The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Transportation Committee

BILL:	CS/SB 2630
INTRODUCER:	Transportation Committee and Senator Haridopolos
SUBJECT:	Motor Vehicle Dealerships
DATE:	March 25, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Meyer	TR	**Fav/CS**
2.			CM	
3.			JU	
4.				
5.				
6.				

I. Summary:

Manufacturers, distributors, and importers enter into contractual agreements with franchised motor vehicle dealers to sell particular vehicles which they manufacture, distribute, or import. Sections 320.61-320.70, F.S., provide for the licensing of motor vehicle dealers and motor vehicle manufacturers, distributors, and importers, and regulate numerous aspects of the franchise contracts these businesses enter into to conduct business in the state of Florida. This bill addresses a number of issues related to the activities of motor vehicle dealers.

The bill specifies after audit time periods have elapsed, warranty or other service-related payments and incentive payments are final. The motor vehicle dealer may not be subject to an adverse action such as financial charge-backs, reducing vehicle allocations, or threatening franchise termination.

A licensee may deny a claim or, as a result of a timely conducted audit, charge a motor vehicle dealer for warranty, maintenance, or other service-related payments or incentive payments only if a licensee can show the payment for claims were falsely calculated or the dealer failed to comply with the procedures of the licensee for documenting the payments claimed to be due.

The bill repeals a conclusive presumption in s. 320.64(26), F.S., relating to one of the offenses for which a dealer can be penalized. The bill provides guidelines addressing the distribution of the franchise assets under a bankruptcy scenario.

The bill amends the criteria for denial by the Department of Highway Safety and Motor Vehicles (Department) of a request to expand operations by a dealer to specify that: a geographic comparison area used to evaluate the performance of the line-make or dealers within the

community or territory must be similar in demographic traits to the community or territory of the proposed site and expected market sales or service penetration must be measured with respect to the community or territory as a whole.

The bill also adds criteria for denial by the Department of a request to expand operations by a dealer to include: foreseeable economic projections, financial expectations, availability of reasonable terms and reasonable amounts of credit to prospective customers; whether there will likely be a material positive impact and a material benefit to consumers; expected growth or decline in population, density of population, and new motor vehicle registrations in the community or territory; anticipated degree of marketing and advertising support; and expectation for a reasonable return on investment.

The bill specifies a licensee or the Department shall not reject a proposed transfer of a legal, equitable, or beneficial interest in a motor vehicle dealer entity to a trust or other entity, or to any beneficiary thereof, that is established by an owner of any interest in a motor vehicle dealer for estate planning purposes, if the controlling person of the trust or entity, or the beneficiary, is of good moral character. This bill also specifies a licensee or the Department may not condition a proposed transfer based on a relocation of, construction of any addition or modification to, or refurbishing or remodeling of the dealership structure, facility, or building or the existing motor vehicle dealer, or upon any modification of the existing franchise agreement.

The bill deletes one of the options for determining reimbursement for warranty parts and labor. In addition, the bill clarifies a licensee may not decrease flat-rate times from or establish an unreasonable flat-rate time in its warranty repair manual, warranty time guide, or any other similarly name document, unless the licensee can prove it has improved the technology related to a particular repair and thereby has lessened the average repair time. A severability clause is also provided.

This bill substantially amends ss. 320.64, 320.642, 320.643 and 320.696 of the Florida Statutes; and creates an undesignated section of law.

II. Present Situation:

Motor Vehicle Franchise Dealerships - Generally

Manufacturers, distributors, and importers enter into contractual agreements with franchised motor vehicle dealers to sell particular vehicles (or “line-make”) which they manufacture, distribute, or import. Chapter 320, F.S., provides, in part, for the regulation of the franchise relationship.

Section 320.60(1), F.S., defines "Agreement" or "franchise agreement" to mean a contract, franchise, new motor vehicle franchise, sales and service agreement, or dealer agreement or any other terminology used to describe the contractual relationship between a manufacturer, factory branch, distributor, or importer, and a motor vehicle dealer, pursuant to which the motor vehicle dealer is authorized to transact business pertaining to motor vehicles of a particular line-make.

Section 320.60(14), F.S., states that "Line-make vehicles" are those motor vehicles which are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same.

Section 320.27, F.S. defines a "franchised motor vehicle dealer" as "any person engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to an agreement as defined in s. 320.60(1)."

