

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/SB 1678

INTRODUCER: Transportation Committee and Senator Garcia

SUBJECT: Motor Vehicle Applicants, Licensees, and Dealers

DATE: April 14, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Jones	Miller	TR	Fav/CS
2.	Little	McKay	CM	Favorable
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1678 addresses issues related to contracts between licensed motor vehicle manufacturers, distributors, and importers (applicants or licensees), and motor vehicle dealers. The bill:

- Prohibits an applicant or licensee from establishing or enforcing unfair, unreasonable, arbitrary, or inequitable sales or service performance measurements that have an adverse effect on a dealer;
- Provides that a dealer who completes certain sales and service facility alterations are in full compliance with the applicant's or licensee's requirements related to such alterations for the following ten-year period;
- Provides that a dealer who has completed a prior approved facility incentive program, standard, or policy during the ten-year period, who does not comply with the provisions related to a new or revised facility, sign, or image program, is not eligible for the new benefits, but is entitled to all prior benefits plus any increase in benefits between the prior and revised or new programs for the remainder of the ten-year period; and
- Reenacts ss. 320.60-320.70, F.S., to incorporate changes made by the bill.

The bill does not appear to have a significant fiscal impact to state and local government.

The bill takes effect upon becoming law.

II. Present Situation:

Florida has substantially regulated motor vehicle manufacturers and motor vehicle dealers since before 1950.¹ Initially, the Florida Legislature approached the issue by implementing only consumer protections aimed at preventing consumer abuse by dealers.² In 1970, the Legislature passed more comprehensive legislation, embodied in ch. 320, F.S.,³ which regulates, in part, the contractual relationship between manufacturers and dealers,⁴ requires the licensing of manufacturers, and regulates numerous aspects of the contracts between the manufacturers and dealers.

Florida Automobile Dealers Act

A manufacturer, factory branch, distributor, or importer (licensee) must be licensed under s. 320.61(1), F.S., to engage in business in Florida. Sections 320.60-320.70, F.S., the “Florida Automobile Dealers Act”⁵ (act), primarily regulate the contractual business relationship between dealers and licensees. The act specifies, in part:

- The conditions and situations under which the Department of Highway Safety and Motor Vehicles (DHSMV) may deny, suspend, or revoke a regulated license;
- The process, timing, and notice requirements for licensees who wish to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a request;
- The procedures a licensee must follow to add a dealership in an area already served by a franchised dealer, the protest process, and the DHSMV’s role in these circumstances;
- The damages that can be assessed against a licensee who is in violation of Florida Statutes; and
- The DHSMV’s authority to adopt rules to implement these sections of law.

Applicability

Section 320.6992, F.S., provides that the act shall apply to all presently existing or future systems of distribution of motor vehicles in Florida, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. Generally, all agreements that are renewed, amended, or entered into subsequent to October 1, 1988, are governed by the act, including amendments to the act, unless the amendment specifically provides otherwise.

In 2009, the DHSMV held in an administrative proceeding that amendments to the act do not apply to dealers whose franchise agreements were signed prior to the effective date of various

¹ Chapter 9157, Laws of Fla. (1923); Chapter 20236, Laws of Fla. (1941).

² Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 Fla. St. Univ. Law Rev. 1058, 1064 (2002), <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1632&context=lr> (last visited April 13, 2017).

³ Chapter 70-424, Laws of Fla.

⁴ See s. 320.60(11), F.S.

⁵ Walter E. Forehand, *supra* note 2 at 1065.

amendments to the act.⁶ The DHSMV has indicated that it will apply the *Motorsports* holding to every amendment to the act. This may result in different protections accruing to dealers, depending on when they signed their franchise agreements.

Grounds for Denial, Suspension, or Revocation of a License

Section 320.64, F.S., currently includes 40 different subsections listing criteria that may cause the DHSMV to deny, suspend, or revoke the licensee's license. A licensee is prohibited from committing the following acts toward dealers:

