

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. Chapter 437, Hawaii Revised Statutes, is amended by designating sections 437-1 through 437-42 as part I, entitled "General Provisions".

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

**"PART II. MANUFACTURER, DISTRIBUTOR, AND DEALER
DISPUTES**

§437-A Dispute resolution. (a) In any dispute among a manufacturer, distributor, or dealer on matters governed by this part, the manufacturer, distributor, or dealer may seek a hearing from the department of commerce and consumer affairs.

(b) The office of administrative hearings of the department of commerce and consumer affairs shall accept no more than thirty requests for hearing per fiscal year under this section. The office of administrative hearings may reject a request for a hearing if in the opinion of the hearings officer the matter presented does not involve the interpretation or enforcement of the provisions of this chapter. The director of commerce and consumer affairs shall appoint a hearings officer pursuant to section 26-9(f) who shall have jurisdiction to review any request for hearing filed under this section. The hearings officer shall have the power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue written decisions that shall be final and conclusive, unless a party adversely affected by the decision files an appeal in the circuit court under section 91-14. All information so provided in and for the hearing shall be sealed and not subject to public review or access. The information shall also remain confidential and not subject to public access or review on appeal pursuant to section 91-14.

(c) The party requesting the hearing shall file a petition with the department of commerce and consumer affairs specifying the specific provisions of this chapter that are in issue; the interpretation or enforcement sought; the legal and factual basis for the interpretation or enforcement sought; and the remedy or remedies sought. The party requesting a hearing under this section shall provide a copy of the petition to the board at the time the petition is filed. Each adverse party shall file a response with the department of commerce and consumer affairs.

(d) Hearings under this section shall be conducted pursuant to chapter 91 and rules adopted by the department of commerce and consumer affairs. The burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding, unless otherwise specified in this chapter. The standard of proof required shall be by a preponderance of the evidence.

(e) The hearings officer shall issue written findings of fact, conclusions of law, and an order as expeditiously as practicable after the hearing has been concluded.

(f) The prevailing party in any proceeding brought under this section shall provide a copy of the hearings officer's written findings of fact, conclusions of law, and order to the board within ten days of receipt of the written findings of fact, conclusions of law, and order.

(g) Each party to the hearing shall bear the party's own costs, including attorney's fees. Both parties shall share equally in the cost of the hearing, including any allocable departmental overhead attributable to the hearing.

(h) Any party to a proceeding brought under this section who is aggrieved by a final decision of a hearings officer may apply for judicial review of that decision pursuant to section 91-14; provided that any party seeking judicial review pursuant to section 91-14 shall be responsible for the costs of preparing the record on appeal, including the cost of preparing the transcript of the hearing. Any party aggrieved by a final decision of a hearings officer who applies for judicial review under this section shall provide a copy of the party's application for judicial review to the board within ten days of filing the application for judicial review.

(i) The department of commerce and consumer affairs may adopt rules, pursuant to chapter 91, to effectuate the purpose of this section and to implement its provisions, including fees to recover the cost of hearings.

§437-B Reciprocal rights and obligations among dealers, manufacturers, and distributors of motor vehicles. 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-H;
- (4) Refuse or fail to offer an incentive program, bonus payment, hold-back 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;
 - (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 performance standard in determining a dealer's compliance with a franchise agreement; or
- (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.

§437-C Sale, assignment, or transfer of franchise to qualified purchaser.

(a) A manufacturer or distributor shall not unreasonably withhold consent to the sale, assignment, or transfer of the franchise to a qualified purchaser capable of being licensed as a dealer.

(b) The dealer shall notify the manufacturer or distributor, in writing, of its desire to sell, assign, or transfer its franchise and identify the proposed transferee's name, address, financial qualifications, and business experience. Along with such notice, the dealer shall also provide the manufacturer or distributor with completed application forms and related information generally used by the manufacturer or distributor to conduct its review of such a proposal, and a copy of all agreements regarding the proposed sale, assignment, or transfer. The manufacturer or distributor shall, within thirty days of receipt of the application and all supporting documentation as specified therein, review the application and identify in writing the additional information, data, or documents, if any, needed by the manufacturer or distributor to complete its review. If the manufacturer or distributor does not reject the application within sixty days of receipt of the completed application and all supporting documentation or within sixty days of receipt of any additional information, data, or documents timely requested by the manufacturer or distributor, the application shall be considered approved,

unless the sixty-day deadline is extended by mutual agreement of the manufacturer or distributor and the dealer.

(c) If a manufacturer or distributor denies a dealer's proposed sale, assignment, or transfer of the franchise, the dealer may file a petition in the manner prescribed in section 437-A, within sixty days of the notice of denial. The manufacturer or distributor shall have the burden of proof to demonstrate at a hearing pursuant to a timely filed complaint that the proposed transferee is not of good moral character or does not meet the written, reasonable, and uniformly applied business standards or qualifications of the manufacturer relating to the financial qualifications of the transferee and business experience of the transferee or the transferee's executive management.