Section 320.61(1) states, in part, "No manufacturer, factory branch, distributor, or importer (all sometimes referred to hereinafter as "licensee") shall engage in business in this state without a license therefor…"

The requirements regulating the business relationship between franchised motor vehicle dealers and automobile manufacturers, distributors, and importers by the Department are primarily in ss. 320.60-320.071, F.S. These sections of law specify, in part:

- The conditions and situations under which the Department may deny, suspend, or revoke a license;
- The process, timing, and notice requirements for licensees wanting to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the Department may deny such a change;
- The procedures a licensee must follow if it wants to add a dealership in an area already served by a franchised dealer, the protest process, and the Department's role in these circumstances;
- Amounts of damages that can be assessed against licensee in violation of statutes; and
- The Department's authority to adopt rules to implement these sections of law.

Dealer Penalty Criteria

Section 320.64, F.S., outlines the causes for the Department to deny, suspend, or revoke the license of a licensed manufacturer, importer, or distributor of motor vehicles. There are 37 different causes of action that could lead the Department to deny, suspend, or revoke the license.

A violation of any of these provisions entitles a dealer to the rights and remedies of ss. 320.695 –320.697, F.S. These remedies include injunctions against licensees, as well as, treble damages and reasonable attorney's fees to be paid by licensees.

Section 320.64(5), F.S., prohibits a licensee from coercing or attempting to coerce a motor vehicle dealer into accepting delivery of motor vehicles, parts, or accessories, or any other commodities which have not been ordered by the dealer.

Section 320.64(10), F.S., prevents a licensee from requiring a dealer to relocate, expand, improve, remodel, renovate, or alter previously approved facilities unless the licensee's requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations and the motor vehicle dealer's market for the licensee's motor vehicles. A licensee may provide a commitment to allocate additional

vehicles or a loan or grant to the dealer as an inducement to remodel or renovate his facilities, as long as the agreement is in writing and was voluntarily entered into by the dealer. This inducement also must be available on substantially similar terms, for any of the licensee's same line-make dealers in Florida, and the licensee cannot withhold a bonus or other incentive that is available to its other same line-make Florida dealers if the licensee offers to enter into an agreement. Also a licensee cannot selectively offer incentive programs to dealers in Florida, other regions, or other states. A licensee may not discriminate against a dealer with respect to a program, bonus, incentive, or other benefit within which the licensee's zone or region in which the State of Florida is included. Finally, licensees may establish and uniformly apply reasonable standards for a dealer's sales and service facilities that are related to upkeep, repair, and cleanliness.

Section 320.64(25), F.S., provides a licensee 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 by a licensee during the 1-year period immediately following the date a warranty claim was paid. Audits of incentive payments may only be performed by a licensee 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 licensee if the dealer distributes cars for foreign export. This section provides that in a legal challenge, the licensee 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"[1] that the dealer had no actual knowledge.

Motor Vehicle Dealership Locations

Section 320.642, F.S., provides a dealer who seeks to establish another motor vehicle dealership or relocate a dealership to a location within a community where the same line-make vehicle is presently represented must give written notice to the Department to be published in the Florida Administrative Weekly. The notice must include:

- The specific location at which the additional or relocated motor vehicle dealership will be established.
- The date on or after which the dealer intends to be engaged in business with the additional or relocated dealership at the proposed location.
- The identity of all dealers who are franchised to sell the same line-make vehicles within the county or any contiguous county to the county where the additional or relocated dealer is proposed to be located.

[1] Black's Legal Dictionary, 7th ed., defines conclusive presumption to mean "a presumption that cannot be overcome by any additional evidence or argument."

- The names and addresses of the dealer and principal investors in the proposed additional or relocated motor vehicle dealership.

The Department must review the notice and may object to the addition or relocation if certain criteria exist. Department denials remain in effect for 12 months.[2]

The Department may deny the request if another dealer timely files a protest and if the applicant fails to adequately establish that current locations do not "adequately represent" the dealer in the community or territory. Section 320.642(2)(b), F.S., provides eleven specific criteria the dealer may use to meet the burden of proof. Other dealers have standing to protest, pursuant to s. 320.642(3), F.S. The section provides demographic and geographic requirements dealers must document in order to prove standing. Openings and re-openings of the same dealer are not considered "relocations," unless certain geographic limitations are reached.[3] "Service only" locations must be noticed, but are subject to limited protests.

Transfer of Interest in a Franchise

Sections 320.643 and 320.644, F.S., provide procedures for requesting and objecting to transfers of franchise agreements, transfers of assets, and changes 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 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 continues in effect in accordance with its terms.

