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 Committee on Transportation

BILL:	CS/SB 1048
INTRODUCER:	Transportation Committee and Senator Garcia
SUBJECT:	Motor Vehicle Manufacturer Licenses
DATE:	March 26, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Jones	Eichin	TR	**Fav/CS**
2.			ATD	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1048 addresses numerous issues related to contractual agreements between motor vehicle licensees and motor vehicle dealers. The bill provides additional grounds to deny, suspend, or revoke a license held by a manufacturer, factory branch, distributor, or importer. It also prohibits manufacturers from taking certain actions against dealers, and requires certain procedures be followed by the manufacturer when dealing with dealers.

This act applies to all franchise agreements entered into, renewed, or amended after October 1, 1988, unless such application impairs valid contractual agreements in violation of the Florida Constitution or United States Constitution.

II. Present Situation:

Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970. Manufacturers, distributors, and importers (collectively referred to as licensees) enter into contractual agreements with dealers to sell particular vehicles that the licensee manufactures, distributes, or imports. Chapter 320, F.S., provides, in part, for the regulation of the relationship between manufacturers and dealers. Existing law requires the licensing of manufacturers, and regulates numerous aspects of the contracts between manufacturers and dealers.

A manufacturer, factory branch, distributor, or importer must be licensed under ss. 320.60-320.70, F.S., to engage in business in this state.[1] A person desiring to be licensed under ss. 320.60-320.70, F.S., must submit an application to the DHSMV along with required documents to determine the fitness of the applicant or licensee to engage in the business for which the applicant or licensee desires to be licensed.[2] The DHSMV may prescribe an abbreviated application for renewal of a license if the licensee has previously filed an initial application, and shall include necessary information to bring current the information required in the initial application.[3]

The requirements regulating the contractual business relationship between a dealer and a manufacturer are primarily found in ss. 320.60-320.071, F.S., (the Florida Automobile Dealers Act).[4] These sections of law specify, in part:

- The conditions and situations under which the DHSMV may grant, deny, suspend, or revoke a license;
- The process, timing, and notice requirements for manufacturers 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 dealer, the protest process, and the DHSMV's role in these circumstances;
- The 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.

In 2009, the DHSMV held, in an administrative proceeding, amendments to the Florida Automobile Dealers Act do not apply to dealers having franchise agreements which were signed prior to the effective date of the amendment.[5]

Currently, s. 320.64, F.S., provides 38 grounds for the DHSMV's denial, suspension, or revocation of the license of a manufacturer. A violation of any of these provisions entitles a dealer to rights and remedies contained within the Florida Automobile Dealers Act.

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[1] Section 320.61(1), F.S.
[2] Section 320.63, F.S.
[3] Section 320.61(2), F.S.
[4] 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://www.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf.
[5] *See Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). In this holding, the DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act, does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. *See also*, *In re Am. Suzuki Motor Corp*., 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013) (The DHSMV has indicated it will be applying this holding to every amendment to the Florida Automobile Dealers Act. That means dealers have different protections under the law depending on when they signed their franchise agreement.).

III. Effect of Proposed Changes:

The bill addresses several issues related to the contractual agreements between motor vehicle licensees and dealers.

Section 1 of the bill amends s. 320.64, F.S., to modify and add acts an applicant or licensee (further referred to as the licensee) is prohibited from committing. A license of a licensee may be denied, suspended, or revoked if a licensee:

- Takes adverse action against a dealer because a motor vehicle sold, leased, or delivered to a customer was resold or exported more than 120 days after it was delivered to the customer;
- Terminates, cancels, discontinues, or does not renew a dealer's franchise agreement on the basis of any act related to a customer's exporting or reselling of a motor vehicle, *unless* the licensee proves by clear and convincing evidence before a trier of fact that the majority owner or dealer-principal had actual knowledge at the time the vehicle was being sold that the customer intended to export or resell the vehicle;
- Fails to make any payment due to a dealer for temporary replacement vehicles loaned, rented, or provided by the dealer to or for its service or repair customers, provided the dealer complied with the terms of the franchise agreement or other contract with the licensee, even if the motor vehicle has been leased, rented, titled, or registered to an entity owned or controlled by the dealer;
- Requires or coerces, or attempts to require or coerce, a dealer to purchase goods from a vendor selected, identified, or designated by the licensee or one of its parents, subsidiaries, divisions, or affiliates, without making available to the dealer the option to obtain like kind, design, and quality goods or services from a vendor chosen by the dealer.
- Requires a dealer to participate in, contribute to, affiliate with, or join, or preclude a portion of its dealers in a designated market from establishing, a dealer advertising or marketing entity;
- Require a dealer, directly or indirectly, to advance, pay for, or reimburse the licensee for any costs related to advertisement for a motor vehicle, but may offer advertising or promotional materials to a dealer for a fee as long as the use of such materials is voluntary to the dealer; and
- Takes or threatens to take adverse action against a dealer that refuses to participate in a dealer advertising or marketing entity.

