PRESENTATION OF THE
MOTOR VEHICLE INDUSTRY LICENSING BOARD

TO THE HOUSE COMMITTEE ON FINANCE

TWENTY-NINTH LEGISLATURE
Regular Session of 2018

Wednesday, March 28, 2018
3:00 p.m.

TESTIMONY ON SENATE BILL NO. 2490, S.D. 1, H.D. 2, RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT.

TO THE HONORABLE SYLVIA LUKE, 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 ("Department"). Thank you for the opportunity to testify in support of S.B. 2490, S.D. 1, H.D. 2, Relating to the Motor Vehicle Industry Licensing Act.

S.B. 2490, S.D. 1, H.D. 2 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.

The Board is aware that a discussion was held between the Hawaii Automobile Dealers' Association ("HADA") and the Alliance of Automobile Manufacturers ("Alliance") in determining a used vehicle recall reimbursement rate. A rate of one per cent as noted on page 3, lines 1-2, has been agreed upon between HADA and Alliance and thus, the Board supports the agreed-upon rate.

Regarding section 3 of the bill, the Board supports the amendments to HRS section 437-2 subsection (b) and agrees with the language on page 6, lines 9-18, as this will assist the Board in determining which locations are precisely affiliated by same common ownership.

While the Board has not met to discuss the amended language in section 4, the Board supports the intent of the amendments to HRS section 437-52 and notes that the amendments from page 11, line 2 to page 18, line 21 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 19, line 1 to page 22, line 13, as these 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 in support of S.B. 2490, S.D. 1, H.D. 2.

Hawaii Automobile Dealers' Association

Brian Kitagawa, President
Dave Rolf, Executive Director

HADA TESTIMONY IN STRONG SUPPORT
of SB2490 SD1 HD2, with HADA-proposed amendments, shown in yellow highlight
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT
Presented to the House Committee on Finance
at the Public Hearing, 3 p.m. Wednesday, March 28, 2018
Conference Room 308, Hawaii State Capitol

Chair Luke, Vice Chair Cullen 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 3 to SB2490 SD1, HD2….

RE: Used vehicle recall; stop-sale orders, please see the proposed amendment language (in yellow highlight) 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 by deleting the highlighted language in (6) below….

Note: After HADA discussions with the Alliance of Automobile Manufacturers both parties agree that this language may have the unintended effect of denying payments to a dealer who has agreed to invest in a facility upgrade. Our request is to please delete the highlighted sentence.

(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 House Committee on Finance give highest consideration to passing SB2490 SD1 HD2, 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

SanHi
GOVERNMENT STRATEGIES
A LIMITED LIABILITY LAW PARTNERSHIP

DATE: March 27, 2018

TO: Representative Sylvia Luke
Chair, Committee on Finance
Submitted Via Capitol Website

RE: **S.B. 2490, S.D. 1, H.D. 2 – Relating to Motor Vehicle Industry Licensing Act**
Hearing Date: Wednesday, March 28, 2018, 3:00 p.m.
Conference Room: 308

Dear Chair Luke and Members of the Committee on Finance:

On behalf of the Alliance of Automobile Manufacturers ("Alliance"), we submit these comments regarding S.B. 2490, S.D. 1, H.D. 2 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 2 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 2 are as follows:

On Page 5 at the end of line 20, we request the following language be added "due to a federal safety recall for a defect or noncompliance, or a federal emissions recall."

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

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On Page 5, after line 20, insert the following new paragraph:

"(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 be unduly burdensome and may not require information that is unduly burdensome to provide."

This additional paragraph recognizes that uniformity is critical when dealing with a large volume of requests. The paragraph protects manufacturers from administrative chaos while explicitly protecting dealers from unduly burdensome procedures.

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

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. Although the Alliance believes that seven years would be more appropriate, we would accept 10 years in the spirit of compromise if the remaining issues in the bill can be resolved.

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 Alliance offers the following language as a clarification:

Page 11, line 13: strike "distributor" and insert "distributor, including as part of an incentive program,"

Page 11, line 19: strike "interior"

Page 11, line 20: After "painting" insert "and repairs"

Page 12, Strike the sentence that begins on line 2 and ends on line 14, and replace it with "If a dealer has completed the facility construction, renovation, or substantial alteration required and approved by the manufacturer or distributor, including as part of an incentive program, the manufacturer or distributor many not deny a dealer payment or benefits according to the terms of that program in place when the dealer began to perform under the program and shall continue such payments for the lesser of the contractual term of the

facilities program or the balance of the ten years after the dealer performed under the program, regardless of whether the manufacturer or distributor's facility program has been changed or cancelled, provided no changes have been made to the facility since the manufacturer or distributor approval that would render the facility substantially non-compliant."

The section on Performance Standards beginning on Page 15, on line 19 and ending on Page 16, line 12.

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. It is extremely burdensome for manufacturers to use local factors in judging performance of a dealer with regard to ordinary matters of performance. Therefore the Alliance believes that local market factors should only be required before terminations. Based on our discussions with HADA, the Alliance proposes the following as a compromise:

Page 16, Line 3, strike "the basis for" and replace with "to take".

Page 16, Line 5, strike "shall" and replace with "may".

Page 16, Line 12, strike "patterns;" and replace with "patterns, provided that nothing in this paragraph shall apply to compliance with an incentive program, an agreement related to dealership facilities, or a site control agreement;"

These changes would limit local factor analysis to only serious situations. The changes would give the courts flexibility to avoid needlessly costly and illogical results that could result from use of the word "shall." Finally, the changes address the statute's counterintuitive definition of the word "franchise agreement" which means not only the franchise contract, but also any contract relating to dealership facilities and site control.

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 agreement on the revised language. The Alliance requests the following additions be made to this section:

Page 20, line 21 the Alliance requests 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 resolve these issues.

Hawaii Automobile Dealers' Association

Brian Kitagawa, President
Dave Rolf, Executive Director

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"§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: Deleting a sentence in the bill language under HRS 437-52(a)(6)

(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

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Note: After HADA discussions with the Alliance of Automobile Manufacturers both parties agree that this language may have the unintended effect of denying a payment to a dealer who has agreed to invest in a facility upgrade with the understanding that manufacturer payments would be forthcoming, and a subsequent facility upgrade is required. That is the reason for the request to delete the sentence.

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Respectfully submitted,

David H. Rolf

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