Warranty Responsibilities

Section 320.696, F.S., contains the dealer warranty provisions specifying a formula by which dealers are to be reimbursed for labor and parts used in warranty service. This section was amended by the 2007 Legislature to specify manufacturers had to reimburse dealers for parts used in warranty repairs at the dealers' retail rates, just as labor costs for warranty work already were. This section was further amended during the 2008 Session to clarify the issue of reimbursement rates for warranty work. Specifically, s. 320.696, F.S., authorizes four options for reimbursement for warranty parts:

- Through an agreement between the manufacturer and dealer or
- If no agreement is reached within 30 days after the dealer has made a claim, then the reimbursement is the greater of:
  - The mean percentage markup from 50 consecutive retail customer repairs within the last three months;
  - The manufacturer's highest suggested retail or list price for the parts; or
  - An amount equal to the price a dealer receives from customers for parts used in non-warranty repair work.

[2] Section 320.642(4), F.S.
[3] Section 320.642(5), F.S.

Similarly, compensation for labor in warranty repair work would either be per agreement, or, if no agreement is reached within 30 days, then the greater of the hourly rate charged for retail customer repairs or an amount equal to the dealer's markup over dealer cost for retail customer-paid repairs.

III. Effect of Proposed Changes:

Section 1 amends s 320.64, F.S., which specifies actions that may lead the Department to deny, suspend, or revoke the state license of a vehicle manufacturer, distributor, or importer. The section adds or elaborates upon five situations related to automobile franchise agreements between manufacturers, distributors, and importers (or licensees) and the auto dealers who sell their products. Specifically:

Subsection (5) is amended to prevent a licensee from coercing a motor vehicle dealer into involuntarily ordering or accepting motor vehicles, parts, accessories, or other commodities or that are in excess of that number which the dealer considers as reasonably required to adequately represent the licensee's line-make in order to meet current and foreseeable market demand.

Subsection (10) is amended to provide additional criteria for incentives and financial support from a licensee to a dealer for relocation relief.

- Paragraph (a) prevents a licensee from requiring a dealer to relocate, expand, improve, remodel, renovate, or alter previously approved facilities unless *the licensee can demonstrate* its requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations and the motor vehicle dealer's market for the licensee's motor vehicles.
- Paragraph (b) clarifies a licensee may provide a written commitment to supply additional vehicles, consistent with the licensee's allocation obligations at law and with the licensee's commitment to other same line-make motor vehicle dealers, or to provide a lump sum as an inducement to remodel or renovate his facilities, as long as the provisions of the commitment and economic and market reasons and basis for them are contained in a written agreement and voluntarily entered into by the dealer. This inducement also must be available on substantially similar terms, for any of the licensee's same line-make dealers in Florida who voluntarily agree to make substantially similar facility expansion, improvement, remodeling, alteration or renovation
- Paragraph (c), includes that a licensee may not take or threaten to take any action that is discriminatory to other same line-make Florida dealers who do not enter into an agreement. A licensee is not required to provide financial support for a relocation of a motor vehicle dealer, because such support was previously provided to other same line-make dealers who relocated.
- Paragraph (d) provides except for a program, bonus, incentive, or other benefit offered by a licensee to its dealers in a market area where the licensee's unrealized sales potential or other market conditions, compared to its competitors' sales of vehicles, justifies the licensee's offers, a licensee cannot selectively offer incentive programs to dealers in Florida, other regions, or other states.

- Paragraph (f) allows a licensee to offer programs for a bonus, incentive, or other benefit to its dealers in Florida that contain rules, criteria, or eligibility requirements relating to a motor vehicle dealer's facilities and non-facility-related eligibility provisions. However, if any portion of the licensee-offered programs contains any qualifying rule, criteria, or eligibility requirement relating to a dealer's relocation, expansion, improvement, remodeling, renovation, or alteration of a dealer's facility, each of the licensee's dealers in Florida, upon complying with all such qualifying provisions, is entitled to obtain the entire bonus, incentive, or other benefit offered. A dealer who does not comply with the facility-related rules, criteria, or eligibility requirements, but complies with the other program's provisions, is entitled to receive a reasonable licensee-predetermined percentage of the bonus, incentive, or other benefit. A licensee's predetermined percentage unrelated to facilities is presumed "reasonable" if it is not less than 75% of the total bonus, incentive, or other benefit offered under the program.
- Paragraph (g) provides that any violation of paragraphs (b) – (g) are not a violation of s. 320.70, F.S., and does not subject a licensee to a criminal penalty.

Subsection (25) is amended to specify after audit time periods have elapsed, warranty or other service-related payments and incentive payments are final. The motor vehicle dealer may not be subject to any financial repercussions. A licensee may deny a claim or, as a result of a timely conducted audit, charge a motor vehicle dealer for warranty, maintenance, or other service-related payments or incentive payments only if a licensee can show that the payment for claims were falsely calculated or the dealer failed to comply with the procedures of the licensee for documenting the payments that are claimed to be due.

