

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	CS/CS/HB 231	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Judiciary Committee; Business & Professions Subcommittee; Trujillo and others	115 Y's	0 N's
<b>COMPANION BILLS:</b>	CS/HB 1087; CS/SB 960; SB 430	<b>GOVERNOR'S ACTION:</b>	Approved

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**SUMMARY ANALYSIS**

CS/CS/HB 231 passed both chambers on March 4, 2016. The bill includes portions of CS/HB 1087.

The bill provides additional grounds to deny, suspend, or revoke a license held by a motor vehicle manufacturer, factory branch, distributor, or importer ("manufacturer"). The bill prohibits manufacturers from taking certain actions against motor vehicle dealers and requires certain procedures be followed by the manufacturer when dealing with motor vehicle dealers related to the time period within which to perform audits of claims, the export or resale of vehicles, the use of replacement vehicles, and the use of certain vendors.

The bill requires a manufacturer or third party acting on behalf of a manufacturer to comply with certain restrictions on sharing or reusing consumer data provided by motor vehicle dealers. The bill requires a manufacturer to comply with all laws on the reuse or disclosure of consumer data to ensure that digital data is protected in the same manner as physical documents. The bill also provides that for any cause of action against a manufacturer for a violation of the prohibitions or requirements established in the bill, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing.

The bill has an indeterminate fiscal impact on state government.

This bill was approved by the Governor on March 24, 2016, ch. 2016-77, L.O.F., and became effective on that date.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Motor Vehicle Manufacturers and Franchise Dealerships - Generally:**

Manufacturers, distributors, and importers (“manufacturers”) enter into contractual agreements with motor vehicle dealers to sell particular vehicles that they manufacture, distribute, or import. Florida law, chapter 320, F.S., has regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970. Existing law requires the licensing of manufacturers and regulates numerous aspects of the contracts between manufacturers and motor vehicle dealers.

#### **Florida Automobile Dealers Act**

A manufacturer, factory branch, distributor, or importer must be licensed to engage in business in this state.<sup>1</sup> The requirements regulating the contractual business relationship between a dealer and a manufacturer are primarily found in ss. 320.60 through 320.70, F.S., known as the Florida Automobile Dealers Act.<sup>2</sup> These sections of law specify, in part:

- The conditions and situations under which the Department of Highway Safety and Motor Vehicles (DHSMV) may deny, suspend, or revoke a license;
- The process, timing, and notice requirements for manufacturers wanting to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a change;
- The procedures a manufacturer must follow if it wants to add a dealership in an area already served by a franchised dealer, the protest process, and the DHSMV’s role in these circumstances;
- Amounts of damages that can be assessed against a manufacturer 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 ss. 320.60 through 320.70, F.S., apply to all presently existing or hereafter established systems of distribution of motor vehicles in this state, except to the extent that such application would impair valid contractual agreements in violation of the Florida Constitution or United States Constitution. The provisions do not apply to a judicial or administrative proceeding pending as of October 1, 1988, but the provisions govern all agreements renewed, amended, or entered into subsequent to October 1, 1988, including amendments, unless specifically provided otherwise.<sup>3</sup>

In 2009, the DHSMV held in an administrative proceeding that amendments to the Florida Automobile Dealers Act do not apply to dealers having franchise agreements which were signed prior to the effective date of various amendments to the Act.<sup>4</sup>

#### **Prohibitions for Manufacturers - Current Situation:**

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<sup>1</sup> s. 320.61(1), F.S.

<sup>2</sup>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 (2002) (No section of the statute provides a short title; however, many courts have referred to the provisions as such.), <http://law-wss-01.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf> (last visited Mar. 8, 2016).

<sup>3</sup> s. 320.6992, F.S.

<sup>4</sup> See *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009); see also, *In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013).

There are currently 38 different criteria that could lead the DHSMV to take action against a motor vehicle manufacturer. A violation of any of these provisions entitles a motor vehicle dealer to rights and remedies contained within the Florida Automobile Dealers Act, including an administrative protest, obtaining an injunction against the manufacturer, and receiving treble damages and attorney's fees, if the manufacturer is found to have violated the Act.

A manufacturer may periodically audit the transactions of a motor vehicle dealer relating to certain financial operations by the dealer. Audits of warranty payments may only be performed during the one-year period immediately following the date a warranty claim was paid. Audits of incentive payments may only be performed during an 18-month period immediately following the date the incentive was paid.