§437-D Transfer of franchise to successor who is not a qualified purchaser.

(a) A manufacturer or distributor shall not refuse or fail to give effect, unless it has good cause, to the dealer's designated successor, whether designated by will, other estate planning document, or written notice to the manufacturer or distributor either while the dealer was living or within ninety days of the dealer's death or incapacity.

(b) In determining whether good cause exists for the manufacturer's or distributor's refusal to honor the succession, the manufacturer or distributor shall have the burden to prove that the successor is not of good moral character, is not willing to be bound by the terms of the franchise agreement, and is either not qualified to operate the dealership or fails to demonstrate that the dealership will be operated by a qualified executive manager.

(c) The designated successor shall furnish written notice to the manufacturer or distributor including all necessary application forms and related information customarily required by the manufacturer or distributor of the successor's intention to succeed to the ownership of the new motor vehicle dealership within sixty days prior to the designee's actual proposed succession to dealership ownership for the manufacturer or distributor to determine whether the proposed successor meets the normal, reasonable, and uniformly applied standards for the grant of an application as a new motor vehicle dealer.

(d) The manufacturer or distributor shall notify the proposed successor of its belief that good cause exists to refuse to honor the succession within sixty days after receipt of the notice of the proposed successor's intent to succeed the franchise, and the manufacturer or distributor shall detail its reasons why it believes good cause exists to deny the succession.

(e) A proposed successor may file a petition in the manner prescribed in section 437-A within sixty days after receipt of the manufacturer's or distributor's notice of refusal to honor the succession. The franchise shall continue, and the manufacturer or distributor is prohibited from any action to the contrary, until a final judgment has been rendered on the proposed succession.

§437-E Establishment or relocation of franchise within relevant market area. (a) When a manufacturer or distributor establishes or relocates a franchise within the relevant market area of an existing dealer with a franchise for the same line make, the manufacturer or distributor shall provide a notice to such existing dealers, hereinafter "affected dealers". For the purposes of this section, "affected dealer" means a dealer that operates a same line make franchise in a relevant market area wherein the manufacturer or distributor is proposing to add or relocate a franchise. The manufacturer's or distributor's notice shall state the location of the proposed dealership and the date on or after which the franchise intends to be engaged in business.

(b) An affected dealer may file a petition in the manner prescribed in section 437-A within thirty days of receipt of the manufacturer's or distributor's notice for determination of whether the manufacturer or distributor has good cause to establish or relocate an additional franchise within the dealer's relevant market area. When such a petition is filed, the manufacturer or distributor shall not establish or relocate the proposed franchise until a hearing has been held and a determination made whether good cause exists for the proposed addition or relocation. The determination of a petition filed under this subsection shall be made no later than one hundred eighty days from receipt of notice of the petition except for good cause. The manufacturer or distributor shall have the burden of proof to demonstrate good cause exists for the addition or relocation of an additional franchise within the affected dealer's relevant market area.

(c) In determining whether the manufacturer or distributor has good cause to add or relocate the franchise into an affected dealer's relevant market area the hearings officer under section 437-A shall consider and make findings upon evidence including the permanency and size of investment made and the reasonable obligations incurred by the existing new motor vehicle dealers in the relevant market area; the growth or decline in population and new car registrations in the relevant market area; the effect on the consuming public in the relevant market area; whether it is injurious or beneficial to the public welfare for a new dealer to be established; whether the new motor vehicle dealers of the same line make in that area are providing adequate competition and convenient customer care for the motor vehicles of the same line make including the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel; whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipating future changes; the effect on the relocating dealer of a denial of its relocation into the relevant market area; and the reasonably expected market penetration of the line make motor vehicle for the community or territory involved, after consideration of all factors which may affect such penetration, including demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory.

(d) This section shall not apply to the relocation of an existing dealer within two miles of the dealer's existing dealership location; the appointment of a successor dealer at the same location as its predecessor or within a two-mile radius from any boundary of the predecessor's former location within one year from the date on which the predecessor ceased operations or was terminated, whichever occurred later; or the relocation of a dealer to a site that is farther away from the protesting affected dealer than the existing location.

§437-F Reimbursement for parts. (a) In no event shall any manufacturer or distributor pay its dealers a markup on parts for warranty work that is less than that charged by the dealer to the retail customers of the dealer; provided that such dealer's retail parts markup is not unreasonable when compared with that of same line make authorized franchise dealers of the manufacturer or distributor for identical merchandise or services in the State.

