

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1087 Protection of Motor Vehicle Dealers' Consumer Data

**SPONSOR(S):** Highway & Waterway Safety Subcommittee; Rooney, Jr.

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 960

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Highway & Waterway Safety Subcommittee	13 Y, 0 N, As CS	Johnson	Smith
2) Judiciary Committee			
3) Economic Affairs Committee			

### SUMMARY ANALYSIS

Since 1970, Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers. 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.

The bill requires a licensee or third party acting on behalf of a licensee to comply with certain restrictions on sharing or reusing consumer data provided by motor vehicle dealers. Specifically, the bill requires a licensee:

- Comply with all laws on the reuse or disclosure of data, not knowingly cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data, and, if requested by the dealer, provide a written statement specifying established procedures to safeguard consumer data;
- Provide a written list of consumer data obtained by a dealer and all persons who the data has been provided to during the previous six months, if requested by the dealer, exempting certain individuals who need not be included in the list;
- May not require a dealer grant the licensee or third party acting on behalf of the licensee direct access to the dealer's data management system to collect consumer data;
- Must allow a dealer to furnish consumer data in a widely accepted file format and through a third-party dealer selected by the dealer;
- Must compensate the dealer for any third-party claims asserted against or damages incurred by the dealer from the licensee's or third party's access, use, or disclosure of the consumer data.

The bill also provides that any cause of action against a licensee 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 does not appear to have a fiscal impact on state or local governments.

The bill takes effect upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Current Situation**

Since 1970, Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers. 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.

#### **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 licensees wanting to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which DHSMV 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 DHSMV's role in these circumstances;
- Amounts of damages that can be assessed against a licensee 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., applies 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 State Constitution or Federal Constitution. The provisions do not apply to any judicial or administrative proceeding pending as of October 1, 1988, but all agreements renewed, amended, or entered into subsequent to October 1, 1988, shall be governed by ss. 320.60 through 320.70, F.S, including amendments, unless specifically providing otherwise.<sup>3</sup>

In 2009, 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 various amendments to that Act.<sup>4</sup>

#### **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 licensee, notwithstanding any other remedies under the Florida Automobile Dealers Act, has a cause of action against the licensee for damages and may

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<sup>1</sup> Section 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 Jan. 15, 2016).

<sup>3</sup> Section 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). 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).

recover damages in the amount of three times the loss, with costs and a reasonable attorney's fee to be assessed by the court. The licensee has the burden of proving that such violation did not occur upon a prima facie showing by the person bringing the action.

### **Consumer Data Protection**

Consumer data can refer to a variety of information, including, but not limited to data such as one's:

- 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.

In the United States there are no all-encompassing laws regulating the acquisition, storage, or use of consumer data in general terms. However, partial regulations do exist in state and federal law, including in the Federal Trade Commission (FTC) Privacy and Safeguards Rule, the Gramm-Leach-Bliley Act, and state law.

### **Gramm-Leach Bliley Act (GLBA)<sup>5</sup>**

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, limits on reuse of information, and privacy notice requirements. The GLBA gave the FTC the authority to prescribe rules necessary to carry out certain purposes of the Act.

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 to someone, arrange for someone to finance or lease a car, or provide financial advice or counseling to individuals.<sup>6</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>7</sup>

The FTC's Safeguards Rule, also part of the GLBA, outlines standards for safeguarding customer information.<sup>8</sup> The rule requires service providers who handle or are permitted access to customer information through its services directly to a financial institution must have a written security plan to protect the confidentiality and integrity of customer data.<sup>9</sup>

### **Florida Information Protection Act of 2014<sup>10</sup>**

The Florida Information Protection Act of 2014 provides the procedure for protection and security of confidential personal information<sup>11</sup> in the possession of covered entities.<sup>12</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

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<sup>5</sup> 15 U.S.C. ss. 6801 *et. seq.*

<sup>6</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 Jan. 17, 2016).

<sup>7</sup> See 16 C.F.R. part 313.

<sup>8</sup> See 16 C.F.R. part 314

<sup>9</sup> *Id.*

<sup>10</sup> Section 501.171, F.S.

<sup>11</sup> "Personal information" includes an individual's first name or first initial and last name in combination with one of the following: a social security number; driver license or identification card number, passport number, military identification number, or other number issued by a governmental entity used to verify identity; a financial account number or credit or debit card number, in combination with any required security code, access code, or password needed to permit access to the financial account; an individual's medical history, mental or physical condition, or medical treatment or diagnosis; or an individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer. A user name or e-mail address, in combination with a password or security question and answer is also considered "personal information." Information that is publicly available from a federal, state, or local governmental entity or information that is encrypted, secured, or modified by a method or technology that removes personally identifiable information is not considered "personal information."

<sup>12</sup> A "covered entity" is a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information.

breached, a covered entity must provide notice to the Department of Legal Affairs and effected 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>13</sup> If a covered entity fails to provide the required notices, it may face civil penalties.

### **Proposed Changes**

The bill creates, s. 320.646, 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) collected by a motor vehicle dealer and which is provided by the motor vehicle dealer directly to a licensee or third party acting on behalf of a licensee. Consumer data does not include the same or similar data which is obtained by a licensee 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 term includes, but is not limited to, dealership management systems and customer relations management systems.

