

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1159 (PCS) Motor Vehicle Manufacturers, Distributors, Importers, and Dealers
SPONSOR(S): Ross
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Highway Safety (Sub)		Garner	Miller
2) Transportation			
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

[NOTE: This analysis is drawn to the Proposed Committee Substitute (PCS) for HB 1159.]

The PCS for HB 1159 makes a number of changes to the Florida Motor Vehicle Dealer Protection Act. The PCS:

- Eases restrictions on the use and classification of motor vehicle dealer "demonstrator" vehicles;
- Clarifies that heavy truck manufacturers, distributors, and importers are subject to the Act;
- Prohibits manufacturers from requiring dealers to sell used and off-lease vehicles;
- Provides procedures for protesting the addition or relocation of a service only dealership; and
- Amends procedures governing disputes over changes in the ownership or executive management control of motor vehicle dealerships.

The PCS does not appear to have a significant fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|-----------------------------------------|----------------------------------------|-----------------------------------------|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input checked="" type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Reduce government?

The PCS increases government imposed protections of motor vehicle dealers against the actions of licensed manufacturers, distributors, and importers.

Expand individual freedom?

Inasmuch as a business entity may be considered an individual, the PCS increases existing limitations on the freedom of a manufacturer, distributor, or importer of motor vehicles to define the terms of franchise agreements with dealers and to reject or withhold approval of changes in dealership ownership and executive management control. The PCS may increase the freedom of a dealer to transfer ownership or change executive management control of a dealership by restricting the ability of manufacturers, distributors, and importers to prevent such changes.

B. EFFECT OF PROPOSED CHANGES:

Demonstrator Vehicles

Current Situation

Florida law defines a "demonstrator" as "any new motor vehicle which is carried in the records of the dealer as a demonstrator and is used by, being inspected or driven by the dealer or his employees or prospective customers for the purpose of demonstrating vehicle characteristics in the sale or display of motor vehicles sold by the dealer." This definition appears to authorize the use of a demonstrator by a dealer or his or her employees only for the purpose of demonstrating the vehicle to customers, and not for personal or other use.

Under current Florida law, it is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a motor vehicle dealer to represent directly or indirectly that a vehicle is a demonstrator unless the vehicle was driven by prospective customers of a dealership selling the vehicle, and the vehicle meets the statutory definition of a demonstrator described above.

Effect of Proposed Changes

The PCS changes the definition of "demonstrator" to clarify that a vehicle may be a demonstrator although it has been used by the dealer or his or her employees for purposes other than demonstrating the vehicle characteristics in a sale or display. The PCS also amends the Florida Deceptive and Unfair Trade Practices Act so that it is no longer actionable under the act for a dealer to represent a vehicle as a demonstrator, although it was not driven by prospective customers of the dealership. These changes will allow a dealer and that dealer's employees to use demonstrator vehicles for purposes other than demonstrating them to customers.

Heavy Trucks

Current Situation

The definition of "motor vehicle" in the Florida Motor Vehicle Dealer Protection Act (Act) brings within the terms of the Act any new automobile, motorcycle, or truck that has not been transferred to an ultimate purchaser. The term "heavy truck" is not included in the definition, although that term is defined in the general definitions for Ch. 320, F.S. According to proponents of the bill, some heavy truck manufacturers are taking the position that they are not governed by the Act because the term "heavy truck" is not used expressly in the definition section of the Act.

Effect of Proposed Changes

The PCS amends the definitions section of the Act to include in the definition of "motor vehicle" the term "heavy truck," as defined in the chapter's general definitions section. This change expressly applies the provisions of the Act to manufacturers, distributors, and importers of heavy trucks.

Used/Leased Vehicles

Current Situation

Currently, the term "used motor vehicle," as used in the Act, means "any motor vehicle title to or possession of which has been transferred from the person who first acquired it from the manufacturer, distributor, importer, or dealer and which is commonly known as 'secondhand' within the ordinary meaning thereof." According to proponents, some vehicles that are sold by a dealer to a purchaser do not meet this definition.

In addition, according to proponents, low-interest or no-interest loan incentives offered to increase purchases of new vehicles have resulted in a glut of off-lease used vehicles as lessees have been attracted to ownership of new vehicles by the incentives. Proponents say that manufacturers have recently attempted to manage this glut by requiring dealers to sell used vehicles (primarily those coming off lease arrangements) as part of franchise agreements. Nothing in the Act currently prohibits this kind of condition in a franchise agreement.

Effect of Proposed Changes

The PCS amends the definition of used motor vehicle to read:

"Used motor vehicle" means any motor vehicle the title to which has been transferred, at least once, by a manufacturer, distributor, importer, or dealer to an ultimate purchaser.

This definition makes it clear that a used motor vehicle is one the title for which has been transferred to an ultimate purchaser by any one of the entities in the distribution chain.

The PCS also defines the terms "certified" and "certifying" to "refer to a used motor vehicle for which a licensee, manufacturer, or common entity has: a) established criteria or standards, including reconditioning, for certification of such used motor vehicle; or b) required a motor vehicle dealer to provide a customer with an extended warranty or service contract."