- Being unable to carry out contractual obligations with motor vehicle dealers;
- Coercing or attempting to coerce dealers into accepting motor vehicles, parts, or accessories the dealer did not order;
- Coercing the dealer into any agreement with the licensee;
- Threatening to discontinue, cancel, or not renew a franchise agreement with a dealer in violation of s. 320.641, F.S., regarding the process for discontinuing, canceling, nonrenewing, modifying, or replacing franchise agreements;
- Threatening to, or replacing or modifying a franchise agreement in a way that would adversely alter the rights or obligations of the dealer, or which substantially impairs sales, service obligations, or investment of the dealer;
- Attempting to enter or entering into a franchise agreement with a dealer who does not have the proper facilities to provide services necessary to provide for new vehicle warranties;
- Requiring a dealer to make substantial changes to the dealer's sales or services facilities that are not considered reasonable or justified, except when offering, to its same line-make⁷ dealers a similar incentive for similar improvements, a written commitment to supply additional vehicles, a loan, or grant money;
- Coercing a dealer to provide installment financing for the dealer's purchasers using a specified financial institution;
- Preventing or refusing to accept the succession to any interest in a franchise agreement by any legal heir or devisee, as long as they meet the licensee's written, reasonable, and uniformly applied minimal standard qualifications for dealer applicants;
- Establishing or implementing a system of vehicle allocation or distribution which alters or reduces allocations or supplies of new motor vehicles to dealers in a way that is unfair, inequitable, unreasonably discriminatory, or not supported by reason and good cause;
- Delaying, refusing, or failing to provide a supply of vehicles by series in reasonable quantities without good and fair cause;
- Threatening to require a dealer to prospectively assent to a release, assignment, novation, waiver, or estoppel intended to relieve any person from liability or obligation under this act;

⁶ See *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). The DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. See also, *In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013).

⁷ Section 320.60(14), F.S., defines "Line-make vehicles" as motor vehicles offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same. However, motor vehicles sold or leased under multiple brand names or marks constitute a single line-make when they are included in a single franchise agreement and every dealer in this state authorized to sell or lease such vehicles has been offered the right to sell or lease the multiple brand names covered by a single franchise agreement.

- Threatening or coercing a dealer toward action whereby the dealer foregoes its right to protest the establishment or relocation of a dealer in the community;
- Refusing to deliver, in reasonable quantities and within a reasonable time, motor vehicles or parts to any dealer who has an agreement for the retail sale of such new vehicles or parts.⁸
- Performing audits on dealers outside of the required time-frames authorized in statute;
- Taking action against a dealer who sold or leased a vehicle that the customer then exported or resold, providing the dealer did not know the customer's intention;
- Making available dealer's confidential financial information without the dealer's consent;
- Failing to reimburse a dealer for the reasonable cost of providing a loaner vehicle, if the dealer is required by the licensee to provide a loaner;
- Offering a dealer a franchise agreement that:
 - Requires the dealer to bring administrative actions, legal actions, arbitration, or mediation in a venue outside of the state; or
 - Requires that a law of another state be applied to legal proceedings between the licensee and dealer;
- Including in any franchise agreement with a dealer, a mandatory obligation of the dealer to purchase, sell, lease, or offer any quantity of used motor vehicles;
- Refusing to sell vehicles to a dealer because the dealer has not purchased, sold, leased, or certified a certain quantity of used vehicles prescribed by the licensee;
- Failing to pay a dealer as required;
- Refusing to allow, limiting, or restricting dealers from acquiring or adding service or sale operations for another line-make of vehicles, without demonstrating justification for such refusal, limit, or restriction;
- Failing or refusing to offer an incentive or benefit, in whole or in part, to all its same line-make dealers, unless the program in this state is reasonably supported by substantially different economic or marketing considerations; and
- Requiring or coercing a dealer to purchase goods or services from a vendor selected by the licensee without making available to the dealer the option to obtain substantially similar goods or services from a vendor chosen by the dealer. This does not include:
 - Materials subject to the licensee's intellectual property rights;
 - Special tools or training required by the licensee;
 - Parts used in repairs under warranty obligations of the licensee;
 - Any goods or services paid for entirely by the licensee; or
 - Any licensee's design or architectural review service.

Procedure for Administrative Hearings and Adjudications

A dealer who is directly and adversely affected by the action or conduct of a licensee that is alleged to be in violation of the act may seek a declaration and adjudication of its rights by either filing a request with the DHSMV for a proceeding and administrative hearing, or filing a written objection or notice of protest with the DHSMV.⁹

⁸ Exceptions are provided for acts of God, work stoppage, delays due to a strike or labor difficulty, a freight embargo, product shortage, or other cause, that the licensee cannot control. Additionally, the licensee can reasonably require the dealer to purchase special tools to service such vehicles or service person training related to the vehicle.

⁹ Section 320.699(1), F.S.