(b) The retail markup charged by the dealer shall be established by submitting to the manufacturer or distributor a sufficient quantity of numerically consecutive repair orders from the most recent months to provide one hundred qualifying customer-paid repair orders. For a dealer unable to provide one hundred qualifying customer-paid repair orders out of all numerically consecutive repair orders within the two-month period prior to the submission, the dealer

shall submit customer service repair orders of all types, including customer pay, warranty, and internal, for that two-month period. The repair orders shall contain the price and percentage markup. Dealers shall declare in their submission the average markup the dealer is declaring as its new parts reimbursement rate. The declared parts reimbursement markup shall take effect within ninety days after initial submission to the manufacturer or distributor and shall be presumed to be fair and reasonable. However, the manufacturer or distributor may make reasonable requests for additional information supporting the submission. The ninety-day timeframe in which the manufacturer or distributor shall make the declared parts reimbursement markup effective shall commence following receipt from the dealer of any reasonably requested supporting information. The dealer shall not request a change in the parts reimbursement markup more than once every twelve months.

(c) In determining qualifying repair orders for parts, the following work shall not be included: repairs for manufacturer or distributor special events; repairs covered by any insurance or service contract; federal, state, or local government legislated vehicle emission or safety inspections; parts sold at wholesale or repairs performed at wholesale, which shall include any sale or service to a fleet of vehicles; engine assemblies and transmission assemblies; routine maintenance not covered under any retail customer warranty, such as fluids, filters, and belts not provided in the course of repairs; nuts, bolts, fasteners, and similar items that do not have an individual part number; tires; and vehicle reconditioning.

(d) Dealers shall have at least thirty days after the repair work is completed to submit a claim for approval. All claims made by the dealers for compensation for delivery, preparation, and warranty work shall be approved or disapproved and if approved, paid within forty-five days after receipt by a manufacturer or distributor of a properly completed claim. All sale incentive claims shall be approved or disapproved and if approved, paid within sixty days after receipt by a manufacturer or distributor of a properly completed claim. When any claim is disapproved, the dealer shall be notified in writing of the grounds for disapproval. Failure to disapprove a claim within the required timeframe constitutes approval of the claim.

§437-G Warranty and incentive audits. (a) No manufacturer or distributor shall conduct a warranty or incentive audit on previously paid claims or chargeback any warranty or incentive payment previously made more than one year after the date the manufacturer or distributor made the payment to the dealer. This section shall not apply to fraudulent claims.

(b) A manufacturer or distributor shall not chargeback a dealer for sales or warranty payments unless the manufacturer or distributor can satisfy its burden of proof that the dealer's claim was fraudulent or that the dealer did not substantially comply with the reasonable written procedures of the manufacturer or distributor.

(c) The manufacturer or distributor shall provide the dealer a written notice thirty days before imposing a proposed chargeback. The dealer may protest the imposition of a proposed chargeback prior to the imposition of a proposed chargeback. The dealer, manufacturer, or distributor shall conduct any internal dispute resolution process in accordance with the franchise agreement. After the internal dispute resolution process is concluded, the dealer may file a petition in the manner prescribed in section 437-A protesting the proposed chargeback amount. If a petition is filed, the proposed chargeback shall be stayed during the entirety of the action and until a final judgment has been rendered.

§437-H Cancellation or failure to renew franchise agreement. (a) A manufacturer or distributor shall give written notice to the dealer and the board of the manufacturer's intent to terminate, discontinue, cancel, or fail to renew a franchise agreement at least sixty days before the effective date thereof, and state with specificity the grounds being relied upon for such discontinuation, cancellation, termination, or failure to renew; provided that the manufacturer or distributor may provide the notice fifteen days before the effective date of termination, discontinuation, cancellation, or non-renewal in the following circumstances:

- (1) The dealer has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against it which has not been discharged within thirty days after the filing, there has been a closeout or sale of a substantial part of the dealer's assets related to the business, or there has been a commencement of dissolution or liquidation of the dealer;
- (2) The dealer has failed to operate in the normal course of business for seven consecutive days or has otherwise abandoned the business;
- (3) The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the manufacturer or distributor;
- (4) The dealer has engaged in conduct that is injurious or detrimental to the dealer's customers or to the public welfare;
- (5) There has been a change, without the prior written approval of the manufacturer or distributor, in the location of the dealer's principal place of business under the dealership agreement; or
- (6) Misrepresentation or fraud upon the manufacturer by the dealer.

(b) A dealer who receives notice of intent to terminate, discontinue, cancel, or fail to renew may, within the sixty-day notice period, file a petition in the manner prescribed in section 437-A for a determination of whether such action is taken in good faith and supported by good cause. The manufacturer or distributor shall have the burden of proof that such action is taken in good faith and supported by good cause.

