.

The HD 1 version of Senate Bill 2490 includes language that reflects the positions of HADA as well as some of the positions of the Alliance. We would note that some of the bill language differs from the principles conceptually agreed to in our discussions. As noted we are hopeful these differences can be resolved.

The Alliance's specific comments on the HD 1 are as follows:

On Page 3, after line 9, we request the following language be added:

(3) in inventory at the time the Stop Sale or Do Not Drive order was issued; or
(4) which was taken in the used vehicle inventory of the dealer as a consumer trade-in incident to the purchase of a new vehicle from the dealer after the Stop Sale or Do Not Drive order was issued.

This remedy should only apply to vehicles taken in the ordinary course of the new dealer's business just as would have been the case if the recall issues the industry is now facing had not occurred.

We believe that the appropriate rate, which is now blank, should be 1%.

A compensation of 1 per cent per month (12% APR) would put Hawaii's law for used motor vehicle compensation in line with the federal law for new motor vehicle compensation. If Hawaii legislates on this issue, it should focus on making dealers whole, not providing additional monies.

The section on facility improvements beginning on page 10, line 15 and ending on page 13 line 7.

The Alliance has objections to two aspects of this section. As background, manufacturers and dealers enter into agreements under which the dealer makes improvements to its facilities in exchange for certain incentive bonuses. This is standard in the industry and benefits both the manufacturer and the dealer. HADA is proposing that such facility changes may not be required as part of an incentive program more than once every 10 years. Because the industry is changing so quickly, the Alliance believes that period should be seven years. Note that dealers are not required generally to participate in these facility incentive programs. They are voluntary.

Another issue raised in this section is that, as the present language reads, the dealer may not be required to perform renovations to receive the related incentives more than once every certain number of years. While the Alliance agrees with this concept, at the same time, a dealer who chooses not to participate in a facility improvement incentive program within that seven or 10 year period should not qualify for the additional incentive unless it undertakes the additional improvements. In other words, if the dealer does not make the improvements, the dealer should not receive the incentive. At decision making, the Committee on Transportation announced that it agreed with the Alliance position and the H.D. 1 language attempts to address this issue.

The section on Performance Standards beginning on Page 15, on line 10 and ending on Page 16, line 3.

This provision deals with performance standards applying to dealers. It calls for taking local market factors into consideration when any material and adverse action is contemplated against a dealer. In our discussions, the Alliance believes it was agreed that the local market factors should not be brought into play except in the case of termination. It is extremely difficult for manufacturers to use local factors in judging performance of a dealer with regard to ordinary matters of performance. But we agree that that should be the case when termination is being considered because of the drastic nature of such action. Therefore, the Alliance position is that the term 'any material and adverse' should be deleted and replaced with the word 'termination'.

The section on Goods and Services beginning on Page17, line 7 and ending on Page 18, line 12.

This section addresses the selection of materials and services for construction of facility improvements and related items. In this section the difference in the language proposed by the Alliance is very close to what HADA has requested. The Alliance believes that to maintain quality that benefits both the manufacturer and the dealer the words 'substantially similar', appearing on line 11 and line 18 should be replaced with the words 'the same'.

The section on Data beginning on page 18, line 13 and ending on page 22, line 6.

This section of the bill deals with data regarding customers that is held by the dealer. The Alliance's understanding is that HADA's primary concern in this area has to do with possible liability when this information is shared by the manufacturer and others and the action of the manufacturer or third party causes harm to the dealer. The Alliance agrees that this issue of liability should be addressed. However, much of the language in the bill addresses other data sharing issues that are now being worked on by a group headed by the National Automobile Dealers Association but that includes other parties, including manufacturers. Because of the complexity of this area, and the fact that this national group will be producing a national model fairly soon, we believe it may be best to restrict this section to dealing with HADA's concern about liability. The sharing of data and the privacy implications are not unique to the auto industry. The Alliance feels that it is very unlikely that the Alliance, HADA and the legislature can develop a better solution during the Legislative session than the working group that is working on it. We are, however, continuing to discuss this area.

Thank you for the opportunity to present these comments. The Alliance is committed to continuing to meet with HADA and its members to resolve these issues.



Brian Kitagawa, President
Dave Rolf, Executive Director

HADA TESTIMONY IN STRONG SUPPORT
of SB2490 SD1 HD1, with HADA-proposed amendments, shown in yellow highlight
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT
Presented to the House Committee on Consumer Protection & Commerce
at the Public Hearing, 2 p.m. Tuesday, March 20, 2018
Conference Room 329, Hawaii State Capitol

Chair Takumi, Vice Chair Ichiyama 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 is requested for approval and inclusion in a House Draft 2 to SB2490 SD1, HD1....

On page 3 line 1...inserting "one" in the blank to indicate a rate of at least **one percent of the value of the vehicle per month.**

Also on page 3, deleting (1) on lines 15-17 and inserting...

(1) Used vehicles subject to a stop-sale order for which repair parts or a remedy remain unavailable for thirty days or longer, **which are in the dealer's inventory at the time the stop sale order was issued, or which are taken in to the used vehicle inventory of the dealer as a result of a consumer trade-in incident to the purchase of a new or used vehicle from the dealer after the stop sale order was issued; and**

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, store, 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 it 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 House Committee on Consumer Protection & Commerce give highest consideration to passing SB2490 SD1 HD1, with the additional amendment language provided, and 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