Section 320.64(26), F.S., details the types of actions against a dealer by a manufacturer if the dealer distributes cars for foreign export. This section provides that, in a legal challenge, the manufacturer must prove that the motor vehicle dealer had "actual knowledge that the customer's intent was to export or resell the motor vehicle." This section also states that if the disputed vehicle is titled in any state of the United States, there is a "conclusive presumption"<sup>5</sup> that the dealer had no actual knowledge that the customer intended to export or resell the motor vehicle.

### ***Prohibitions for Manufacturers - Effect of Proposed Changes:***

The bill addresses several issues related to manufacturers and the franchise contracts between manufacturers and motor vehicle dealers. The bill amends s. 320.64, F.S., to specify that a manufacturer is prohibited from committing certain actions against motor vehicle dealers and requires certain procedures be followed by the manufacturer when dealing with motor vehicle dealers. The bill amends two existing provisions and adds two additional provisions. Specifically, the manufacturer:

- Is limited to a 12-month period following the date a claim was paid, pursuant to warranty provisions, to perform audits of warranty, maintenance, other service-related payments, and incentive payments;
- May not deny or charge back any payment related to a warranty, maintenance, or other service-related claim or incentive claim or a portion of such claim, until the manufacturer has "proven" the claim or portion of such claim to be false or fraudulent or that the dealer failed to substantially comply with the reasonable, written, and uniformly applied procedures of the manufacturer;
- May not take adverse action against a motor vehicle dealer due to a motor vehicle being resold or exported by the customer unless the manufacturer provides written notification to the dealer of such resale or export within 12 months;
- Must pay the dealer for temporary replacement vehicles provided to customers by the dealer as a loaner vehicle during service or repair even if the dealer owns the vehicle, provided that the dealer complies with written and uniformly enforced vehicle eligibility requirements; and
- May not require or coerce a dealer to purchase goods or services from a vendor selected by the manufacturer without first making available to the dealer the option to obtain the goods or services from a vendor chosen by the dealer and may not unreasonably withhold consent to allow the dealer to use alternative goods or services. The term "goods or services" does not include intellectual property of the manufacturer, required special tools or training, parts to be used in repairs, goods or services paid for entirely by the manufacturer, or a manufacturer's architectural review service.

### ***Consumer Data - Current Situation:***

#### **Consumer Data Protection**

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<sup>5</sup> BLACK'S LAW DICTIONARY, p. 263 (5th ed. 1979) (Defines conclusive presumption to mean "a presumption that cannot be overcome by any additional evidence or argument.").

Consumer data can refer to a variety of information, including, but not limited to:

- Personal-identifying data: name, address, telephone number, or email address;
- Demographic data: age, race, occupation, income, or education;
- Retail data: purchase history, credit card numbers, or bank account information; and
- Government data: social security or driver license numbers.

There are a number of laws in the United States regulating the acquisition, storage, or use of consumer data in general terms, including the Federal Trade Commission (FTC) Privacy and Safeguards Rule, the Gramm-Leach-Bliley Act, and Florida law.

### **Gramm-Leach Bliley Act (GLBA)**

The GLBA, also known as the Financial Services Modernization Act of 1999, implemented laws regarding the protection and disclosure of nonpublic personal information obtained by financial institutions, the reuse of information, and privacy notice requirements.<sup>6</sup> Under the GLBA, the FTC has the authority to prescribe necessary rules.

The FTC is the chief federal agency on privacy policy and enforcement. The FTC's Privacy Rule (*The Financial Privacy Rule*) is a principle part of the GLBA, and applies to vehicle dealers who extend credit, arrange for finance or lease, or provide financial advice or counseling.<sup>7</sup> Personal information collected by a dealer to provide these services is covered under the Privacy Rule, which outlines when privacy notices are required to be given to consumers, information to be included in the privacy notices, limits on the disclosure and reuse of non-public personal information, and opt-out requirements.<sup>8</sup>

The FTC's Safeguards Rule, also part of the GLBA, outlines standards for safeguarding customer information.<sup>9</sup> The rule requires service providers who handle or are permitted access to customer information to have a written security plan in place to protect the confidentiality and integrity of customer data.<sup>10</sup>

### **Florida Information Protection Act of 2014**

The Florida Information Protection Act of 2014 provides for the protection and security of confidential personal information in the possession of covered entities.<sup>11</sup> Covered entities, governmental entities, and third-party agents are required to take reasonable measures to protect and secure electronic data containing personal information. When the security of a data system is breached, a covered entity must provide notice to the Department of Legal Affairs and affected individuals unless an investigation and consultation with relevant law enforcement agencies determines the breach has not and will not likely result in identity theft or financial harm to the individuals whose personal information has been accessed.<sup>12</sup> If a covered entity fails to provide the required notices, it may face civil penalties.