Subsection (26) is amended to delete the provisions stating, "there is a conclusive presumption that the dealer had no actual knowledge if the vehicle is titled or registered in any state in this country."

Subsection (36) provides guidelines addressing the distribution of the franchise assets under a bankruptcy scenario. Specifically, the subsection provides if the termination, cancellation, or nonrenewal of the dealer's franchise is the result of the bankruptcy or reorganization of a licensee or its common entity, or the termination, elimination, or cessation of the line-make, in addition to the other required payments to the dealer, the licensee, or if it is unable to do so, its common entity, is liable to the motor vehicle dealer for the following:

- An amount at least equal to the fair market value of the franchise for the line-make, which shall be the greater of the value determined as of the day the licensee announces the action that results in the termination, cancellation, or nonrenewal, and the value determined on the day that is 12 months before that date. In determining the fair market value of a franchise for a line-make, if the line-make is not the only line-make for which the dealer holds a franchise in its dealership facilities, the dealer is also entitled to compensation for the contribution of the line-make to payment of the rent or to covering the dealer's obligation for the fair rental value of the dealership facilities for a specified period. Fair market value of the franchise for the line-make includes only the goodwill value of the dealer's franchise for that line-make in the dealer's community or territory.

- If the line-make is the only line-make for which the dealer holds a franchise in the dealership facilities, the licensee, or its common entity if the licensee is unable to pay, also must pay to the dealer with respect to the dealership facilities leased or owned by the dealership or its principal owner a sum equal to the rent for the unexpired term of the lease or three years' rent, whichever is less, or, if the dealer or its principal owner owns the dealership facilities, a sum equal to the reasonable fair rental value of the dealership facilities for a period of three years as if the franchise were still in existence at the facilities, if the motor vehicle dealer uses reasonable commercial efforts to mitigate this liability by attempting, in good faith, to lease or sell the facilities within a reasonable time on terms consistent with local zoning requirements to preserve the facilities' right to sell and service motor vehicles.

Section 2 amends s. 320.642(1), F.S., to extend the protest period of an existing franchise dealer from 30 to 45 days after the initial posting in the Florida Administrative Weekly.

The bill amends s. 320.642(2)(a), F.S., to revise the criteria for denial by the Department of a request to expand operations by a dealer. The revisions revolve around whether or not an existing dealer or dealers are providing "adequate competition" and "convenient customer service" in a manner beneficial to the public interest the dealer in the community or territory. The bill includes the following to make this determination:

- A geographic area used for comparison to evaluate the performance of the line-make or existing dealers within the community or territory must be reasonably similar in demographic traits to the community or territory of the proposed site, including such factors as age, income, education, vehicle size, class, or model preference, and product popularity, and the comparison area must not be smaller than the largest entire county in which each any of the protesting dealers are located;

- Reasonably expected market sales or service penetration must be measured with respect to the community or territory as a whole.

In determining whether the existing franchised dealers are providing adequate representation, adequate competition, and convenient customer service, the bill adds criteria to include:

- foreseeable economic projections, financial expectations, availability of reasonable terms and reasonable amounts of credit to prospective customers;
- whether there will likely be a material positive impact and a material benefit to consumers;
- the past and reasonably foreseeable expected growth or decline in population, density of population, and new motor vehicle registrations in the community or territory;
- anticipated degree of marketing and advertising support; and
- expectation for a reasonable return on investment.

The bill amends s. 320.642(3)(a) and (b), F.S., to provide dealers with standing to protest, (defined in terms of either being within 15 miles of the proposed dealership site or having 20% of new vehicle sales registered within 15 miles of the proposed dealership site, or performed

repairs on the same line-make motor vehicles which constituted 15% of its total service department sales within 15 miles of the proposed dealer site) may protest the establishment of the additional dealership or relocation of the existing dealership.

The bill amends s. 320.642(6)(a), F.S., to include dealers standing to protest the addition or relocation of a service-only dealership are limited to those instances in which the applicable mileage requirement established in s. 320.642(3)(b)2., F.S., are met.

The bill amends s. 320.642(6)(b), F.S., to provide the addition or relocation of a service-only dealership is not subject to protest if the proposed location of an additional or relocated service-only dealership radius from all existing motor vehicle dealerships or the same line-make is to at least 10 miles (increased from at least 7 miles).

