

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1916

SPONSOR: Transportation Committee and Senator Latvala

SUBJECT: Motor Vehicle Dealers

DATE: April 16, 2000 REVISED: 04/18/00 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Vickers</u>	<u>Meyer</u>	<u>TR</u>	<u>Favorable/CS</u>
2.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Fav/1 amendment</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

This CS implements numerous changes to laws regulating motor vehicle manufacturers, distributors, and importers. The CS provides that when a complaint of unfair cancellation of a dealer agreement is made by a franchise motor vehicle dealer, no replacement application may be granted until all appellate remedies have been exhausted. The CS provides additional reasons which could justify the denial, suspension, or revocation of a manufacturer's license. The CS provides that in an action for discontinuation, cancellation, nonrenewal, or replacement of a franchise agreement, the manufacturer has the burden of proving the action is fair and not prohibited, and it establishes standards for determining when an agreement is unfair.

The CS prohibits a manufacturer from exercising a right of first refusal with respect to any proposed transfer of ownership of a franchise dealership. The CS clarifies that a motor vehicle manufacturer, importer, or distributor may not have any interest in a dealership except under specified conditions, and provides that a manufacturer, importer, or distributor may not be issued a motor vehicle dealer license under s. 320.27, F.S. Finally, the CS authorizes additional parties to seek injunctive relief for violations of any of the statutes governing motor vehicle manufacturers.

This CS substantially amends the following sections of the Florida Statutes: 320.61, 320.64, 320.641, 320.643, 320.645, and 320.695.

## II. Present Situation:

Chapter 320, F.S., provides for the licensing of automobile dealers and automobile manufacturers and regulates the franchise relationship between franchise dealers and the manufacturers. The intent of this licensing and regulation as stated in s. 320.605, F.S., is to protect the public health, safety and welfare of citizens of the state by regulating licensing, maintaining competition, providing consumer protection and fair trade, and providing minorities with opportunities for full participation as motor vehicle dealers.

Section 320.60 provides definitions for the manufacturer licensing and franchise regulations portions of the chapter. As used in ss. 320.60-320.70, F.S., the term “licensee” refers to a manufacturer, factory branch, distributor, or importer.

Currently, no motor vehicle may be sold, leased, or offered for sale or lease in this state unless the manufacturer, importer, or distributor of such motor vehicle, which issues an agreement to a motor vehicle dealer in this state, is licensed under ss. 320.60-320.70, F.S. Upon obtaining a license under this section the licensee is considered to be doing business in this state and is subject to the jurisdiction of the court of this state and service of process in accordance with chapter 48, F.S.

Section 320.61(4), F.S., currently provides that when a complaint of unfair cancellation of a dealer agreement is made by a motor vehicle dealer against a licensee and is being heard by DHSMV, no replacement application for such agreement may be granted to another dealer until a final decision on the complaint of unfair cancellation is rendered by the Department of Highway Safety and Motor Vehicles (DHSMV) .

Section 320.64, F.S., provides for denial, suspension, or revocations of a manufacturer’s license. A license may be denied, suspended, or revoked, within the entire state or at specific locations within the state at which the licensee engages in business upon proof the licensee has failed to comply with the specific provisions set out in the section with sufficient frequency to establish a pattern of wrongdoing. A sample of the specific provisions in s. 320.64, F.S., include the following subsections: (1) The licensee is unable to carry out contractual obligations; (13) The licensee has refused to deliver to a dealer with an agreement with the manufacturer any vehicles or parts covered by the agreement specifically advertised by the licensee to be available for immediate delivery, except as excused by the section; and, (20) The licensee has established or implemented a method of distribution of motor vehicles to its franchise dealers which is unfair, inequitable, unreasonably discriminatory, or not supportable by reason and good cause after considering the equities of the affected motor vehicle dealer or dealers.