(c) If the manufacturer's or distributor's notice of intent to terminate, discontinue, cancel, or fail to renew is based upon the dealer's alleged failure to comply with sales or service performance obligations, the dealer shall first be provided with notice of the alleged sales or service deficiencies and afforded at least one hundred eighty days to correct any alleged failure before the manufacturer or distributor may send its notice of intent to terminate, discontinue, cancel, or fail to renew. Good cause shall not be deemed to exist if a dealer substantially complies with the manufacturer's or distributor's reasonable performance provisions within the one hundred eighty-day cure period, or if the failure to demonstrate substantial compliance was due to factors that were beyond the control of the dealer.

(d) Good cause shall not exist absent a breach of a material and substantial term of the franchise agreement. The existence of one or more circumstances enumerated in subsection (a)(1) through (6) above shall be presumed to be good cause, and the dealer shall have the burden of proof to show that the action was not taken in good faith and supported by good cause.

(e) Except in the circumstances enumerated in subsection (a)(1) through (6) above, the franchise agreement shall remain in effect until a final judgment is entered after all appeals are exhausted, and during that time the dealer shall retain all rights and remedies pursuant to the franchise agreement, including the right to sell or transfer the franchise.

(f) Upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by the manufacturer or distributor, the manufac-

turer or distributor shall compensate the dealer for all new, unused, and undamaged parts listed in the current parts catalog and still in the original, resalable merchandising packages and in unbroken lots; provided that for sheet metal, a comparable substitute may be used. Prices shall be those in effect at the time the manufacturer or distributor receives the parts, less applicable allowances; the fair market value of all undamaged, unmodified special tools, equipment, and signage required by the manufacturer or distributor and acquired by the dealer within the three years prior to the termination; all new, undamaged, and unsold vehicle inventory of the current model year and one model year prior acquired from the manufacturer or distributor or from another same line make dealer in the ordinary course of business prior to the effective date of termination or non-renewal; provided that the vehicle has less than five hundred miles registered on the odometer. The purchase price shall be the dealer's net acquisition cost. The compensation shall be paid to the dealer no later than ninety days from the date of the franchise termination, discontinuation, cancellation, or failure to renew.

(g) In addition to the other compensation set forth in this section, upon the termination, discontinuation, cancellation, or failure to renew the franchise agreement by a manufacturer or distributor without good cause and good faith; or as a result of the discontinuation of a line make, the manufacturer or distributor shall compensate the dealer at the fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise as of the effective date of the termination or one day prior to the date of the notice, whichever is greater. The compensation shall be paid to the dealer no later than ninety days from the date of the franchise termination, discontinuation, cancellation, or failure to renew.

(h) As used in this section, "good faith" means the duty of each party to any franchise agreement to fully comply with that agreement, and to act in a fair and equitable manner towards each other."

SECTION 3. Section 437-1, Hawaii Revised Statutes, is amended to read as follows:

"§437-1 Legislative findings and declaration. The legislature finds that:

- (1) The manufacture, distribution, and sales of motor vehicles in the State vitally affects the general economy of the State and the public interest and public welfare;
- (2) Manufacturers of motor vehicles [~~whose~~] without physical manufacturing facilities [~~are not located~~] within the State[.] and motor vehicle distributors [~~are doing~~] doing business in the State through their control over, and relationships and transactions with their dealers, branches, and representatives; and
- (3) The geographical location of Hawaii makes it necessary to ensure [~~the availability of~~] that motor vehicles [~~and~~], parts and dependable service [~~therefor~~] are available within the State to protect and preserve the transportation system and the investments of its residents.

The legislature declares, on the basis of the foregoing findings, that it is necessary to regulate and to license motor vehicle manufacturers, distributors, dealers, salespersons, and auctions in the State[.] in order to prevent frauds, impositions, and other abuses against its residents[.] and to protect and preserve the economy and the transportation system of the State. In order to further this intent, the legislature finds that this chapter is remedial and shall apply to all franchise agreements existing as of the date of enactment, except to the extent that such application violates any provision of the State or federal constitutions."

SECTION 4. Section 437-1.1, Hawaii Revised Statutes, is amended as follows:

1. By adding a new definition of "relevant market area" to be appropriately inserted and to read:

"Relevant market area" means the following:

- (1) In a county with a population of less than five hundred thousand persons according to the most recent data of the United States Census Bureau or the data of the department of business, economic development, and tourism, the relevant market area shall be the county in which the dealer is located; or
- (2) In a county with a population of more than five hundred thousand persons according to the most recent data of the United States Census Bureau or the data of the department of business, economic development, and tourism, the relevant market area shall be within a radius of six miles from the dealership location."

