

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1090

SPONSOR: Transportation Committee and Senator Villalobos

SUBJECT: Motor Vehicle Dealer Franchise Agreements

DATE: April 12, 2001                      REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Vickers	Meyer	TR	Favorable/CS
2.	_____	_____	GO	_____
3.	_____	_____	AGG	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This CS implements numerous changes to laws regulating motor vehicle manufacturers, distributors, and importers. The CS provides that no replacement dealer license may be granted pending a dealer complaint of unfair or prohibited cancellation or non-renewal, so long as the dealer agreement of the complaining dealer is in effect. The CS provides that violations of prohibited acts are sufficient grounds for license denial, suspension, or revocation and makes them subject to certain penalty provisions. These provisions relate to temporary or permanent injunctions, which shall be issued without bond and civil penalties respectively. If a violation by a licensee has occurred, the person who has been affected may recover damages in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. The burden of proof is upon the licensee to prove that a violation or unfair practice did not occur.

The CS provides additional reasons which could justify the denial, suspension, or revocation of a manufacturer's license in Florida. In addition, the CS states that violation of these requirements and prohibitions may result in denial, suspension, or revocation of a license to do business within the entire state, or at specific locations within the state upon proof that the section was violated with sufficient frequency to establish a pattern of wrongdoing. The CS also provides criteria to be used in determining whether a termination, cancellation, non-renewal, or modification of a franchise should be approved. Finally, the CS allows a manufacturer to use financial qualifications in its determinations regarding a transfer of a franchise agreement, and allows the dealer to file a complaint in protest of the denial of a transfer.

This CS substantially amends the following sections of the Florida Statutes: 320.60, 320.61, 320.63, 320.64, 320.641, 320.643, 320.645, 320.695, and 320.699. This CS creates section 320.69905 of the Florida Statutes.

## II. Present Situation:

Chapter 320, F.S., provides for the licensing of motor vehicle dealers and motor vehicle 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 the Department, 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 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 1:** The CS amends s. 360.60, F.S., to revise the definition of "motor vehicle dealer" to include licensed franchised motor vehicle dealers who repair or service motor vehicles or certain used motor vehicles for commission, money, or other things of value; and to define "sell" and its various synonyms to include lease transactions.

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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.

**Section 2:** The CS amends s. 360.61, F.S., to provide no replacement dealer license may be granted pending a dealer complaint of unfair or prohibited cancellation or non-renewal, so long as the dealer agreement of the complaining dealer is in effect as provided under s. 320.641(7), F.S.

**Section 3:** The CS amends s. 320.64, F.S., to provide violations of prohibited acts are sufficient grounds for license denial, suspension, or revocation and makes them subject to penalties provided in ss. 320.695 and 320.697, F.S. These provisions relate to temporary or permanent injunctions, which shall be issued without bond and civil penalties respectively. If a violation by a licensee has occurred, the person who has been affected may recover damages in an amount equal to 3 times the pecuniary loss, together with costs and a reasonable attorney's fee to be assessed by the court. Burden of proof is upon the licensee to prove that a violation or unfair practice did not occur.

The CS also amends s. 320.64, F.S., to provide additional reasons which could justify the denial, suspension, or revocation of a manufacturer's license in Florida. The CS provides for the following:

- Require manufacturers to retain for three years, records describing methods or formulas for allocation of motor vehicles and records of actual allocation and distribution of motor vehicles to its dealers in Florida;
- Require manufacturers to make available all named vehicles from a line-make, e.g., a manufacturer may not refuse to distribute particular models to particular dealers;
- Prohibit manufacturers from competing with dealers of the same line-make;
- Require all sales of vehicles in Florida to be through franchised motor vehicle dealers, excepting factory programs for certain defined persons so long as the vehicles are delivered through a dealer;
- Limit warranty audit periods;
- Prohibit a manufacturer from refusing to allocate vehicles, charged-back or withheld payments, or other things of value to dealers otherwise eligible under a sales promotion, program, or contest;
- Prohibit a manufacturer from excluding a dealer from participating in promotions, programs, or contests for selling to a customer who ships the vehicle to a foreign country. The CS creates a rebuttable presumption that the dealer did not know, or should not have reasonably known that the vehicle would be exported if the vehicle was titled in the United States;
- Prohibit a manufacturer's failure to indemnify dealers against negligent manufacture, design, or assembly;

- Prohibit a manufacturer from publishing confidential dealer information without dealer consent;
- Prohibit a manufacturer's failure to reimburse a dealer for the reasonable cost of providing loaner vehicles, if dealers are required by factory programs to provide such loaner vehicles;
- Prohibit a manufacturer's threat to audit a dealer for the purpose of coercing the dealer to forego rights granted to the dealer by agreement or by law. (Manufacturers are permitted to reasonably and periodically audit dealers to determine the validity of paid claims);
- Prohibit a manufacturer from offering a franchise agreement that forces binding mediation or arbitration, requires legal action in venues outside Florida, requires mediation or arbitration outside Florida, or fails to provide that the laws of Florida are binding in any legal proceeding or other method of dispute resolution;
- Prohibit a manufacturer's discrimination in prices charged to dealers, except in certain limited circumstances and prohibits a manufacturer's discrimination in prices charged to dealers through the use of rebates or incentives.

The CS provides that violation of these requirements and prohibitions may result in denial, suspension, or revocation of a license to do business within the entire state, or at specific locations within the state upon proof that the section was violated with sufficient frequency to establish a pattern of wrongdoing.

**Section 4:** The CS amends s. 320.641, F.S., relating to the discontinuation, cancellation, nonrenewal, or replacement of franchise agreements to provide the following:

- Provide criteria to be used in determining whether a termination, cancellation, non-renewal, or modification of a franchise should be approved;
- Require that a franchise agreement shall remain in effect during the appeals process over a decision to discontinue, cancel, or refuse renewal of the agreement, except in the case of a dealer's loss of license or abandonment; and
- Allow the transfer of a franchise agreement pending the outcome of a termination proceeding.

**Section 5:** The CS amends s. 320.643, F.S., relating to the transfer, assignment, or sale of franchise agreement to provide the following:

- Allow a manufacturer to use financial qualifications in its determinations regarding a transfer, and allows the dealer to file a complaint in protest of the denial of a transfer;

- Require a manufacturer to state reasons for rejecting a transfer, and to provide for approval of the transfer if the manufacturer fails to notify the dealer of the rejection within 60 days.

**Section 6:** The CS amends s. 320.645, F.S., relating to the restriction upon ownership of dealerships by a licensee to allow manufacturers to operate motor vehicle dealerships for the exclusive purpose of broadening diversity and improving minority representation. The CS provides certain definitions. In addition, the CS does not restrict the business activities of short term rental businesses that sell only used vehicles, perform warranty repairs only on vehicles they sell, and finance the sale of used vehicles only.

**Section 7:** The CS amends s. 320.699, F.S., to require that a hearing on a notice of protest shall not be held sooner than 180 days from the filing of the protest.

**Section 8:** Specifies that if a provision of the CS or its application to any person or circumstance is held invalid, the other provisions or applications of the act which can be given effect without the invalid provision or application. To that end the provisions of the CS are declared severable.

#### 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).

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<sup>4</sup>16 So. 2d 557 (Fla. 1975).

The Court then went on to find 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, 2001.

**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:**

None.