Section 320.641, F.S., provides remedies for unfair cancellation of a franchise agreement by a licensee. The section requires the licensee to provide notice to a dealer at least 90 days before changing, canceling or not renewing a franchise agreement when such action would adversely alter the rights or obligations of a dealer under the franchise agreement or will substantially impair the sales, service obligations or investment of a dealer. DHSMV must be notified of any action taken regarding a franchise agreement, and failure to provide the 90 day notice will render the action voidable by the dealer. Any motor vehicle dealer whose franchise agreement is discontinued, canceled, not renewed, modified, or replaced may, within a 90-day notice period, file a petition or complaint for a determination of whether such action is unfair or prohibited. The discontinuation, cancellation, or nonrenewal of a franchise agreement is unfair unless it is: 1) Not clearly permitted by the franchise agreement; 2) Is not undertaken in good faith; 3) Is not undertaken for good cause; or, 4) Is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach. Agreements and certificates of appointment continue in effect until final determination of the issues raised in the petition or complaint by the motor vehicle dealer. No replacement dealer may be named prior to final adjudication of the dealer’s complaint by DHSMV and the exhaustion of all appellate remedies if a stay is issued by either DHSMV or an appellate court. The petitioner (the motor vehicle dealer) has the initial

burden of proof to show by a preponderance of the evidence the unfairness of the manufacturer's decision.<sup>1</sup> If there is a prima facie showing of bad faith, the burden shifts to the licensee to show by a preponderance of the evidence it would have reached the same conclusion even in the absence of the alleged bad faith.<sup>2</sup>

Section 320.643, F.S., establishes certain provisions governing a dealer's transfer, assignment, or sale of a franchise agreement. The section provides for written notice to the licensee and provides the licensee with 60 days in which to approve or not approve the transfer, assignment, or sale. Where the licensee objects, the refusal must include the material reasons for the rejection. The licensee is prohibited from unreasonably withholding approval. Additionally, the courts have held that a first right of refusal in a franchise agreement is void.<sup>3</sup>

Section 320.645, F.S., provides restrictions on the ownership of motor vehicle dealerships by licensees. With certain exceptions, no licensee or representative of the licensee may own or operate a motor vehicle dealership in this state for the sale or service of motor vehicles which have been or are offered for sale under a franchise agreement with a motor vehicle dealer in this state. However, licensees are not considered to own or operate a dealership when operating a dealership during transitions between owners, when owning or operating a dealership in conjunction with someone purchasing the dealership, or while offering the dealership for sale when there is no independent person to operate the dealership.

Section 320.695, F.S., authorizes DHSMV, or any motor vehicle dealer to seek a temporary or permanent injunction, or both, restraining any person who is not licensed by DHSMV from acting as a licensee under the terms of ss. 320.60-320.70, F.S.

### **III. Effect of Proposed Changes:**

Section 320.61, F.S., is amended to provide that when a complaint of unfair cancellation of a dealer agreement is made by a franchise motor vehicle dealer against a manufacturer, no replacement application for such agreement may be granted until all *appellate* remedies have been exhausted by the manufacturer or dealer. This conforms this section to other sections of the act.

Section 320.64, F.S., is amended to provide additional reasons which could justify the denial, suspension, or revocation of a manufacturer's license in Florida. These additional reasons include the following:

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<sup>1</sup>*International Harvester Co. v. Clavin*, 353 So. 2d 144 at 148 (Fla. 1st DCA, 1977).

<sup>2</sup>*Id.*

<sup>3</sup>In *Bayview Buick-GMC Truck, Inc. v General Motors Corp.*, 597 so. 2d 887 (Fla 1st DCA, 1992), the court found that a contract provision which provided General Motors with the ability to purchase the dealership was void. First, the manufacturer could not use a contract provision to circumvent the statutes which set forth the manner and terms for a licensee to object to a transfer of ownership. Second, s. 320.645, F.S., prohibits any manufacturer from owning a dealership either directly or indirectly except as provided in the three exceptions, none of which applied in this instance.

- Failure to offer to its franchise dealers all models manufactured for that line-make or requiring a dealer to pay an extra charge, purchase unreasonable advertising displays or other materials, or renovate the dealer's facilities as a prerequisite to receiving a model or series of vehicles;
- Failure to maintain 3 years of records that fully describe the method of allocation or distribution of motor vehicles and the actual allocation of vehicles to franchise dealers. The licensee would have to make such records available to any franchise dealer who lodges a complaint against the manufacturer in this regard at no charge to the dealer;
- The licensee has conducted or attempted to conduct an audit of a franchise motor vehicle dealer covering a period in excess of 12 months prior to the date of the audit or has threatened to conduct an audit to coerce the dealer to forego rights granted under these licensing provisions; and
- Offering any refunds, incentives, or other inducements to any person to purchase new motor vehicles for sale to the state or any political subdivision or any other person without making the same offer to all franchise dealers of the same line-make.