2. By amending the definitions of "dealer", "franchise", and "new motor vehicle dealer" to read:

"Dealer" includes "auction" as defined in this section or any person or entity not expressly excluded by this chapter who sells three or more vehicles within a calendar year, or who is engaged in the business of selling, soliciting, offering, or attempting to negotiate sales, purchases, or exchanges of motor vehicles or any interest therein, including options to purchase motor vehicles. The term "dealer" excludes a person who sells or purchases motor vehicles in the capacity of:

- (1) A receiver, trustee, personal representative, guardian, or any other person appointed by or acting under a judgment or order of any court;
- (2) A public officer while performing official duties;
- (3) A holder of an auction license issued under this chapter when acting within the scope of the license;
- (4) An insurance company, finance company, bank, or other financial institution ~~selling~~ that sells or ~~offering~~ offers for sale motor vehicles repossessed or foreclosed by it under the terms of a credit sale contract or security agreement;
- (5) A person not engaged in the business of selling or purchasing motor vehicles ~~when acquiring~~ who acquires or ~~disposing~~ disposes of motor vehicles for the person's own personal, family, or business use; provided that the vehicles are acquired or disposed of for the person's use in good faith and not for the purpose of evading any provision of this chapter;
- (6) A consumer consultant who is not engaged in the business of selling, soliciting, offering, or attempting to negotiate sales or exchanges of motor vehicles or any interest therein for any dealer, and who for a fee provides specialized information and expertise in motor vehicle sales transactions to consumers ~~wishing~~ who wish to purchase or lease motor vehicles~~[- The]~~; provided that the consumer consultant shall register and pay a fee to the board prior to offering consultant services; or
- (7) A Hawaii bank or its affiliate selling or offering for sale motor vehicles surrendered or redelivered to it under the terms of a lease~~[-]~~ or sold by it pursuant to a purchase option contained in a lease.

"Franchise" or "franchise agreement" means any contract or agreement between a dealer and a manufacturer or distributor that authorizes the dealer to engage in the business of selling or purchasing any particular make or makes of

new motor vehicles or motor vehicle parts [~~therefor~~] manufactured or distributed by [~~such~~] the manufacturer or distributor[-], or that establishes rights or obligations, or both, relating to the dealer's new motor vehicle operation, including agreements relating to dealership facilities or site control.

“New motor vehicle dealer” means a dealer who engages in the business of selling, at wholesale or retail, [~~or both,~~] new motor vehicles or new and used motor vehicles.”

SECTION 5. Section 437-27, Hawaii Revised Statutes, is amended to read as follows:

“**§437-27 Change of status, notice.** If the status of any licensee changes during the period for which the license is issued [~~in respect to:~~] because of:

- (1) Changes in officers, directors, or limited partners of the licensee or termination of the employment of any licensed salesperson;
- (2) The transfer of more than ten per cent of the ownership of the licensee to one person;
- (3) The termination of a licensed premises by a dealer or auction or the acquiring or termination of a franchise; or
- (4) The assignment of any part of the licensee's assets for the benefit of creditors;

the licensee shall within fifteen days thereafter file with the board notice of such change containing such information as may be required by the board; provided that nothing contained in this section shall limit the power of the board to suspend, revoke, or deny the renewal of such license or impose any other penalty authorized by this chapter. A manufacturer or distributor shall give written notice to the board pursuant to section 437-H, of its intent to terminate, discontinue, cancel, or fail to renew a franchise agreement.”

SECTION 6. Section 437-28, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) In addition to any other actions authorized by law, the board, after notice and hearing as provided in chapter 91, and subject to appeal to the circuit court of the circuit in which the board has jurisdiction under the procedure and rules prescribed by the laws of the State or the applicable rules of the courts pertaining to appeals to circuit courts, may suspend, revoke, fine, or deny the renewal of any license, or prior to notice and hearing deny the issuance of any license for any cause authorized by law, including but not limited to circumstances where the board finds that the applicant or holder, or any officer, director, general manager, trustee, partner, or stockholder owning more than ten per cent interest of the applicant or holder:

- (1) Has intentionally made a false statement of a material fact in the application for a license or in any other statement required by this chapter or has obtained or attempted to obtain a license by fraud or misrepresentation;
- (2) Has failed to comply with, observe, or adhere to any provision of this chapter or any other law relating to the sale, taxing, or licensing of motor vehicles or any rule or order made pursuant to this chapter;
- (3) Has committed a fraudulent act in selling, purchasing, or otherwise dealing in motor vehicles or has misrepresented the terms and conditions of a sale, purchase, or contract for sale or purchase of a motor vehicle or any interest therein including an option to purchase motor vehicles;