Hearings are held no sooner than 180 days nor later than 240 days from the date a written objection or notice of protest is filed, unless extended with good cause by the administrative law judge.¹⁰

Civil Damages

A motor vehicle dealer who can demonstrate that a violation or failure to comply with any of these provisions by an applicant or licensee will or can adversely and pecuniarily affect the dealer may pursue an injunction against the licensee, treble damages, and attorney's fees.¹¹ The licensee has the burden to prove that such violation did not occur upon a prima facie showing by the person bringing the action.¹²

III. Effect of Proposed Changes:

Section 1 amends s. 320.64, F.S., relating to acts an applicant or licensee is prohibited from committing. A violation is grounds for the DHSMV to deny, suspend, or revoke the license. The bill provides that:

- A dealer who completes any licensee-approved program related to facility construction, improvements, renovations, expansion, remodeling, or alterations or installation of signs or other image elements is in full compliance with the licensee's requirements related to the new, remodeled, improved, renovated, expanded, replaced, or altered facilities, signs, and image elements for a ten-year period following such completion; and
- A dealer who has completed a prior approved facility incentive program, standard, or policy during the ten-year period but does not comply with the provisions related to facility, sign, or image under a revised or new incentive program is not eligible for the revised or new benefits, but is entitled to all prior benefits plus any increase in benefits between the prior program and the revised or new programs during the remainder of the ten-year period.

The bill also prohibits an applicant or licensee from establishing, implementing, or enforcing criteria for measuring sales or service performance of franchised dealers which have a negative material or adverse effect on any dealer and are unfair, unreasonable, arbitrary, or inequitable, or which do not include all applicable local and regional criteria, data, and facts. A licensee, common entity, or affiliate thereof that seeks to establish, implement, or enforce such performance measurements must, upon request of the dealer, describe in writing how the performance measurement criteria were designed, calculated, established, and uniformly applied.

Section 2 reenacts s. 320.6992, F.S., concerning applicability of amendments made to the Florida Automobile Dealers Act.

Section 3 reenacts the remaining sections of the Florida Automobile Dealers Act (ss. 320.60-320.70, F.S.) to incorporate the amendments made by the bill.

Section 4 provides that the bill takes effect upon becoming law.

¹⁰ Section 320.699(2), F.S.

¹¹ See ss. 320.64, 320.694, and 320.697, F.S.

¹² Section 320.697, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the agreements between licensees and dealers change, the parties could experience a positive or negative impact.

C. Government Sector Impact:

The bill does not appear to have a significant fiscal impact on the government sector.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.¹³ “[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear.”¹⁴ If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to serve an important public purpose.¹⁵ The factors that a court will consider when balancing the impairment of contracts with the public purpose include whether the law:

- Was enacted to deal with a broad, generalized economic or social problem;

¹³ U.S. Const. Article I, s. 10; Art. I, s. 10, Fla. Const.

¹⁴ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). See also, *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

¹⁵ *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So. 2d 395, 397 (Fla. 3d DCA 1982) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

- Operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and
- Results in a temporary alteration of the contractual relationships of those within its scope, or whether it permanently and immediately changes those contractual relationships, irrevocably and retroactively.¹⁶

Some state laws regulating contracts between automobile manufacturers and dealers have been found to violate the constitution, while other laws have been upheld as constitutional.¹⁷

VIII. Statutes Affected:

This bill substantially amends section 320.64 of the Florida Statutes.

This bill reenacts the following sections of the Florida Statutes: 320.60, 320.605, 320.61, 320.615, 320.62, 320.63, 320.6403, 320.6405, 320.641, 320.6412, 320.6415, 320.642, 320.643, 320.644, 320.645, 320.646, 320.664, 320.67, 320.68, 320.69, 320.695, 320.696, 320.697, 320.6975, 320.698, 320.699, 320.69915, 320.6992, and 320.70.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Transportation on April 4, 2017:

The CS removes provisions of the original bill, and reenacts ss. 320.60-320.70, F.S. Specifically, the CS:

- Removes language added to 320.64, F.S., authorizing the DHSMV to deny, suspend, or revoke an applicant or licensee’s license for not “acting in good faith or dealing fairly” with franchise dealers;
- Removes the creation of s. 320.648, F.S., prohibiting licensees from committing discriminatory practices against dealers; and
- Removes language added to s. 320.699, F.S., allowing dealers to file with any court of competent jurisdiction when seeking a declaration and adjudication against a licensee.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹⁶ See *supra*, note 28; see also, *Vesta Fire Ins. Corp. v. State of Fla.*, 141 F. 3d 1427, 1433 (11th Cir. 1998).

¹⁷ See *Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32 (D. Conn. 2013) (upholding state law that revised statutory method for calculating reasonable compensation for vehicle warranty work and prohibited manufacturers from recovering any additional cost of the new method from the dealers); *Arapahoe Motors, Inc. v. Gen. Motors Corp.*, No. CIV. A. 99 N 1985, 2001 WL 36400171, at 13 (D. Colo. Mar. 28, 2001) (the retroactive application of state law would be unconstitutional as it would create a new obligation or impose a new duty upon General Motors).