Section 320.641, F.S., is amended to provide that in an action for discontinuation, cancellation, nonrenewal, or replacement of a franchise agreement the licensee has the burden for proving the action is fair and not prohibited, and such agreement shall remain in force until all appellate remedies have been exhausted. The bill also provides that in a modification or replacement of a franchise agreement it is unfair if it is: 1) Not clearly permitted by the franchise agreement; 2) Not undertaken in good faith; 3) Not undertaken for good cause. Additionally, the termination of an agreement is unfair if it is based in whole or in part on the manufacturer's failure to provide vehicles within a reasonable time. The section then defines "good faith" to mean that the provisions or standards relied upon by the licensee in its action were reasonable and have been applied in a uniform, consistent, and nondiscriminatory manner considering actions taken when other dealers engaged in similar conduct. The term "good cause" is defined as a material and substantial breach of the franchise agreement which is significantly detrimental to the licensee's business interests.

Section 320.643, F.S., is amended to prohibit a manufacturer from exercising a right of first refusal with respect to any proposed transfer of ownership of a franchise dealership. The section then provides that any such right of first refusal in a franchise agreement is void. This codifies the holding in *Bayview Buick-GMC Truck, Inc. v General Motors Corp.*, 597 so. 2d 887 (Fla 1st DCA, 1992).

Section 320.645, F.S., is amended to add to those reasons a manufacturer may own any interest in or control a franchise motor vehicle dealership, the purpose of broadening the diversity of qualified persons who own franchise dealerships who have been historically underrepresented. In any case in which a manufacturer temporarily owns a dealership, it must continue to make the dealership available for sale unless it certifies in writing to DHSMV that it is attempting to broaden the diversity of qualified persons who own franchise dealerships who have been historically underrepresented. In no circumstance may a licensee be issued a motor vehicle dealer license. The section then provides definitions for the terms "agent," "control," "independent

person,” “reasonable terms and conditions,” and “significant investment.” The CS exempts any dealership owned, controlled, or operated by a licensee on July 1, 2000.

Section 320.695, F.S., is amended to add associations of motor vehicle dealers or associations of manufacturers as parties who may apply to a circuit court for an injunction on behalf of a franchise motor vehicle dealer or manufacturer against any person acting as a manufacturer in this state who has not been properly licensed or who has violated any of the statutes governing motor vehicle manufacturers in Florida.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

In the case of *Yamaha Parts Distributors, Inc. v. Ehrman*<sup>4</sup>, the Supreme Court discussed the applications of the manufacturer licensing provisions in chapter 320 in relation to the constitutional right to contract. Absent a specific statement of retroactive application in the statutory provision the Court stated:

To justify retroactive application it is not enough to show that this legislation is a valid exercise of the state’s police power because that power, however broad in other contexts, here collides with the constitutional ban on laws impairing contracts. Virtually no degree of contract impairment has been tolerated in this state. citing *Ft Lauderdale v. State ex rel. Elston Bank & Trust Co.*, 125 Fla. 89, 169 So. 1(1933).

The Court then went on to find that the state’s interest in policing the industry in the termination of franchise agreements was not so great as to override the sanctity of contracts. Thus the provisions of section 320.641 applied only prospectively to franchise agreements signed after its date. Based on this case the amendments to provisions impacting the franchise agreement would apply only prospectively to franchise agreements entered into after July 1, 2000. This is specifically stated in the amendments to s. 320.645, F.S.

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<sup>4</sup>316 So. 2d 557 (Fla. 1975).

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Motor vehicle manufacturers may incur some additional cost in meeting the requirements associated with the cancellation of a motor vehicle dealer agreement.

This CS provides additional safeguards for Florida motor vehicle dealers against unfair or capricious actions by motor vehicle manufacturers.

**C. Government Sector Impact:**

This CS will have no fiscal impact on DHSMV.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Judiciary:  
Technical.