- (4) Has engaged in business under a past or present license issued pursuant to this chapter, in a manner as to cause injury to the public or to those with whom one is dealing;
- (5) Has failed to comply with, observe, or adhere to any law in any other respect ~~[on account whereof]~~ so that the board ~~[may deem]~~ deems the applicant or holder to be an unfit or improper person to hold a license;
- (6) Has failed to meet or maintain the conditions and requirements necessary to qualify for the issuance of a license;
- (7) Is insolvent ~~[or]~~, has filed or is the subject of a petition for bankruptcy, wage earner's plan, or financial reorganization plan~~;~~, or has made or proposes to make an assignment for benefit of creditors;
- (8) ~~[In the case of an individual applicant or holder of a license, if the applicant or holder is]~~ Is not at least eighteen years of age~~;~~, or in the case of a partnership applicant or holder of a license, if any general or limited partner ~~[thereof]~~ is not at least eighteen years of age;
- (9) Has charged more than the legal rate of interest on the sale ~~[or]~~, purchase, or attempted sale or purchase, or in arranging the sale or purchase of a motor vehicle or any interest therein including an option to purchase;
- (10) Has violated any ~~[of the laws]~~ law pertaining to false advertising or to credit sales in the offering, soliciting, selling, ~~[or]~~ purchasing, or arranging to sell or purchase a motor vehicle or any interest therein;
- (11) Has wilfully failed or refused to perform any unequivocal and indisputable obligation under any written agreement involving the sale or purchase of a motor vehicle or any interest therein, including an option to purchase;
- (12) Has been denied the issuance of a license under this chapter for substantial culpable cause or ~~[for having]~~ has had a license issued under this chapter suspended, revoked, or the renewal thereof denied for substantial culpable cause;
- (13) Has entered ~~[or]~~, has attempted to enter, or proposes to enter into any contract or agreement contrary to this chapter or any rule adopted thereunder;
- (14) Has been ~~[or]~~, is engaged, or proposes to engage in the business of selling new motor vehicles as a dealer or auction without a proper franchise therefor;
- (15) Has at any time employed ~~[or]~~, utilized, or attempted or proposed to employ or utilize any person not licensed under this chapter who is required to be so licensed;
- (16) Has entered or attempted to enter any one-payment contract~~;~~ where the contract is required to be signed by the purchaser prior to removal of the motor vehicle for test driving from the seller's premises;
- (17) ~~[Being]~~ Is a salesperson or dealer~~;~~ and:
 - (A) Has required a purchaser of a motor ~~[vehicles]~~ vehicle as a condition of sale and delivery ~~[thereof]~~, to purchase special features, appliances, accessories, or equipment not desired or requested by the purchaser; provided that this prohibition shall not apply as to special features, appliances, accessories, or equipment which are ordinarily installed on the vehicle when received or acquired by the dealer;

- (B) Has represented and sold as an unused motor vehicle any motor vehicle which has been leased or operated as a demonstrator~~[-leased,-]~~ or U-drive motor vehicle;
- (C) Has sold a new motor vehicle without providing or securing for the purchaser the standard factory new car warranty for the vehicle~~[-]~~ unless the dealer or salesperson clearly notes in writing on the sales contract that the new motor vehicle is sold without the standard factory warranty;
- (D) Has sold a new motor vehicle covered by a standard factory warranty without informing the purchaser in writing that any repairs or other work necessary on any accessories which were not installed by the manufacturer of the vehicle may not be obtainable in a geographic location other than where the purchase occurred; provided that the notice required by this section shall conform to the plain language requirements of section 487A-1, regardless of the dollar amount of the transaction;
- (E) Has engaged in any improper business conduct, including but not limited to employing, contracting with, or compensating consumer consultants; or
- (F) Has sold or leased a new or used motor vehicle, other than at auction, without written documentation ~~[that contains the following provision printed legibly in at least fourteen point bold typeface print,-]~~ upon which the salesperson or dealer shall appropriately indicate the type of sale, ~~[and upon]~~ which both the customer and salesperson or dealer shall place their initials in the designated spaces~~[-]~~ prior to the signing of the contract of sale or lease~~[-]~~ and that contains the following provision printed legibly in at least fourteen point bold typeface:

“This (IS) (IS NOT) a door-to-door sale. There (IS A) (IS NO) 3-DAY RIGHT TO CANCEL on this purchase.

