ACT 163

S.B. NO. 2490

A Bill for an Act Relating to the Motor Vehicle Industry Licensing Act.

Be It Enacted by the Legislature of the State of Hawaii:

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

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

(1) Specifying certain recall reimbursement or repair requirements for manufacturers where a stop-sale order has been issued;

(2) Authorizing a license holder to engage in business at motor vehicle dealer locations that are affiliated by common ownership under the same license;

(3) Clarifying when certain manufacturers' or distributors' sales or service performance standards shall be deemed unreasonable, arbitrary, or unfair; and

(4) Prohibiting 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.

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

"§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). If parts or a remedy are not reasonably available to perform a recall service or repair on a used vehicle held for sale by a dealer authorized to sell and service new vehicles of the same line make within thirty days of the manufacturer issuing the initial notice of recall, and the manufacturer has issued a stop-sale order on the vehicle, the manufacturer shall compensate the dealer at a prorated rate of at least one per cent of the value of the vehicle per month, beginning on the date that is thirty days after the date on which the stop-sale order was provided to the dealer until:

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

(2) The date the dealer sells, trades, or otherwise disposes of the affected used motor vehicle;

whichever is earlier.

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

(c) This section shall only apply to:

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

(A) Are in the dealer's inventory at the time the stop-sale order was issued; or

(B) Are taken into the used vehicle inventory of the dealer as a result of a consumer trade-in incident to the purchase of a new or certified pre-owned used vehicle from the dealer after the stop-sale order was issued; and

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

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

(e) All reimbursement claims made by new motor vehicle dealers pursuant to this section for recall repairs, or for compensation where no part or repair is reasonably available and the vehicle is subject to a stop-sale order shall be subject to the same limitations and requirements as a warranty reimburse-

ment claim made under section 437-56 or 437-28(a)(21)(G). In the alternative, a manufacturer may compensate its franchised dealers under a national recall compensation program; provided that the compensation under the program is equal to or greater than that provided under subsection (a) or the manufacturer and dealer otherwise agree.

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

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

(h) A manufacturer may direct the manner and method in which a dealer shall 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 for a dealer to provide.

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

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

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

(1) Branch locations in the same county for which the license is issued during the term thereof; provided that each branch location of a motor vehicle dealer is approved by the board[~~.~~]; or

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

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

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

"[~~]~~§437-52[~~]~~ Reciprocal rights and obligations among dealers, manufacturers, and distributors of motor vehicles. (a) A manufacturer or distributor shall not:

(1) Require any dealer in the State to enter into any agreement with the manufacturer or distributor or any other party that requires the law of another jurisdiction to apply to any dispute between the dealer and manufacturer or distributor, or requires that the dealer bring an action against the manufacturer or distributor in a venue outside of Hawaii, or requires the dealer to agree to arbitration or waive its rights to bring a cause of action against the manufacturer or distributor, unless done in connection with a settlement agreement to resolve a matter or pending dispute between a manufacturer or distributor, or officer, agent, or other representative thereof, and the dealer; provided[~~, however,~~] that such agreement has been entered

voluntarily for adequate and valuable consideration; and provided further that the renewal or continuation of a franchise agreement shall not by itself constitute adequate and valuable consideration;

(2) Require any dealer in the State to enter into any agreement with the manufacturer or distributor or any other party, to prospectively assent to a release, assignment, novation, waiver, or estoppel, which instrument or document operates, or is intended by the applicant or licensee to operate, to relieve any person from any liability or obligation of this chapter, unless done in connection with a settlement agreement to resolve a matter or pending dispute between a manufacturer or distributor, or officer, agent, or other representative thereof, and the dealer; provided[~~, however,~~] that such agreement has been entered voluntarily for adequate and valuable consideration; and provided further that the renewal or continuation of a franchise agreement shall not by itself constitute adequate and valuable consideration;

(3) Cancel or fail to renew the franchise agreement of any dealer in the State without providing notice, and without good cause and good faith, as provided in section 437-58;

(4) Refuse or fail to offer an incentive program, bonus payment, holdback margin, or any other mechanism that effectively lowers the net cost of a vehicle to any franchised dealer in the State if the incentive, bonus, or holdback is made to one or more same line make dealers in the State;

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

(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[~~;~~] or any corresponding incentives or benefits. 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 painting and repairs reasonably necessary to maintain a dealership facility in attractive condition, or any changes to items protected by federal intellectual property rights. If a dealer has completed facility construction, renovation, or substantial alteration under an incentive program, the manufacturer or distributor may 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. If the incentive program under which the dealer completed a facility construction, renovation, or substantial alteration on or after January 1, 2016, does not contain a specific time period during which the manufacturer or distributor must provide payments or benefits to a dealer, then the manufacturer or distributor may not deny the dealer payment or benefits under the terms of that incentive program, as it existed when the dealer began to perform under the program for the balance of ten years after the manufacturer or distributor made the program available to the dealer, regardless of whether the manufacturer's or distributor's facility program has been changed or canceled. This paragraph shall not be construed to require a manufacturer or distributor to provide payment or benefits if changes have been made to the facility since the manufacturer's or distributor's 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:

(A) Lump sum payments for the cost of the facility upgrade;

(B) Payments on a per vehicle basis; and

(C) Any facility-related incentive program in effect with one or more dealers in the State on the effective date of this Act.