Section 3 amends s. 320.643, F.S., to specify a licensee, the Department, or court may not reject a proposed transfer of a legal, equitable, or beneficial interest in a motor vehicle dealer entity to a trust or other entity, or to any beneficiary thereof, that is established by an owner of any interest in a motor vehicle dealer for estate planning purposes, if the controlling person of the trust or entity, or the beneficiary, is of good moral character. This bill also specifies a licensee, the Department, or court may not condition a proposed transfer based on a relocation of, construction of any addition or modification to, or any refurbishing or remodeling of the dealership structure, facility, or building of the existing motor vehicle dealer, or upon any modification of the existing franchise agreement.

During the pendency of any Department or court hearing, the franchise agreement continues in effect. In addition, the Department or court is to use reasonable efforts to expedite any requested determination.

Section 4 amends s. 320.696, F.S., related to reimbursement of warranty work, and increases the dealer's arithmetical mean percentage markup over dealer cost estimate to include 75 (from 50) consecutive retail customer repairs within a three-month period.

This section of the bill, also, deletes one of the options for determining reimbursement for warranty parts and labor. Specifically, the option for reimbursement for warranty parts is eliminated that requires if no agreement is reached within 30 days after the dealer has made a claim, then the reimbursement would be the greater of *an amount equal to the price a dealer receives from customers for parts used in non-warranty repair work.*

Similarly, the option for compensation for labor in warranty repair work is eliminated that requires if no agreement is reached within 30 days the *greater of an amount equal to the dealer's markup over dealer cost for retail customer-paid repairs is to compensated.*

In addition, this section clarifies a licensee may not decrease flat-rate times from or establish an unreasonable flat-rate time in its warranty repair manual, warranty time guide, or any other similarly name document, unless the licensee can prove it has improved the technology related to a particular repair and thereby has lessened the average repair time.

Section 5 provides if any provisions of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 6 provides this act shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. To the extent the bill could require motor vehicle manufacturers to provide additional compensation to motor vehicle dealers for warranty work, there may be an increase in expenditures for manufacturers who currently compensate dealers for warranty labor and parts at levels below market prices. In the same respect, dealers in the state of Florida may see an increase in revenues due to the increase in the level of reimbursement received for warranty work from manufacturers.

The expansion of the distance for which a dealership of the same line-make or service facility can be located may have an effect on dealer density and may result in fewer licensed dealers and service-only facilities.

C. Government Sector Impact:

The Department already regulates this industry, so the additional grounds in the bill for regulatory actions should result in no additional state impact. However, it is possible the Department may have an increase in the number of administrative hearings as a result of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Transportation on March 25, 2009:

The CS:

- Prevents a licensee from coercing a motor vehicle dealer into involuntarily ordering or accepting motor vehicles, parts, accessories, or other commodities in excess of that number which the dealer considers as reasonably required to adequately represent the licensee's line-make in order to meet current and foreseeable market demand.
- Provides additional criteria for incentives and financial support from a licensee to a dealer for relocation relief.
- Specifies after audit time periods have elapsed, warranty or other service-related payments and incentive payments are final. The motor vehicle dealer may not be subject to an adverse action such as financial charge-backs, reducing vehicle allocations, or threatening franchise termination.
- Provides a licensee may deny a claim or, as a result of a timely conducted audit, charge a motor vehicle dealer for warranty, maintenance, or other service-related payments or incentive payments only if a licensee can show the payment for claims were falsely calculated or the dealer failed to comply with the procedures of the licensee for documenting the payments claimed to be due.
- Repeals a conclusive presumption in s. 320.64(26), F.S., relating to one of the offenses for which a dealer can be penalized.
- Provides guidelines addressing the distribution of the franchise assets under a bankruptcy scenario.
- Includes criteria when determining whether the existing franchised dealers are providing adequate representation, adequate competition, and convenient customer service, to include anticipated degree of marketing and advertising support.
- Modifies provisions authorizing dealers with standing to protest.
- Increases the radius to at least 10 miles that a proposed location of an addition or relocation of a service-only dealership can be from all existing dealerships and not be subject to protest.
- Prohibits the rejection of proposed transfer of interest in a motor vehicle dealer entity to a trust or other entity, or a beneficiary thereof, which is established for estate-planning purposes, if the controlling person of the trust or entity, or beneficiary, is of good moral character.

- Increases the dealer's arithmetical mean percentage markup over dealer cost estimate to include 75 consecutive retail customer repairs within a three-month period, as it relates to reimbursement of warranty work.
- Deletes one of the options for determining reimbursement for warranty parts and labor.

B. Amendments:

None.