By 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.; revising provisions for denial, suspension, or revocation of the license of a manufacturer, factory branch, distributor, or importer of motor vehicles; providing requirements for incentive payments made to motor vehicle dealers for making certain changes or additions to a dealer's facility or signage; providing applicability; conforming a cross-reference; revising provisions for certain audits of service-related payments or incentive payments to a dealer by an applicant or licensee and the timeframe for the performance of such audits; defining the term "incentive"; revising provisions for denial or chargeback of claims; revising provisions that prohibit certain adverse actions against a dealer that sold or leased a motor vehicle to a customer who exported the vehicle to a foreign country or who resold the vehicle; revising conditions for taking such adverse actions; prohibiting failure to make certain payments to a motor vehicle dealer for temporary replacement vehicles under certain circumstances; prohibiting requiring or coercing a dealer to purchase goods or services from a vendor designated by the applicant or licensee unless certain conditions are met; providing procedures for approval of a dealer to purchase goods or services from a vendor not designated by the applicant or licensee;

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; prohibiting an applicant or licensee from taking or threatening 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 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; providing for severability; providing an effective date.

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

Section 1. Paragraph (h) of subsection (10) of section 320.64, Florida Statutes, is amended and redesignated as paragraph (i), a new paragraph (h) is added to that subsection, subsections (25) and (26) 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 an applicant or licensee establishes a program, standard, or policy that offers a bonus, incentive, rebate, or other benefit that is available to a motor vehicle dealer in this state and that is premised, wholly or in part, on dealer facility improvements, renovations, expansions, remodeling, or alterations or installation of signs or other image elements, a motor vehicle dealer who completes an approved change to or installation on the facility in reliance upon such program, standard, or policy is deemed to be in full compliance with all of the applicant's or licensee's requirements related to the facility, sign, and image for a 10-year period following such completion. If, during the 10-year period, the applicant or licensee establishes a new program, standard, or policy related to facility, sign, or image requirements that offers a new bonus, incentive, rebate, or other benefit, a motor vehicle dealer that completed an approved facility in reliance upon the prior program, standard, or policy but does not comply with the new program, standard, or policy is not eligible for benefits under provisions related to the facility, sign, or image of the new program, standard, or policy but shall remain entitled to

all benefits under the older program, standard, or policy, in addition to any increase in benefits between the old and new programs, standards, or policies during the remainder of the 10-year period. This subsection does not obviate, affect, or alter the any provision 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 were 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 consideration. 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 chargeback ~~charge-back~~ or repayment. An applicant or licensee may deny a claim or, as a result of a timely conducted audit, impose a chargeback ~~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 chargeback ~~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 chargebacks ~~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 chargebacks ~~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 chargebacks ~~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 chargeback ~~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 chargeback ~~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 chargeback ~~charge-back~~ until the

department renders a final determination, which is not subject to further appeal, that the chargeback ~~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 chargeback ~~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 chargebacks ~~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 to a dealer any ~~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. An applicant or licensee may not take any adverse action against a motor vehicle dealer 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 applicant or licensee provides written notification to the motor vehicle dealer of such resale or export within 12 months after the date the dealer sold or leased

the vehicle to the customer.

(39) Notwithstanding any agreement, program, incentive, bonus, policy, or rule, an applicant or licensee may not fail to make any payment pursuant to any agreement, program, incentive, bonus, policy, or rule 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, use, and reporting 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 may not require or coerce, or attempt 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 substantially similar 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 goods or services for up to 30 days to determine whether it will provide a written approval to the motor vehicle dealer to use said alternative goods or services. Approval 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, approval to use the alternative goods or services is deemed granted. If a dealer using alternative goods or services complies with this subsection and has received approval from the licensee or applicant, the dealer is not ineligible for all benefits described in the agreement, standard, policy, program, incentive provision, or otherwise solely for having used such alternative goods or services. 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, including signage incorporating the applicant's or licensee's trademark or copyright, or facility or building materials to the extent that the applicant's or licensee's trademark is displayed thereon;

(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, may not require a motor vehicle dealer, directly or indirectly, to advance or pay or reimburse the applicant or licensee for any costs related to the creation, development, showing, placement, or publication in any media of any advertisement for a motor vehicle; require 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 take or threaten 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, reducing allocations, charging fees for a licensee's or dealer's advertising or a marketing group's advertising or marketing, terminating or threatening to terminate the motor vehicle dealer's franchise agreement, reducing any incentive for which the motor vehicle dealer is eligible, or engaging in any action that fails to take into account the equities of the motor vehicle dealer.

(b) The applicant or licensee may not require a dealer to participate in or preclude 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 does not prohibit an applicant or licensee from offering advertising or promotional materials to a motor vehicle dealer for a fee or charge, if 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 to the extent that such application would impair valid contractual agreements in violation of the State Constitution or the United States Constitution.

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect upon becoming a law.