It is also added that:

- A dealer who received approval of its facility from the licensee within ten years prior to an incentive program offered by the licensee premised, wholly or in part, on dealer facility improvements is deemed to be in full compliance with facility-related requirements under the offer for the duration of the ten-year period;
- A dealer who, during the ten-year period, has completed a prior approved facility incentive program, standard, or policy but does not comply with the provisions related to facility, sign, or image under a new incentive program still remains entitled to the benefits under the older program plus any increase in benefits between the old and new programs for the remainder of the ten-year period;

- An audit of service-related payments, and incentive payments can be performed by a licensee only during the 12-month period immediately following the date the claim or incentive was paid;
- An "incentive" is defined as including any bonus, incentive, or other monetary or nonmonetary thing of value;
- A dealer who desires to use like kind, design, and quality goods or services from a chosen vendor must provide written notice to the licensee along with samples or clear descriptions of the goods or services. The licensee has up to 30 days to respond and may not unreasonably withhold consent. If the dealer receives no response within 30 days, consent to use the alternative goods or services is deemed granted;
- The term "goods or services" used in this bill refers to goods and services used to construct or renovate dealership facilities, and does not include:
  - Intellectual property of the licensee related to signage incorporating the licensee's trademark or copyright;
  - Any special tool or training required by the licensee;
  - Any part to be used in repairs under warranty obligations of a licensee;
  - Any good or service paid for entirely by the licensee; or
  - Any licensee's design or architectural review service; and
- A licensee may deny a service-related claim or incentive claim, or subject a dealer to a charge-back *only* for the portion of a claim proven to be false or fraudulent by the licensee.

Section 2 provides that this act applies to all franchise agreements entered into, renewed, or amended after October 1, 1988, unless such application impairs valid contractual agreements in violation of the Florida Constitution or the United States Constitution.

Section 3 provides that this act takes 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.

D. Other Constitutional Issues:

The Federal Contracts Clause provides that no state shall pass any law impairing the obligation of contracts.[6] However, the Contracts Clause prohibition must be weighed against the State's inherent power to safeguard its people's interests. Three factors are

[6] U.S. CONST. art. I, s. 10.

considered when evaluating a claim that the Contracts Clause has been violated: (1) whether the law substantially impairs a contractual relationship; (2) whether there is a significant and legitimate public purpose for the law; and (3) whether the adjustments of rights and responsibilities of the contracting parties are based upon reasonable conditions and are of an appropriate nature.[7]

Some state laws regulating contracts between automobile manufacturers and dealers have been found to have violated the constitution while other laws have been upheld as constitutional.[8]

The bill provides an exception to the act if such application violates the Florida Constitution or United States Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the agreements between dealers and manufacturers, distributors, and importers change due to compliance with existing laws, the parties could be positively or negatively impacted. Dealers may experience increased revenue from new limitations and procedures governing the incentives, bonuses, and other benefit programs.

C. Government Sector Impact:

The DHSMV may experience an increase in the number of administrative hearings as a result of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 320.64 of the Florida Statutes.

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[7] *Vesta Fire Ins. Corp. v. State of Fla.,* 141 F.3d 1427, 1433 (11th Cir. 1998).

[8] See *Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32 (D. Conn. 2013) (Upholding state law that revised statutory method for calculating reasonable compensation for vehicle warranty work and prohibited manufacturers from recovering any additional cost of the new method from the dealers.); *Arapahoe Motors, Inc. v. Gen. Motors Corp*., No. CIV.A. 99 N 1985, 2001 WL 36400171, at *13 (D. Colo. Mar. 28, 2001) (the retroactive application of state law would be unconstitutional as it would create a new obligation or impose a new duty upon General Motors.).

IX. 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 26, 2015:
The CS added:

- A licensee may not refuse to pay a dealer who participated in an incentive program related to facility improvements or signs "any increase in benefits" between the older program and new program offered within a ten-year period;
- A dealer has the option to obtain like kind, design, and quality goods or services from a vendor chosen by the dealer, and includes the process for obtaining approval by the licensee, defines "good and services," and provides exceptions; and
- A licensee may not require a dealer, directly or indirectly, to advance, pay for, or reimburse the licensee for any costs related to advertisement for a motor vehicle

The CS removed:

- The amendments to ss. 320.641, 320.642, and 320.643, F.S., which added that a dealer could file a protest or petition against a manufacturer with a "court of competent jurisdiction";
- The language to be used to determine if a complainant dealer has substantially prevailed when petitioning a notice of intent to discontinue, cancel, not renew, or replace a franchise agreement;
- The creation of an alternative cause of civil action procedure for a dealer directly and adversely affected by the action or conduct of the licensee; and
- The provision that required a manufacture to provide a written statement or notice disclosing whether the manufacturer has an ownership interest in a prescribed vendor.

The CS changed the timeframe a licensee can audit incentive payments from six months to 12 months. Additionally, a licensee may not take adverse action against a dealer because a motor vehicle sold, leased, or delivered to a customer was resold or exported more than 120 days after it was delivered to the customer, instead of 90 days.

B. Amendments:

None.