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;

(7) Require the dealer to establish or maintain an exclusive showroom or facility unless justified by current and reasonably expected future economic conditions existing in the dealer's market and the automobile industry at the time the request for an exclusive showroom or facility is made; provided that the foregoing shall not restrict the

terms and conditions of any agreement for which the dealer has voluntarily accepted separate and valuable consideration;

(8) Condition the award of an additional franchise on the dealer entering a site control agreement or the dealer waiving its rights to protest the manufacturer's or distributor's award of an additional franchise within the dealer's relevant market area; provided that the foregoing shall not restrict the terms and conditions of any agreement for which the dealer has voluntarily accepted separate and valuable consideration;

(9) Require a dealer or the dealer's employees to attend a training program that does not relate directly to the sales or service of a new motor vehicle in the line make of that sold or serviced, or both, by the dealer;

(10) Require a dealer to pay all or part of the cost of an advertising campaign or contest, or purchase any promotional materials, showroom, or other display decorations or materials at the expense of the dealer without the consent of the dealer, which consent shall not be unreasonably withheld;

(11) Implement or establish a customer satisfaction index or other system measuring a customer's degree of satisfaction with a dealer as a sale or service provider unless any such system is designed and implemented in such a way that is fair and equitable to both the manufacturer and the dealer. In any dispute between a manufacturer, distributor, and a dealer, the party claiming the benefit of the system as justification for acts in relation to the franchise shall have the burden of demonstrating the fairness and equity of the system both in design and implementation in relation to the pending dispute. Upon request of any dealer, a manufacturer or distributor shall disclose in writing to such dealer a description of how that system is designed and applied to such dealer;

(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~~]. If the sales or service performance standard is to be used as the basis for a termination of 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;

(13) Implement or establish a system of motor vehicle allocation or distribution to one or more of its dealers that is unfair, inequitable, or unreasonably discriminatory. As used in this paragraph, "unfair" includes without limitation, requiring a dealer to accept new vehicles not ordered by the dealer or the refusal or failure to offer to any dealer all models offered to its other same line make dealers in the State. The failure to deliver any motor vehicle shall not be considered a violation of this section if such failure is due to an act of God, work stoppage, or delay caused by a strike or labor difficulty, shortage of products or materials, freight delays, embargo, or other causes of which the motor vehicle franchisor shall have no control. Notwithstanding the foregoing, 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[.]; or

(14) Require a dealer that is constructing, renovating, or substantially altering its dealership facility to purchase goods, building materials, or services for the dealership facility, including but not limited to office furniture, design features, flooring, and wall coverings, from a vendor chosen by the manufacturer or distributor if: goods, building materials, or services of a substantially similar appearance, function, design, and quality are available from other sources; and the franchised motor vehicle dealer has received the manufacturer's or distributor's approval; provided that this approval shall not be unreasonably withheld or unreasonably delayed. In the event that a manufacturer or distributor does not approve the dealer's use of substantially similar goods, building materials, or services, the manufacturer or distributor shall provide the dealer, in writing at the time of disapproval, a detailed list of reasons why the proposed substantially similar items are not acceptable. 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 or impair other intellectual property interests owned or controlled by the manufacturer or distributor, including the design and use of signs.

(b) Notwithstanding the provisions of any franchise agreement, a manufacturer or distributor shall not require a dealer to provide its 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.

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

(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 by the dealer;

(2) May not require a dealer to grant the manufacturer or distributor 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;

(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 line make of the manufacturer or distributor;

(C) Safety or recall obligations;

(D) Validation and payment of customer or dealer incentives;

(E) Analytics; or

(F) Reasonable marketing purposes for the benefit of the providing dealer;

(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 nonpublic personal information about a dealer's customers, as defined in title 15 United States Code section 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 the third party; and

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

(d) Written consent under subsection (c)(3):

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

(2) Shall be executed by the dealer; and

(3) May be withdrawn by the dealer upon thirty days' written notice to the manufacturer or distributor.

(e) For purposes of this section:

"Consumer and proprietary data" means a dealer's customer and prospective customer information, customer lists, service files, transaction data, or other proprietary business information. "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."

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.[1]

SECTION 6. This Act shall take effect on July 1, 2018.

(Approved July 10, 2018.)

Note

1. Edited pursuant to HRS §23G-16.5.