_____ Customer’s Initials _____ Salesperson’s or Dealer’s Initials”;

- (18) ~~Being~~ Is an applicant or holder of a dealer’s license~~[-]~~ and:
 - (A) Has sold or proposed to sell new motor vehicles without providing for the maintenance of a reasonable inventory of parts for new vehicles or without providing and maintaining adequate repair facilities and personnel for new vehicles at either the main licensed premises or at any branch location;
 - (B) Has employed or proposed to employ any salesperson who is not duly licensed under this chapter; or
 - (C) Has sold or proposed to sell new motor vehicles without being franchised therefor;
- (19) ~~Being~~ Is an applicant or holder of an auction’s license and has sold or proposed to sell new motor vehicles without being franchised therefor; or
- (20) ~~Being~~ Is an applicant for a salesperson’s license~~[-]~~ and:
 - (A) Does not intend to be employed as a salesperson for a licensed motor vehicle dealer; or
 - (B) Intends to be employed as a salesperson for more than one dealer; ~~[or]~~
- (21) Being a manufacturer or distributor:
 - (A) Has ~~[attempted to coerce or has coerced]~~ required any dealer in the State to enter into any agreement with the manufacturer or

distributor or any other party, to perform any act not required by or to refrain from performing any act not contrary to the reasonable requirements of the franchise agreement with the dealer, by threatening to cancel the franchise agreement or by threatening to refuse, at the expiration of the current franchise agreement, to enter into a new franchise agreement with the dealer;

- (B) Has ~~[attempted to coerce or has coerced]~~ required any dealer in the State to enter into any agreement with the manufacturer or distributor or any other party, to perform any act not required by or to refrain from performing any act not contrary to the reasonable requirements of the franchise agreement with the dealer, by awarding or threatening to award a franchise to another person for the sale of the same make of any motor vehicle in the ~~[same sales area of responsibility covered by the existing franchise agreement of the dealer;]~~ relevant market area of a dealer;
- (C) Has ~~[attempted to or has]~~ canceled or failed to renew the franchise agreement of any dealer in the State without good faith, as defined herein. ~~[Upon such a cancellation or failure to renew the franchise agreement, the party canceling or failing to renew the franchise agreement, at the dealer's option, shall either:~~
- (i) ~~Compensate the dealer at the fair market going business value for the dealer's capital investment, which shall include but not be limited to the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise, inventory of parts, and motor vehicles possessed by the dealer in connection with the franchise, plus reasonable attorney's fees incurred in collecting compensation; provided that the investment shall have been made with reasonable and prudent judgment for the purpose of the franchise agreement; or~~
 - (ii) ~~Compensate the dealer for damages including attorney's fees as aforesaid, resulting from the cancellation or failure to renew the franchise agreement.]~~

As used in this ~~[paragraph,]~~ subparagraph, "good faith" means the duty of each party to any franchise agreement to fully comply with that agreement, or to act in a fair and equitable manner towards each other;

- (D) Has delayed delivery of or refused to deliver without cause, any new motor vehicle to a dealer, franchised to sell the new motor vehicle, within a reasonable time after receipt of a written order for the vehicle from the dealer. The delivery to another dealer of a motor vehicle of the same model and similarly equipped as the vehicle ordered by a dealer who has not received delivery thereof, but who had placed the written order for the vehicle prior to the order of the dealer receiving the vehicle, shall be prima facie evidence of a delayed delivery of, or refusal to deliver, a new motor vehicle without cause. The nondelivery of a new motor vehicle to a dealer within sixty days after receipt of a written order for the vehicle from a dealer shall also be prima facie evidence of delayed delivery of, or refusal to

deliver, a new motor vehicle without cause; provided that the delayed delivery of, or refusal to deliver, a motor vehicle shall be deemed with cause if the manufacturer establishes that the delay or refusal to deliver is due to a shortage or curtailment of material, labor, transportation, utility service, labor or production difficulty, or other similar cause beyond the reasonable control of the manufacturer;

- (E) Has discriminated against any of their franchised dealers in the State by directly or indirectly charging the dealer more for a new motor vehicle or services, parts, or accessories or a higher rate of transportation for transporting the vehicle from the manufacturing or assembly plant to the dealer or any portion of the distance, than is charged to any other of their franchised dealers in the State for the same make, model, and year of a new motor vehicle or for the same devices, parts, or accessories for the similar transportation for the vehicle during the same period. A manufacturer or distributor who provides or causes to be provided greater transportation benefits for a new motor vehicle as aforesaid to any of their franchised dealers in the State than is provided to any of their competing franchised dealers in the State for the same or lesser price or charge than that imposed upon the franchised dealer in the State during the same period is deemed to have so discriminated against the competing franchised dealer in the State. Evidence of similar discriminatory practice against franchised dealers in other states shall not constitute a defense to or justification of the commission of the discriminatory act against the franchised dealer in the State. The intent and purpose of this subparagraph is to eliminate inequitable pricing policies set by manufacturers or distributors which result in higher prices of new motor vehicles to the consumer in the State. This subparagraph shall be liberally interpreted to effect its intent and purpose and in the application thereof, the substance and effect and not the form of the acts and transactions shall be primarily considered in determining whether a discriminatory act has been committed. Nothing contained in this subparagraph shall prohibit establishing delivered prices or destination charges to dealers in the State which reasonably reflect the seller's total transportation costs incurred in the manufacture or delivery of products to the dealers, including costs that are related to the geographical distances and modes of transportation involved in shipments to this State, or which meet those lower prices established by competitors;
- (F) Has required a dealer of new motor vehicles in the State as a condition of sale and delivery of new motor vehicles to purchase special features, appliances, accessories, or equipment not desired or requested by the dealer; provided that this prohibition shall not apply to special features, appliances, accessories, or equipment, except heaters, that are regularly installed on that particular model or new motor vehicles as "standard" equipment or to special features, appliances, accessories, or equipment that are an integral part of the new motor vehicles and cannot be removed therefrom without substantial expense. Nothing in this subparagraph shall make it unlawful for a deal-