#### **Civil Damages**

Section 320.697, F.S., provides that any person who has suffered pecuniary loss or who has been otherwise affected because of a violation by a manufacturer has a cause of action against the manufacturer for damages and may recover damages in the amount of three times the loss, with costs and reasonable attorney's fees to be assessed by the court. In such cases, the manufacturer has the

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<sup>6</sup> 15 U.S.C. § 6801 *et. seq.*

<sup>7</sup> Federal Trade Commission, *FTC's Privacy Rule and Auto Dealers: FAQ*, (January 2005), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-privacy-rule-auto-dealers-faq> (last visited Mar. 8, 2016).

<sup>8</sup> *See* 16 C.F.R. § 313.

<sup>9</sup> *See* 16 C.F.R. § 314.

<sup>10</sup> *Id.*

<sup>11</sup> s. 501.171, F.S.

<sup>12</sup> s. 501.171(4), F.S.

burden of proving that the violation did not occur after the claimant makes a prima facie showing of the violation.

### **Consumer Data - Effect of Proposed Changes:**

The bill creates s. 320.646, F.S., within the Florida Automobile Dealers Act to address consumer data protection.

The bill defines "consumer data" as "nonpublic personal information" as such term is defined in 15 U.S.C. s. 6809(4)<sup>13</sup> that is collected by a motor vehicle dealer and which is provided by the motor vehicle dealer directly to a manufacturer or third party acting on behalf of a manufacturer. The term does not include the same or similar data which is obtained by a manufacturer from any other source.

The bill defines "data management system" as a computer hardware or software system that is owned, leased, or licensed by a motor vehicle dealer, including a system of web-based applications, computer software, or computer hardware, whether located at the motor vehicle dealership or hosted remotely, and that stores and provides access to consumer data collected or stored by a motor vehicle dealer.

The bill provides that notwithstanding the provisions of any franchise agreement, a manufacturer that receives consumer data from a motor vehicle dealer or requires that a motor vehicle dealer provide consumer data to a third party must comply with certain restrictions on sharing or reusing the data. Specifically, the bill requires a manufacturer:

- Comply with all applicable restrictions on the reuse or disclosure of data established by federal and state law and upon request, must provide a written statement to the motor vehicle dealer describing the established procedures adopted by the manufacturer or a third party acting on behalf of the manufacturer which meet or exceed any federal or state requirements;
- Provide, upon request of the motor vehicle dealer, a list of the consumer data obtained from a motor vehicle dealer and all persons to whom any of the consumer data has been disclosed during the previous six months, with the exception of certain individuals;
- May not require that a motor vehicle dealer grant the manufacturer or a third party direct or indirect access to the dealer's data management system to collect consumer data;
- Must permit a motor vehicle dealer to furnish consumer data in a widely accepted file format, and through a third-party vendor selected by the motor vehicle dealer. However, a manufacturer may access or obtain consumer data directly from a motor vehicle dealer's data management system with the express consent of the dealer; and
- Must compensate the motor vehicle dealer for any third-party claims asserted against or damages incurred by the motor vehicle dealer as a result of the manufacturer's or a third-party's unlawful access to, use of, or disclosure of the consumer data.

The bill also provides that in any action against a manufacturer pursuant to the provisions above, the person bringing the action has the burden of proving that the violation was willful or with sufficient frequency to establish a pattern of wrongdoing with respect to such person's consumer data.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

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<sup>13</sup> "Nonpublic personal information" means "personally identifiable financial information provided by a consumer to a financial institution; resulting from any transaction with the consumer or any service performed for the consumer; or otherwise obtained by the financial institution." 15 U.S.C. s. 6809(4).

2. Expenditures:

The DHSMV already regulates this industry, so the additional grounds proposed in the bill for regulatory actions may result in no additional state impact. However, it is possible that the DHSMV may experience an increase in the number of administrative hearings as a result of the bill. The bill may have an indeterminate fiscal impact.<sup>14</sup>

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent the agreements between dealers and motor vehicle manufacturers, distributors, and importers change due to compliance with existing laws, the parties may be positively or negatively impacted. The bill may make it easier and more affordable for dealers to comply with manufacturer's requirements which, in turn, may make it easier for new dealership franchises to open and for current dealership franchises to remain in business.<sup>15</sup>

D. FISCAL COMMENTS:

None.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 3.