By the Committee on Transportation; and Senator Garcia

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A bill to be entitled

An act relating to motor vehicle manufacturer licenses; amending s. 320.64, F.S.; providing that a motor vehicle dealer who receives approval of a facility from an applicant or licensee within a specified timeframe is deemed to be in full compliance with facility-related requirements; providing that such motor vehicle dealer are entitled to certain benefits under certain circumstances; providing applicability; conforming a cross-reference; revising provisions related to an applicant or licensee who has undertaken or engaged in an audit of service-related payments or incentive payments; limiting the timeframe for the performance of such audits; defining the term "incentive"; providing that an applicant or licensee may deny or charge back only the portion of a service-related claim or incentive claim which the applicant or licensee has proven to be false or fraudulent or for which the dealer failed to substantially comply with certain procedures; prohibiting an applicant or licensee from taking adverse action against a motor vehicle dealer under certain circumstances; prohibiting an applicant or licensee from failing to make any payment due a motor vehicle dealer that substantially complies with the terms of a certain contract between the two parties regarding reimbursement for temporary replacement vehicles under certain circumstances; authorizing a motor vehicle dealer to purchase goods or services from a vendor

chosen by the motor vehicle dealer, subject to certain requirements; defining the term "goods or services"; prohibiting an applicant or licensee from requiring a motor vehicle dealer to pay for certain advertising or marketing, or to participate in or affiliate with a dealer advertising or marketing entity; providing that an applicant or licensee may not take or threaten to take any adverse action against a motor vehicle dealer who refuses to join or participate in such entity; defining the term "adverse action"; providing that an applicant or licensee may not require a dealer to participate in, or may not preclude only a number of its motor vehicle dealers in a designated market area from establishing, a voluntary motor vehicle dealer advertising or marketing entity; providing that an applicant or licensee is not required to fund such an entity under certain circumstances; providing for retroactive applicability under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Present paragraph (h) of subsection (10) of section 320.64, Florida Statutes, is redesignated as paragraph (i), a new paragraph (h) is added to that subsection, present paragraph (h) of subsection (10) and subsections (25) and (26) of that section are amended, and subsections (39), (40), and (41) are added to that section, to read:

320.64 Denial, suspension, or revocation of license;

grounds.—A license of a licensee under s. 320.61 may be denied, suspended, or revoked within the entire state or at any specific location or locations within the state at which the applicant or licensee engages or proposes to engage in business, upon proof that the section was violated with sufficient frequency to establish a pattern of wrongdoing, and a licensee or applicant shall be liable for claims and remedies provided in ss. 320.695 and 320.697 for any violation of any of the following provisions. A licensee is prohibited from committing the following acts:

(10)

(h) If the applicant or licensee offers any bonus, incentive, rebate, or other program, standard, or policy that is available to a motor vehicle dealer in this state and that is premised, wholly or in part, on dealer facility improvements, renovations, expansion, remodeling, alterations, or installation of signs or other image elements, and if the motor vehicle dealer completes an approved facility in reliance upon such offer, the motor vehicle dealer shall be deemed to be in full compliance with all of the applicant's or licensee's requirements related to facility, sign, and image for the duration of a 10-year period following such completion. If, during the 10-year period, the applicant or licensee establishes a program, standard, or policy that offers a new bonus, incentive, rebate, or other benefit, and if a motor vehicle dealer has completed an approved facility in reliance upon the prior program, standard, or policy but does not comply with the provisions related to facility, sign, or image under the new program, standard, or policy, except as hereinafter provided,

the motor vehicle dealer may not be eligible for benefits under the provisions related to facility, sign, or image of the new program, standard, or policy, but shall remain entitled to all the benefits under the older program, standard, or policy, plus any increase in the benefits between the old and new programs, standards, or policies during the remainder of the 10-year period. Nothing contained in this subsection shall in any way obviate, affect, or alter the provisions of subsection (38).

(i) ~~(h)~~ A violation of paragraphs (b)-(h) ~~(b) through (g)~~ is not a violation of s. 320.70 and does not subject any licensee to any criminal penalty under s. 320.70.

(25) The applicant or licensee has undertaken or engaged in an audit of warranty, maintenance, and other service-related payments or incentive payments, including payments to a motor vehicle dealer under any licensee-issued program, policy, or other benefit, which previously have been paid to a motor vehicle dealer in violation of this section or has failed to comply with any of its obligations under s. 320.696. An applicant or licensee may reasonably and periodically audit a motor vehicle dealer to determine the validity of paid claims as provided in s. 320.696. Audits of warranty, maintenance, and other service-related payments shall be performed by an applicant or licensee only during the 12-month ~~1-year~~ period immediately following the date the claim was paid. Audits ~~Audit~~ of incentive payments shall ~~only~~ be performed only during the 12-month ~~for an 18-month~~ period immediately following the date the incentive was paid. As used in this section, the term "incentive" includes any bonus, incentive, or other monetary or nonmonetary thing of value. After such time periods have

elapsed, all warranty, maintenance, and other service-related payments and incentive payments shall be deemed final and incontrovertible for any reason notwithstanding any otherwise applicable law, and the motor vehicle dealer shall not be subject to any charge-back or repayment. An applicant or licensee may deny a claim or, as a result of a timely conducted audit, impose a charge-back against a motor vehicle dealer for warranty, maintenance, or other service-related payments or incentive payments only if the applicant or licensee can show that the warranty, maintenance, or other service-related claim or incentive claim was false or fraudulent or that the motor vehicle dealer failed to substantially comply with the reasonable written and uniformly applied procedures of the applicant or licensee for such repairs or incentives, but only for that portion of the claim so shown. Notwithstanding the terms of any franchise agreement, guideline, program, policy, or procedure, an applicant or licensee may deny or charge back only that portion of a warranty, maintenance, or other service-related claim or incentive claim which the applicant or licensee has proven to be false or fraudulent or for which the dealer failed to substantially comply with the reasonable, written, and uniformly applied procedures of the applicant or licensee for such repairs or incentives, as set forth in this subsection. An applicant or licensee may not charge back a motor vehicle dealer ~~back~~ subsequent to the payment of a warranty, maintenance, or service-related claim or incentive claim unless, within 30 days after a timely conducted audit, a representative of the applicant or licensee first meets in person, by telephone, or by video teleconference with an officer or employee of the dealer

designated by the motor vehicle dealer. At such meeting the applicant or licensee must provide a detailed explanation, with supporting documentation, as to the basis for each of the claims for which the applicant or licensee proposed a charge-back to the dealer and a written statement containing the basis upon which the motor vehicle dealer was selected for audit or review. Thereafter, the applicant or licensee must provide the motor vehicle dealer's representative a reasonable period after the meeting within which to respond to the proposed charge-backs, with such period to be commensurate with the volume of claims under consideration, but in no case less than 45 days after the meeting. The applicant or licensee is prohibited from changing or altering the basis for each of the proposed charge-backs as presented to the motor vehicle dealer's representative following the conclusion of the audit unless the applicant or licensee receives new information affecting the basis for one or more charge-backs and that new information is received within 30 days after the conclusion of the timely conducted audit. If the applicant or licensee claims the existence of new information, the dealer must be given the same right to a meeting and right to respond as when the charge-back was originally presented. After all internal dispute resolution processes provided through the applicant or licensee have been completed, the applicant or licensee shall give written notice to the motor vehicle dealer of the final amount of its proposed charge-back. If the dealer disputes that amount, the dealer may file a protest with the department within 30 days after receipt of the notice. If a protest is timely filed, the department shall notify the applicant or licensee of the filing of the protest, and the

applicant or licensee may not take any action to recover the amount of the proposed charge-back until the department renders a final determination, which is not subject to further appeal, that the charge-back is in compliance with the provisions of this section. In any hearing pursuant to this subsection, the applicant or licensee has the burden of proof that its audit and resulting charge-back are in compliance with this subsection.

(26) Notwithstanding the terms of any franchise agreement, including any licensee's program, policy, or procedure, the applicant or licensee has refused to allocate, sell, or deliver motor vehicles; charged back or withheld payments or other things of value for which the dealer is otherwise eligible under a sales promotion, program, or contest; prevented a motor vehicle dealer from participating in any promotion, program, or contest; or has taken or threatened to take any adverse action against a dealer, including charge-backs, reducing vehicle allocations, or terminating or threatening to terminate a franchise because the dealer sold or leased a motor vehicle to a customer who exported the vehicle to a foreign country or who resold the vehicle, unless the licensee proves that the dealer knew or reasonably should have known that the customer intended to export or resell the motor vehicle. There is a rebuttable presumption that the dealer neither knew nor reasonably should have known of its customer's intent to export or resell the vehicle if the vehicle is titled or registered in any state in this country. A licensee may not take any action against a motor vehicle dealer, including reducing its allocations or supply of motor vehicles to the dealer, or charging back a dealer for an incentive payment previously paid, unless the licensee first

meets in person, by telephone, or video conference with an officer or other designated employee of the dealer. At such meeting, the licensee must provide a detailed explanation, with supporting documentation, as to the basis for its claim that the dealer knew or reasonably should have known of the customer's intent to export or resell the motor vehicle. Thereafter, the motor vehicle dealer shall have a reasonable period, commensurate with the number of motor vehicles at issue, but not less than 15 days, to respond to the licensee's claims. If, following the dealer's response and completion of all internal dispute resolution processes provided through the applicant or licensee, the dispute remains unresolved, the dealer may file a protest with the department within 30 days after receipt of a written notice from the licensee that it still intends to take adverse action against the dealer with respect to the motor vehicles still at issue. If a protest is timely filed, the department shall notify the applicant or licensee of the filing of the protest, and the applicant or licensee may not take any action adverse to the dealer until the department renders a final determination, which is not subject to further appeal, that the licensee's proposed action is in compliance with the provisions of this subsection. In any hearing pursuant to this subsection, the applicant or licensee has the burden of proof on all issues raised by this subsection. In addition to the requirements, protections, and procedures set forth in this subsection, an applicant or licensee, by agreement, program, rule, policy, standard, or otherwise, may not take adverse action against a motor vehicle dealer, including, but not limited to, reducing allocations, product deliveries, or

planning volumes, or imposing any penalty or charge-back, because a motor vehicle that was sold, leased, or delivered to a customer was resold or exported more than 120 days after it was delivered to the customer. If the applicant or licensee does not provide written notification to the motor vehicle dealer of such resale or export within 12 months after the date of the motor vehicle dealer's delivery of the vehicle to the customer, the motor vehicle dealer may not be subject to any adverse action. Notwithstanding the provisions of any franchise agreement, program, policy, or procedure, a motor vehicle dealer's franchise agreement may not be terminated, canceled, discontinued, or nonrenewed by an applicant or licensee on the basis of any act related to a customer's exporting or reselling of a motor vehicle, unless the applicant or licensee proves by clear and convincing evidence before a trier of fact that the motor vehicle dealer knowingly engaged in a pattern of conduct of selling to known exporters and that the majority owner, or if there is no majority owner, the person designated as the dealer-principal in the franchise agreement, had actual knowledge, at the time the motor vehicle was sold, leased, or delivered, that the customer intended to export or resell the motor vehicle. However, nothing herein shall prohibit a licensee from terminating or nonrenewing a motor vehicle dealer's franchise agreement for a pattern of conduct that includes fraud, or intentionally making false statements or documentation in connection with retail sales of motor vehicles that are exported.

