# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Highway Safety (Sub) | 10 Y, 0 N | Garner | Miller |
| 2) Transportation | 18 Y, 0 N w/CS | Garner | Miller |
| 3) Appropriations | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

HB 1159 w/CS makes a number of changes to the Florida Motor Vehicle Dealer Protection Act (Act). The amendment:

- Eases restrictions on the use and classification of motor vehicle dealer "demonstrator" vehicles;
- Clarifies that cargo trucks and heavy trucks fall within the definition of "motor vehicles" for the purposes of the Act;
- Prohibits manufacturers from requiring dealers to sell used and off-lease vehicles, except in the case of dealers of heavy trucks in excess of 8,000 pounds;
- Provides guidelines to be applied in a protest of the addition or relocation of a service only dealership;
- Amends procedures governing disputes over changes in the ownership or executive management control of motor vehicle dealerships; and
- Authorizes a distributor, or common entity of a distributor, to own more than one motor vehicle dealership of a line-make other than that distributed by the distributor or common entity.

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

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

| | | | |
|---|---|---|---|
| 1. Reduce government? | Yes[] | No[X] | N/A[] |
| 2. Lower taxes? | Yes[] | No[] | N/A[X] |
| 3. Expand individual freedom? | Yes[X] | No[X] | N/A[] |
| 4. Increase personal responsibility? | Yes[] | No[] | N/A[X] |
| 5. Empower families? | Yes[] | No[] | N/A[X] |

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

Reduce government?

The bill 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 amendment 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 bill 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**

HB 1159 w/CS 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 bill 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 "truck" or "heavy truck" is not included in the definition, although those terms are defined in the general definitions for Ch. 320, F.S. According to proponents of the bill, at least one cargo truck or heavy truck manufacturer is taking the position that it is not governed by the Act because the terms "truck" and "heavy truck" are not used expressly in the definition section of the Act.

### Effect of Proposed Changes

The term "motor vehicle" in the definitions section of the Act is clarified to expressly include the terms "truck" and "heavy truck." This change clarifies that manufacturers, distributors, and importers of light and heavy trucks designed or used principally for the carriage of goods are governed by the provisions of the Act.

## 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

HB 1159 w/CS changes 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.

In addition, the bill 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, except in the case of heavy trucks over 8,000 pounds. It is current industry practice for used commercial trucks to be

sold by licensees rather than dealers. The 8,000 pound threshold prohibits licensees from selling used vehicles such as SUV's and larger light trucks.

- 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 contend that the Meteor Motors decision is inconsistent with current DHSMV rules interpreting the Florida Statutes, and that no consistent ruling has been issued by a Florida court. Because the practice in Florida and the decision by the Federal District Court in Meteor Motors are at odds, proponents say uncertainty has been introduced in the business environment in Florida between dealers and manufacturers.

**Effect of Proposed Changes**

HB 1159 w/CS 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, or any extension thereof, issued by the licensee."

The bill also amends s. 320.642, F.S., to clarify that Florida law gives 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 bill 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 location 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 7 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**

HB 1159 w/CS creates uniform procedures for requesting and objecting to transfers of franchise agreements, transfers of assets, and changes in executive management control. Under the bill, 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.

Pending 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 bill 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 bill 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 bill 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.

**Other**

**Current Situation**

Certain motor vehicle distributors who owned and operated a dealership in Florida until July 1, 1996, are authorized to own and operate that dealership, as long as it is of a different line-make than the distributorship.

**Effect of Proposed Changes**

HB 1159 w/CS authorizes certain distributors, or their common entities, to own and operate one or more dealerships in Florida of a different line make than the distributorship, regardless of ownership prior to July 1, 1996.

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. 320.645, F.S., to delete certain dealer ownership restrictions placed on distributors.

**Section 7.** 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 8.** 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:

HB 1159 w/CS 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 bill 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

**Highway Safety Subcommittee**

On March 26, 2003, the Highway Safety Subcommittee recommended the strike-all amendment with 5 amendments to the amendment, and made a favorable report. The amendments to the amendment:

- Amend the definition of "service" as provided in the PCS;
- Delete the definition of "certified" or "certifying, as provided in the PCS;
- Change the mileage provision in the PCS that requires additional or relocated service only dealerships to be no closer than a certain distance;
- Amend certain restrictions on the ownership of dealerships by certain licensed distributors; and
- Authorize manufacturers to lease or sell used heavy trucks that weigh more than 8,000 pounds.

**Committee on Transportation**

On April 2, 2003, the Committee on Transportation adopted the strike-all amendment with two amendments and reported the bill favorably as amended: The amendments to the amendment:

- Clarify that manufacturers may not sell or lease used motor vehicles other than trucks with a net weight of more than 8,000 pounds.
- Insert the word "location" after the word "dealership" on line 224 of the amendment. The insertion was necessary because the passage deals with protests of proposed additional or relocated dealership locations by existing dealers of the same line-make, not the establishment of new dealerships.