In addition, the PCS includes new grounds for denial, suspension, or revocation of a manufacturer's, distributor's, or importer's license. A licensee will be prohibited from:

- Selling or leasing, or attempting to do so, used motor vehicles at retail of a line-make that is the subject of any franchise agreement with a motor vehicle dealer in Florida.
- Including in any franchise agreement a mandatory obligation or requirement on the part of the motor vehicle dealer to purchase, sell, lease, or offer any quantity of used motor vehicles.
- Refusing to assign allocation earned by a motor vehicle dealer, or refusing to sell motor vehicles to a motor vehicle dealer, because the motor vehicle dealer has failed or refused to sell, lease, or certify, a certain quantity of used motor vehicles, prescribed by the licensee.

According to proponents, these new grounds for denial, suspension, or revocation of a manufacturer's distributor's, or importer's license are necessary to prevent manufacturers and distributors from attempting to require the sale of vehicles coming off lease arrangements or other used vehicles.

Service Only Dealerships

Current Situation

Section 320.642(1), F.S., mandates that manufacturers who propose establishment of a new motor vehicle dealer within the territory of an existing dealer of the same line-make vehicle must give written notice to DHSMV to be published in Florida Administrative Weekly. An existing dealer may protest the additional location if it meets the standing requirements enumerated in s. 320.642(3), F.S. DHSMV applies criteria listed in the statute to determine whether the manufacturer may establish an additional dealer.

Section 320.60(11)(a), F.S., defines a "motor vehicle dealer" not only as an entity that sells motor vehicles, but also as, among other things, "any person, firm, company, corporation, or other entity, who is licensed ... as a "franchised motor vehicle dealer" and, for commission, money, or other things of value, repairs or services motor vehicles or used motor vehicles pursuant to [a franchise agreement]... ." This definition recognizes the possibility that a motor vehicle dealer may have a "service only" franchise agreement.

While s. 320.642(1), F.S., provides a procedure for an existing dealer to challenge an additional dealer proposed to be established by a manufacturer, a recent court decision, Meteor Motors, Inc. v. Hyundai Motor America Corp., 1999 WL 1800074 (S.D.Fla.), held that Florida law does not provide standing for protest of establishment of an additional service only dealer. The Meteor Motors court pointed to s. 320.642(3), F.S., which states in pertinent part:

An existing franchised motor vehicle dealer or dealers shall have standing to protest a proposed additional or relocated motor vehicle dealer where the existing motor vehicle dealer or dealers have a franchise agreement for the same line-make vehicle *to be sold* by the proposed additional or relocated motor vehicle dealer... . (emphasis added).

According to the court, "the plain language of this standing provision states that standing to protest occurs only when vehicles are to be sold by the proposed additional dealer."

Proponents argue that because Florida does not provide separate licensing for service only dealerships, and there is not standing to protest the addition or relocation of a service only dealership, the possibility exists that a service only dealership could be added without an opportunity for existing dealers to protest, and the new dealer, at a later date, could attempt to convert its service only business into one that also sells and/or leases motor vehicles.

Effect of Proposed Changes

The PCS defines "service" as "any maintenance or repair of any motor vehicle or used motor vehicle that is sold or provided to an owner, operator, or user pursuant to a motor vehicle warranty issued by the licensee, or any extension thereof."

The PCS also amends s. 320.642, F.S., to give standing to existing dealers to protest additional or relocated service only dealerships of the same line-make, and to provide that a protesting dealer no longer has the burden of proving that benefits to consumers from the new dealership cannot be obtained by other geographic or demographic changes in the community or territory.

In addition, the PCS provides that proposed additional or relocation service only dealerships that don't sell or lease new motor vehicles are subject to existing notice and protest provisions. However:

- Current mileage provisions for determining standing to protest apply;
- The proposed service only dealership is not subject to protest if the applicant is an existing dealer, there is not a dealer of the same line-make closer to the proposed service only dealership, and the proposed location is at least 12.5 miles from existing dealerships of the same line-make.
- When determining whether existing dealers of the same line-make are providing adequate representation in a community or territory, DHSMV may not consider: impacts on consumers, public interest, existing dealers, or the licensee, except as the impact relates to service; the expected market penetration of the line-make; the adequacy of facilities other than those related to service; and the volume of registrations in the community or territory.
- DHSMV shall only issue a license permitting vehicle service and not sales to applicants for a service only dealership, and notice and protest provisions will apply if the service only dealer later seeks to sell new vehicles.

Changes in Ownership or Executive Management Control

Current Situation

Section 320.697, F.S., provides that any person who has suffered pecuniary loss or who has been otherwise adversely affected because of a violation by a licensee has a cause of action against the licensee for treble damages, costs, and a reasonable attorney's fee. Once a prima facie case is made, the licensee must prove that no violation or unfair practice occurred.