- er to sell a vehicle that includes a heater that has been installed as standard equipment;
- (G) Has failed to adequately and fairly compensate its dealers for labor [~~parts, and other expenses~~] incurred by the dealer to perform under and comply with manufacturer's warranty agreements. In no event shall any manufacturer or distributor pay its dealers a labor rate per hour for warranty work that is less than that charged by the dealer to the retail customers of the dealer nor shall the rates be more than the retail rates. All claims made by the dealers for compensation for delivery, preparation, and warranty work shall be paid within thirty days after approval and shall be approved or disapproved within thirty days after receipt. When any claim is disapproved, the dealer shall be notified in writing of the grounds for disapproval;
 - (H) Has wilfully failed to affix the vehicle bumper impact notice pursuant to section 437-4.5(a), or wilfully misstated any information in the notice. Each failure or misstatement is a separate offense;
 - (I) Has wilfully defaced, or removed the vehicle bumper impact notice required by section 437-4.5(a) prior to delivery of the vehicle to which the notice is required to be affixed to the registered owner or lessee. Each wilful defacement, alteration, or removal is a separate offense; or
 - (J) Has required a dealer to refrain from participation in the management of, investment in, or the acquisition of, any other line of new motor vehicle or related products; provided that the new motor vehicle dealer maintains a reasonable line of credit consistent with the requirements of section 437-7(d)(1) for each make or line of new motor vehicle, remains in compliance with reasonable facilities and other franchise requirements of the manufacturer or distributor, and makes no unauthorized change in the principal management of the dealer."

SECTION 7. Section 437-28.5, Hawaii Revised Statutes, is amended to read as follows:

~~"[§437-28.5] Procedures, protections, rights, and remedies made available to licensees. (a) The same procedures, protections, rights, and remedies provided to a dealer under section 437-28(a)(21) and section 437-3.6 shall apply to a distributor that is not a manufacturer; provided that for a distributor that is not a manufacturer, the measure of compensation under section 437-28(a)(21) (C) upon cancellation or failure to renew a franchise agreement shall include compensation related to [that] distributor's dealer operations and franchise agreements with other dealers].~~

(b) Notwithstanding the terms, provisions, or conditions of any dealer or distributor agreement or franchise or the terms or provisions of any waiver[~~]~~ and notwithstanding any other legal or administrative remedies available, any person who is licensed under this chapter and whose business or property is injured by a violation of section 437-28(a)(21), may bring a civil action in a court of competent jurisdiction in the State to enjoin further violations and to recover any damages together with the costs of the suit. Laws of the State of Hawaii shall apply to any action initiated under this section.

(c) Any person that brings or defends against a civil action under subsection (b) [~~shall~~] may be entitled to recover reasonable attorneys' fees as a part

of any damages or injunction; provided that the person substantially prevails in establishing or defending against a violation of section 437-28(a)(21).

(d) Upon a cancellation or failure to renew a distributorship agreement, the party canceling or failing to renew the agreement, at the distributor's option, shall either:

- (1) Compensate the distributor at the fair market value for the distributor's capital investment, which shall include but not be limited to the going business value of the business, goodwill, property, and improvement owned or leased by the distributor for the purpose of the distributorship, inventory of parts, including compensation related to distributor's dealer operations and franchise agreements with other dealers and motor vehicles possessed by the distributor in connection with the distributorship, plus reasonable attorney's fees incurred in collecting compensation; provided that the investment shall have been made with reasonable and prudent judgment for the purpose of the distributorship agreement; or
- (2) Compensate the distributor for damages including attorney's fees as aforesaid, resulting from the cancellation or failure to renew the distributorship agreement.
As used in this paragraph, "good faith" means the duty of each party to any franchise agreement to fully comply with that agreement, or to act in a fair and equitable manner towards each other."

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

SECTION 9. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 10. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 11. This Act shall take effect on July 1, 2010; provided that section 437-A, Hawaii Revised Statutes, shall take effect on January 1, 2011.

(Approved June 3, 2010.)

Note

1. So in original.