The bill provides that notwithstanding the provisions of any franchise agreement, a licensee that receives consumer data from a motor vehicle dealer or requires that a motor vehicle dealer provide consumer data to a third party:

- Shall comply with all, and not knowingly cause a motor vehicle dealer to violate any, applicable restrictions on reuse or disclosure of data established by federal and state law and must provide a written statement to the motor vehicle dealer upon request describing the established procedures adopted by the licensee or a third party acting on behalf of the licensee which meet or exceed any federal or state requirements to safeguard consumer data, including, but not limited to, those established in the Gramm-Leach-Bliley Act.<sup>14</sup>
- Shall, upon the written request of the motor vehicle dealer, provide a written list of the consumer data obtained from a motor vehicle dealer and all persons to whom any of the consumer data has been provided by the licensee or a third party acting on behalf of the licensee, during the preceding six months. The dealer may make such a request no more than once every six months. The list must indicate the specific fields of the consumer data which were provided to each person. Notwithstanding the foregoing, the list need not include:
  - A person to whom consumer data was provided, or the specific consumer data provided to such person, if the person was, at the time the consumer data was provided, one of the licensee's service providers, subcontractors or consultants acting in the course of such person's performance of services on behalf of or for the benefit of the licensee or motor vehicle dealer, provided that the licensee has entered into an agreement with such person requiring that the person comply with the safeguard requirements of applicable state and federal law, including, but not limited to, those established in the Gramm-Leach-Bliley Act, or
  - A person to whom consumer data was provided, or the specific consumer data provided to such person, if the motor vehicle dealer has previously consented in writing to such person receiving the consumer data provided and the motor vehicle dealer has not withdrawn such consent in writing.
- May not require that a motor vehicle dealer grant the licensee or a third party direct or indirect access to the dealer's data management system to collect consumer data. A licensee must permit a motor vehicle dealer to furnish consumer data in a widely accepted file format, such as comma delimited, and through a third-party vendor selected by the motor vehicle dealer. However, a licensee may access or obtain consumer data directly from a motor vehicle dealer's

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<sup>13</sup> Section 501.171(4), F.S.

<sup>14</sup> 15 U.S.C. ss. 6801 et. seq.

data management system with the express consent of the dealer. The consent is required to be in the form of a written document that is separate from the parties' franchise agreement, is executed by the motor vehicle dealer, and may be withdrawn by the dealer upon 30 days' written notice to the licensee..

- Must indemnify the motor vehicle dealer for any claims asserted against or damages incurred by the motor vehicle dealer as a result of the licensee's or a third party's access to, use of, or disclosure of the consumer data in violation of s. 320.646, F.S, by the licensee, a third party acting on behalf of the licensee, or a third party to whom the licensee has provided consumer data.

The bill provides that in any action against a licensee 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.

The bill also reenacts s. 320.6992, F.S., incorporating the newly created section.

The bill takes effect upon becoming law.

#### B. SECTION DIRECTORY:

Section 1      Creates s. 320.646, F.S, relating to consumer data protection.

Section 2      Reenacts s. 320.6992, F.S., relating to application.

Section 3      Provides an effective date.

## 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:

The bill could positively impact motor vehicle dealers who will be compensated by a licensee for any damages incurred as a result of the licensee's or a third party's access, use, or disclosure of consumer data. For that reason, the bill could also have a negative impact to the licensees.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect municipal or county governments.

2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

While the bill does not specifically provide rulemaking authority, s. 320.69, F.S., provides rulemaking authority to DHSMV for ss. 320.60 through 320.70, F.S., which includes the newly created statute.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 1, 2016, the Highway & Waterway Safety Subcommittee adopted a strike-all amendment. The amendment:

- Changed the definition of “consumer data” from information collected or record created by a motor vehicle dealer which contains personal information from which the consumer’s identity could be derived, to the definition of “nonpublic personal information” as defined in 15 U.S.C. s. 6809(4), collected by the dealer and provided to the licensee or third party acting on behalf of the licensee.
- Added that the definition of “consumer data” does not include the same or similar data obtained by a licensee from any source other than the dealer.
- Clarified in the bill that the consumer data restrictions apply to a third party *acting on behalf of the licensee*.
- Added that a licensee may not *knowingly* cause a dealer to violate any applicable restrictions on the reuse or disclosure of consumer data.
- Added *upon request* from the dealer, the licensee or third party acting on behalf on the licensee must provide a written statement describing the established procedures to safeguard consumer data.
- Regarding the dealer requesting a list of consumer data obtained by the licensee and all persons the dealer’s consumer data has been provided to by the licensee or third party acting on behalf of the licensee, the amendment lowered the preceding period of time the list must include, from 12 to 6 months.
- Added that the list need not include a licensee’s service providers, subcontractors or consultants acting in the course of his or her performance of services on behalf of or for the benefit of the licensee or dealer, or the data provided, if the person also has agreed to comply with applicable consumer data laws. The list also need not include persons or the data provided to a person if the dealer has consented in writing that such person may receive consumer data.
- Made a technical change regarding widely accepted file formats, from comma delineated to comma delimited.
- Concerning a dealer granting a licensee access to the dealer’s data management system to obtain consumer data, the amendment added that the dealer must provide the licensee 30 days’ written notice to withdraw such consent.
- Added a section to the bill providing in any cause of action against a licensee for prohibitions or requirements within 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 analysis is written to the committee substitute as reported favorably by the Highway & Waterway Safety Subcommittee.