Section 320.643, F.S., prohibits any licensee from refusing a transfer, assignment, or sale of a franchise agreement by a dealer unless it can prove that the transferee is not of good moral character, and lacks business experience. If the transaction involves only a transfer of assets, and does not involve a transfer of the franchise agreement, the licensee may not refuse the transfer unless it can prove that the transferee is not of good moral character. A dealer must notify the licensee of any transfer. To object to a transfer, a licensee must file a complaint with DHSMV alleging those grounds named above, depending upon the type of transfer. Similar provisions regulate changes in executive management control of a dealership, however, Florida Statutes do not provide a clear definition of executive management control.

According to federal and Florida courts, licensee complaints that warrant dismissal because they lack a proper basis for a transfer challenge violate the Act. Risley v. Nissan Motor Corp. USA, 254 F.3d 1296, 1301 (11th Cir. 2001); Mercedes-Benz of N. Am. v. Mike Smith Pontiac GMC, Inc., 561 So.2d 620, 624 (Fla. 1st DCA 1990). Therefore, any pecuniary loss suffered because of the filing of a legally insufficient complaint by a licensee challenging a transfer may be actionable and subject the licensee to treble damages, costs, and reasonable attorney's fees.

The Risley case, cited above, held that a licensee is in violation of the Act if it asserts a legally insufficient complaint under s. 320.643, F.S. The Court in Risley explained that it is not, however, a

violation of the Act to assert a legally sufficient complaint that will ultimately fail on the merits. Risley, 254 F.3d at 1301.

According to proponents of the bill, the Risley decision allows licensees to file and prosecute merit-free transfer challenges and avoid treble damages provisions by withdrawing a challenge before disposition, so long as they formalistically allege lack of moral character or business experience, whether those allegations have any basis or not. They further claim that any administrative remedy available to dealers is so time consuming as to be commercially impracticable. They argue that by the time the administrative process is complete, any attempt at a transaction for the transfer of a franchise agreement or a dealership's assets will have failed for an inability to consummate it. The Risley case, they argue, has therefore created a de facto method of veto over dealer transfers for manufacturers.

Effect of Proposed Changes

The PCS creates uniform procedures for requesting and objecting to transfers of franchise agreements, transfers of assets, and changes in executive management control. Under the PCS, a dealer or transferee must notify a licensee of the transfer or change in executive management control. If the licensee objects to the transfer or change, the dealer may file a complaint. At a hearing on the complaint, the licensee is required to prove that the transfer or change is to a person who is not of good moral character, does not meet the licensee's financial qualifications (in the case of transfers), or does not have the required business experience.

During the pendency of a hearing regarding a proposed transfer of an agreement or assets, or a proposed change in executive management control, the franchise agreement will continue in effect in accordance with its terms, and DHSMV must expedite the disposition.

The PCS also expressly provides that it is a violation of the Act for a licensee to reject or withhold approval of a proposed transfer or change in executive management control, unless it can prove in defense of a claim brought seeking treble damages under s. 320.697, F.S., that the rejection or withholding of approval was, in fact, reasonable. The PCS provides that what is reasonable is to be determined by application of an objective standard, and further expressly provides that a licensee is not protected from violation of the s. 320.643, F.S., by merely alleging the permitted statutory grounds in a written rejection of a proposed transfer.

The PCS clarifies that "Executive management control" means the person or persons designated under the franchise agreement as the dealer/operator, executive manager, or similarly designated persons who are responsible for the overall day to day operation of the dealership.

C. SECTION DIRECTORY:

Section 1. Amends s. 320.60, F.S., to provide definitions for the terms "demonstrator," "motor vehicle," "used motor vehicle," "service," and "certified" or "certifying" as those terms are used in the Florida Motor Vehicle Dealer Protection Act.

Section 2. Amends s. 320.64, F.S., to provide additional grounds for the denial, suspension, or revocation of the license of a motor vehicle manufacturer, distributor, or importer.

Section 3. Amends s. 320.642, F.S., to provide procedures for protesting the addition or relocation of a service only dealership.

Section 4. Amends s. 320.643, F.S., to provide new procedures for evaluating proposed changes in dealership ownership.

Section 5. Amends s. 320.644, F.S., to provide new procedures for evaluating proposed changes in executive management control.

Section 6. Amends s. 501.976, F.S., to provide that it is no longer an unfair or deceptive act or practice under the Florida Deceptive and Unfair Trade Practices Act to represent a vehicle as a demonstrator if it is not driven by prospective customers of a dealership selling the vehicle.

Section 7. Provides that the act shall take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. See FSICAL COMMENTS section below.

D. FISCAL COMMENTS:

The PCS increases existing limitations on the freedom of a manufacturer, distributor, or importer of motor vehicles to define the terms of franchise agreements with dealers and to reject or withhold approval of changes in dealership ownership and executive management control. The PCS may increase the freedom of a dealer to transfer ownership or change executive management control of a dealership by restricting the ability of manufacturers, distributors, and importers to prevent such changes. Because of these changes, transaction costs in the transfer of motor vehicle dealerships may be decreased for some dealers.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

No new exercise of rule making authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES