

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

TO THE HOUSE COMMITTEE ON  
TRANSPORTATION

TWENTY-NINTH LEGISLATURE  
Regular Session of 2018

Wednesday, March 14, 2018  
10:30 a.m.

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

TO THE HONORABLE HENRY J.C. AQUINO, 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, Relating to the Motor Vehicle Industry Licensing Act. The Board supports S.B. 2490, S.D. 1, which is a companion to H.B. 2433, and provides the following comments.

S.B. 2490, S.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 manufacturer’s or motor vehicle distributor’s (“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. However, the Board was unable to take a position on the proposed reimbursement rate of 1.5%. 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 measure, 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 amendments to HRS section 437-52 and notes that the amendments from page 10, line 15 to page 18, 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 18, line 10 to page 19, line 18, and agrees this will keep non-public consumer information protected, without restricting a manufacturer's ability to satisfy any safety or recall notice obligation or other legal obligation.

Thank you for the opportunity to testify in support of S.B. 2490, S.D. 1.



**SanHi**

GOVERNMENT STRATEGIES  
A LIMITED LIABILITY LAW PARTNERSHIP

DATE: March 13, 2018

TO: Representative Henry Aquino  
Chair, Committee on Transportation  
*Submitted Via Capitol Website*

RE: **S.B. 2490, S.D. 1 – Relating to Motor Vehicle Industry Licensing Act**  
**Hearing Date: Wednesday, March 14, 2018, 10:30 a.m.**  
**Conference Room: 423**

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Dear Chair Aquino and Members of the Committee on Transportation:

On behalf of the Alliance of Automobile Manufacturers (“Alliance”), we submit these comments regarding S.B. 2490, S.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 was a telephone conference call 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.

The SD 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. We are hopeful these differences can be resolved.

The Alliance’s specific comments on the SD 1 are as follows:

On Page 2, 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.

On Page 3, in line 1, we request that 1.5 per cent be changed to 1 per cent.

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. 1.5 per cent per year (18% APR) is excessive. If Hawaii legislates on this issue, it should focus on making dealers whole, not providing a windfall.

**The section on facility improvements beginning on page 10, line 15 and ending on page 13 line 3.**

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. At the time of the Alliance discussion with HADA, the Alliance's understanding was that HADA agreed. However, the language in the SD1 does not reflect that agreement and needs to be modified in order to reflect that agreement. In other words, if the dealer does not make the improvements, the dealer should not receive the incentive.

**The section on Performance Standards beginning on Page 15, on line 9 and ending on line 20.**

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 in to 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 4 and ending on Page 18, line 9.**

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 10 and ending on page 19, line 18.**

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 is 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.

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  
RELATING TO THE MOTOR VEHICLE INDUSTRY LICENSING ACT  
Presented to the House Committee on Transportation  
at the Public Hearing, 10:30 a.m. Wednesday, March 14, 2018  
Conference Room 423, Hawaii State Capitol

Chair Aquino, Vice Chair Quinlan 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 1 to SB2490 SD1.... replacing the existing language beginning on page 18, line 10 and ending on page 19, line 18 with the amended language shown in yellow below.

(15) A. Notwithstanding the provisions of any franchise agreement, ~~Require~~ a dealer to provide its customer and prospective customer information, customer lists, service files, transaction data or other proprietary business information ("consumer and proprietary data"), or access the dealer's data management system to obtain consumer and proprietary data, unless written consent is provided by the dealer. Consumer and proprietary data does not include the same or similar data which is obtained by a manufacturer from any other source. "Data Management System" means a computer hardware or software system that is owned, leased or licensed by a dealer, including a system of web-based applications, and is located at the dealership or hosted remotely, which stores and provides access to consumer and proprietary data collected and which is stored by the dealer or on behalf of a dealer.

B. Notwithstanding the provisions of any franchise agreement, a manufacturer, distributor or its agent:

(1) Shall allow a dealer to furnish consumer and proprietary data in a widely accepted file format, such as comma-separated values, and through a third-party vendor selected the dealer;

(2) May not require that a dealer grant the manufacturer, distributor or its agent, access to the dealer's data management system to obtain consumer and proprietary data;

(3) May access or obtain consumer data directly from a dealer's data management system only with the express written consent of the dealer; and

(4) May not take any adverse action against a dealer for refusing to grant access to the dealer's data management system;

(5) May require that a dealer of the manufacturer or distributor provide consumer data and proprietary data that pertains to any of the following:

- (a) Claims for warranty parts or repairs; (b) data pertaining to the sale and delivery of a new or certified pre-owned vehicle of any linemake of the manufacturer or distributor; (c) safety or recall obligations; or (d) validation and payment of customer or dealer incentives.

(6) May not require a dealer to grant access to the dealer's data management system through the franchise agreement or as a condition of renewal or continuation of the franchise agreement;

(7) May not release or cause to be released a dealer's nonpublic customer information, as defined in 15 U.S.C. § 6809(4), to: (a) another dealer unless the franchise has been terminated, the customer has relocated out of the State or to a different island in the State, or the dealer whose information is being released has provided written consent; or (b) any other third party unless the manufacturer or distributor provides the dealer with advanced written notice that the manufacturer or distributor intends to distribute the information to such third party.

(8) Shall indemnify the dealer for any third-party claims asserted against or damages incurred by the dealer to the extent the claims of damages are caused by the access to and unlawful disclosure of consumer and proprietary data resulting from a breach caused by the manufacturer, distributor or its agent or a third party

to which the manufacturer, distributor or its agent, has provided the consumer and proprietary data in violation of this section, the written consent granted by the dealer or other applicable State or federal law.

C. Written consent under subsection B(3) of this section: (i) shall be separate from the dealer franchise agreement; (ii) shall be executed by the dealer; and (iii) may be withdrawn by the dealer on 30 days written notice to the manufacturer or distributor.

## **Background Information**

### **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: 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.

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-car purchase, dealers must balance the projected wholesale value of the 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.

### **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 Transportation Committee give highest consideration to passing SB2490 SD1, 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 this week.

Respectfully submitted,

David H. Rolf

For the Members of the Hawaii Automobile Dealers Association