(39) Notwithstanding the terms of any agreement, program, incentive, bonus, policy, or rule, the applicant or licensee

fails to make any payment pursuant to any of the foregoing for any temporary replacement motor vehicle loaned, rented, or provided by a motor vehicle dealer to or for its service or repair customers, even if the temporary replacement motor vehicle has been leased, rented, titled, or registered to the motor vehicle dealer's rental or leasing division or an entity that is owned or controlled by the motor vehicle dealer, provided that the motor vehicle dealer or its rental or leasing division or entity complies with the written and uniformly enforced vehicle eligibility and use requirements specified by the applicant or licensee in its agreement, program, policy, bonus, incentive or rule relating to loaner vehicles.

(40) Notwithstanding the terms of any franchise agreement, the applicant or licensee has required or coerced, or attempted to require or coerce, a motor vehicle dealer to purchase goods or services from a vendor selected, identified, or designated by the applicant or licensee, or one of its parents, subsidiaries, divisions, or affiliates, by agreement, standard, policy, program, incentive provision, or otherwise, without making available to the motor vehicle dealer the option to obtain the goods or services of like kind, design, and quality from a vendor chosen by the motor vehicle dealer. If the motor vehicle dealer exercises such option, the dealer must provide written notice of its desire to use the alternative goods or services to the applicant or licensee, along with samples or clear descriptions of the alternative goods or services that the dealer desires to use. The licensee or applicant shall have the opportunity to evaluate the alternative good or service for up to 30 days and to provide its written consent to use said good

or service; such consent may not be unreasonably withheld by the applicant or licensee. If the motor vehicle dealer does not receive a response from the applicant or licensee within 30 days, consent to use the alternative goods or services shall be deemed granted. If a dealer using alternative goods or services complies with the terms of this subsection, the dealer shall qualify and be eligible for all benefits described in the agreement, standard, policy, program, incentive provision, or otherwise. As used in this subsection, the term "goods or services" is limited to such goods and services used to construct or renovate dealership facilities, or furniture and fixtures at the dealership facilities. The term does not include:

(a) Any intellectual property of the applicant or licensee relating to signage incorporating the applicant's or licensee's trademark or copyright, any facility or building materials bearing the applicant's or licensee's trademark;

(b) Any special tool and training as required by the licensee or applicant;

(c) Any part to be used in repairs under warranty obligations of an applicant or licensee;

(d) Any good or service paid for entirely by the applicant or licensee; or

(e) Any applicant's or licensee's design or architectural review service.

(41)(a) The applicant or licensee, by agreement, policy, program, standard, or otherwise, requires a motor vehicle dealer, directly or indirectly, to advance or pay for, or to reimburse the applicant or licensee for, any costs related to

the creation, development, showing, or publication in any media of any advertisement for a motor vehicle; requires a motor vehicle dealer to participate in, contribute to, affiliate with, or join a dealer advertising or marketing group, fund, pool, association, or other entity; or takes or threatens to take any adverse action against a motor vehicle dealer that refuses to join or participate in such group, fund, pool, association, or other entity. As used in this subsection, the term "adverse action" includes, but is not limited to, reduction of allocations, charging fees for a licensee's or dealer's advertising or a marketing group's advertising or marketing, termination of or threatening to terminate the motor vehicle dealer's franchise, or reducing any incentive for which the motor vehicle dealer is eligible.

(b) An applicant or licensee requires a dealer to participate in, or precludes a number of its motor vehicle dealers in a designated market area from establishing, a voluntary motor vehicle dealer advertising or marketing group, fund, pool, association, or other entity. Except as provided in an agreement, if a motor vehicle dealer chooses to form an independent advertising or marketing group, the applicant or licensee is not required to fund such group.

(c) This subsection may not prohibit an applicant or licensee from offering advertising or promotional materials to a motor vehicle dealer for a fee or charge, as long as the use of such advertising or promotional materials is voluntary for the motor vehicle dealer.

A motor vehicle dealer who can demonstrate that a violation of,

or failure to comply with, any of the preceding provisions by an applicant or licensee will or can adversely and pecuniarily affect the complaining dealer, shall be entitled to pursue all of the remedies, procedures, and rights of recovery available under ss. 320.695 and 320.697.

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

Section 3. This act shall take effect upon becoming a law.